

The Challenge of Arbitral Awards in Pakistan

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Key Words : Arbitration, Arbitration Agreement, Arbitral Award, Place of Challenge, Exclusion of Challenge, Waiver of Challenge, Limitation on Challenge.

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I . Introduction

Arbitration is settlement of a dispute by one or more arbitrators between contracting parties of an arbitration agreement outside the court of law by avoiding all types of technicalities of procedural law. When an arbitral award is made and submitted in a court of law for its implementation, the aggrieved party either has to honor the award and if required may apply for its modification and remission or may challenge an arbitral award for setting it aside or for revocation of its recognition and enforcement in Pakistan. An aggrieved party to an arbitration agreement may apply in a court of law for correction of an arbitral award or for an interpretation of an arbitral award or for an additional award at place of arbitration where the award is made and submitted in a court of law for its recognition and enforcement. The court of law may remit the arbitral award if modification cannot be done without affecting the arbitral award, therefore the court of law is required to resend the matter to an arbitrator for reconsideration.

If parties to an arbitration agreement want an implementation of an international arbitral award in Pakistan, they are required to submit the arbitration agreement, the arbitral award and their translation in official language of Pakistan before the concerned High Court for its implementation. An aggrieved party to an arbitration agreement may challenge an arbitral award for setting it aside under section 30 of the Arbitration Act 1940 and may also apply against recognition and enforcement of an arbitral award before the concerned court of law under article 5 of the New York Convention 1958. It is pertinent to mention here that the concept of interpretation of an arbitral award and an additional award is prescribed under the UNCITRAL Model Law 1985, moreover more grounds of setting aside an arbitral award and refusal of recognition and enforcement of an arbitral award are prescribed under articles 34-36 of the UNCITRAL Model Law 1985 and under article 52 of the ICSID Convention 1965. An Arbitration Bill was presented before the National Assembly of Pakistan in 2009 to implement the UNCITRAL Model Law 1985 and the ICSID Convention 1965 but it was unsuccessful. It is therefore highly recommended that Parliament of Pakistan should pass a domestic legislation to implement the UNCITRAL Model Law 1985 and the ICSID Convention 1965.

A contract in restraint of legal proceedings is void contract under section 28 of the

Contract Act 1872 but parties to an agreement of arbitration may exclude the right to challenge an arbitral award which is an exception to the general rule and parties to an arbitration agreement may exclusively insert a provision in an agreement of arbitration for exclusion of the right of challenge, the award would then be binding upon the contracting parties and the aggrieved party would then not be able to challenge an arbitral award. The exclusion does not merely stop the court of law to take steps against an irregular and void arbitral awards under sections 151-153 of the Code of Civil Procedure 1908. An aggrieved party to an arbitration agreement is allowed to challenge an arbitral award within 30 days under article 158 of the Limitation Act 1908. If the party fails to challenge an arbitral award within a prescribed time limit, it would then be considered as the party has waived his right to challenge an arbitral award but in certain circumstances, the court of law may allow the party to challenge an arbitral award after expiration of the prescribed time limit under Order 7, Rule 6 of the Code of Civil Procedure 1908. Usually 90 days are given for challenging a civil matter before the concerned court of law under section 96 of the Code of Civil Procedure 1908. It is therefore highly recommended that the limitation time for challenging an arbitral award should be increased from 30 to 90 days in Pakistan.

II . Arbitration Agreement

Arbitration agreement is a written contract between contracting parties of arbitration to submit and to offer present or future disputes between contracting parties to an arbitrator, sometimes name to it and sometimes not.¹⁾ A contract is a valid and voluntary agreement between equals for the purpose of regulating their particular interests which is enforceable by law. Parties to an arbitration agreement must have capacity to enter into an arbitration agreement and they must be major and sane and must fulfill all major requirements under provisions of the Contract Act 1872, otherwise that arbitration agreement would be declared void by the court of law in Pakistan. The agreement which is applicable by law is a contract which must be registered in Pakistan and must not contain any provision against the Contract Act 1872 and no arbitration proceedings can be declared valid under a void arbitration agreement and if already conducted cannot be implemented and would

1) Frank Elkouri, Edna Asper and Kenneth May, How Arbitration Works, Bureau of National Affairs Washington DC, United States of America, 1985.

be declared void by the competent court of law in Pakistan.²⁾

All types of contracts are allowed to be solemnized in Pakistan except a contract in restraint of a legal marriage, a contract in restraint of trade activities and a contract in restraint of legal proceedings. The provision of a contract which restrains parties to take legal action against other party of agreement is void but in case of an arbitration agreement, this rule does not apply and parties to an arbitration agreement are free to include provision in an agreement of arbitration for exclusive exclusion of the right of challenge. Parties belong to arbitration agreement have full right to exclude exclusively the right to challenge an arbitral award, they may write and add a clause in an agreement of arbitration with respect to exclusion of the right to challenge an arbitral award, the award would then become a conclusive decision of an arbitrator and that would be binding upon the contracting parties.³⁾

Exclusion is either actual when parties to an arbitration agreement exclusively write in an agreement of arbitration or in an arbitration clause or in a subsequent agreement that no party is allowed to challenge an arbitral award after it has been made and submitted in a court of law and an exclusion is constructive when there is no such clause in an arbitration agreement but parties do not challenge an arbitral award voluntarily within a prescribed time limit and do not object upon noncompliance of the required prescribed rules of procedure, it would then be considered as parties have waived their right to challenge an arbitral award. If contracting parties to an arbitration agreement wish to withdraw from their right to challenge an arbitral award which is available under relevant laws of the land, they may add a provision in an arbitration agreement to that effect but applicability of exclusion is dependent upon applicable law of the land, which is under section 28 of the Contract Act 1872. If one of the parties to an agreement of arbitration habitually resides, having a domicile or have a place of business in a country, he may exclude the right of challenge completely or limits the right of challenge to some grounds through an arbitration agreement or through a subsequent agreement. If parties to an arbitration agreement do not raise an objection of noncompliance of rules of procedure and continue to conduct arbitration proceedings and thereafter do not justify their stance of no objection within a prescribed time limit, it would then be deemed as they have waived their right to challenge an arbitral award.⁴⁾

2) Martin Lau, "Introduction to the Pakistani Legal System, With Special Reference to the Law of Contract." 1 Islamic and Middle Eastern Law, 3 (1994).

3) Sections 26-28 The Contract Act Islamic Republic of Pakistan 1872

III . Arbitration in Pakistan

Arbitration in Pakistan is required to be conducted as per provisions of the Arbitration Act 1940. Arbitration is one of the modes of alternate dispute resolution. Alternate means proxy, dispute means a conflict and resolution means a settlement. Alternate dispute resolution is a settlement of a dispute by a forum other than a judicial forum by avoiding all types of technicalities of procedural law. There are various types of alternate dispute resolution but most commonly used method is arbitration. It is a settlement of a dispute by one or more arbitrators if the arbitration is ad-hoc or by an institution if the arbitration is institutional. An arbitrator is a person who decides a dispute between contracting parties after an inquiry and determination following a judicial procedure keeping in view the principles of natural justice and laws of the land by avoiding all types of technicalities of procedural law. The person who determines rights and liabilities of parties is called an arbitrator, his decision is called an arbitral award which is an outcome of labor and skills of one or more arbitrators.⁵⁾

Arbitration proceedings is conducted in civil matters, the decision of an arbitrator is binding upon the contracting parties and it cannot be challenged unless a contrary provision is given in a relevant statute but even then the parties may exclude the right to challenge an arbitral award under section 28 of the Contract Act 1872 and they may add a provision in an arbitration agreement that they have exclusively excluded the right to challenge an arbitral award which is an exception to the general rule that a contract in restraint of legal proceedings is a void contract.⁶⁾

The Arbitration Act 1940 is applicable in Pakistan and it is required to be applied on all types of arbitration proceedings and the Recognition and Enforcement Act 2011 deals with recognition and enforcement of International Arbitral Awards in Pakistan. The Recognition and Enforcement Act was enacted by the Parliament of Pakistan in 2011 to implement the New York Convention 1958. Pakistan has dualism system, it needs a

4) Article 4 The UNCITRAL Model Law The United Nations 1985
Article 32 The UNCITRAL Arbitral Rules United Nations 1976

5) Tariq Hassan, "International Arbitration in Pakistan." 19 *Journal of International Arbitration*, p 591 (2002).
, Sung-Kwon Won, "Overview of Alternate Dispute Resolution with Special Reference to Arbitration
Laws in Pakistan." 23 *Journal of Arbitration Studies*, 149 (2013).

6) Section 28 The Contract Act Islamic Republic of Pakistan 1872

domestic legislation to implement International Statutes at its soil thus the Recognition and Enforcement Act was passed in 2011 for the implementation of the New York Convention 1958. An Arbitration Bill was presented before the National Assembly of Pakistan in 2009 to implement the UNCITRAL Model Law 1985 and the ICSID Convention 1965 but it was not passed by the Parliament. It is therefore highly recommended that the Parliament should implement the UNCITRAL Model Law 1985 and the ICSID Convention 1965 and do amendments in the current Arbitration Act 1940 and make it a comprehensive statute of arbitration in accordance with customs and usages of the Pakistani society, as per injunctions laid down in the Holy Quran and Sunnah of Prophet Muhammad ﷺ and under the light of relevant International Treaties.⁷⁾

People of Pakistan usually resolve their disputes outside the court of law, mostly in rural areas of the Federally Administered Tribal Areas, Khyber Pakhtunkhwa and in rural areas of Baluchistan, Sindh and Punjab provinces. Most commonly used systems of alternate dispute resolution in Pakistan are Jirga and Panchayat, Jirga is a dispute resolution system most commonly used by the Pashtu speaking people of Pakistan, they live in the Federally Administered Tribal Areas and in the province of Khyber Pakhtunkhwa. In this system, a dispute is presented before elders of the area and they decide a dispute through consensus and make a decision of punishment or release. They do not submit their decisions before the court of law for implementation rather they enforce their verdicts through people of the vicinity. It is highly recommended that the Jirga system should be reformed by consultation with elders of the vicinity and should be made part of the legislation in Pakistan by making a separate statute or by making amendments in the current Arbitration Act 1940.⁸⁾

Panchayat is the same system with a same procedure but it is used by the people of Punjab province where the head is called Chaudhry who rectify the decision given by elders. This system is not completely perfect but most people of the vicinity resolve their disputes through this process. People of traditional systems of Jirga and Panchayat do not follow provisions of the Arbitration Act 1940 as they have their own customary rules and procedures and it is highly recommended that the government of Pakistan should amend the current Arbitration Act 1940 or make a separate law to enter their system under the

7) Gordon Jaynes, "International Arbitration in Pakistan." 21 Journal of International Arbitration, p 83 (2004).

, Ikram Ullah, "Interim Measures in Arbitration under the Pakistani Legal Regime." 29 4 Arbitration International, p 653-670 (2013).

8) Ali Wardak, "Jirga-A Traditional Mechanism of Conflict Resolution in Afghanistan." Institute of Afghan Study Center, (2003).

, Ali Gohar Hassan M Yousufzai, *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peacebuilding*, Sang-e-Meel Publications, Lahore, Pakistan, 2012.

ambit of legislation after consultation with elders of the vicinity, making reforms for better procedure of alternate dispute resolution and recognition and enforcement of verdicts through the executive wing of the state in Pakistan.⁹⁾

Arbitrators in urban areas of Pakistan follow provisions of the Arbitration Act 1940 and make awards and submit them in a court of law for their implementation and thereafter parties reach the court of law for their enforcement normally at the place where an arbitral award is made or at the place in whose law is chosen by the parties.

Arbitrators of urban areas of Pakistan follow modern day laws and submit an arbitral award in a court of law for its implementation¹⁰⁾ and the court of the competent jurisdiction passes a decree upon the decision of an arbitrator if no objection is raised by the contracting parties within the limited time specified in the Limitation Act 1908. National Center for Dispute Resolution is the first Dispute Resolution Institute in Pakistan, which has been working since 2007¹¹⁾ and Center for International Investment and Commercial Arbitration also offers dispute settlement services in Lahore, Pakistan since 2014.

The Arbitration in Pakistan is required to be conducted in accordance with “the Arbitration Act”. which is passed by the British Parliament in 1940. It came into force on 1st July, 1940. It has 48 Sections consisted in seven chapters and two schedules. All types of arbitration proceedings in Pakistan are required to be conducted in accordance with provisions of the Arbitration Act 1940. The purpose of the Arbitration Act 1940 is to consolidate and alter previous enactments and to bring it and to confirm it and to enforce agreed upon stance of the parties of the written agreement and to save time and wealth of the parties by way of resolving a dispute through arbitration.¹²⁾

After filling the arbitral award in a competent court of law for its recognition and enforcement in Pakistan, an aggrieved party to an arbitration award may apply for modification of an arbitral award or for remission of an arbitral award under sections 15-16 of the Arbitration Act 1940. An aggrieved party may challenge an arbitral award before the court of law where it is filed for implementation and the court of law may set aside an arbitral award on one of the grounds mentioned under section 30 of the

9) Anees Jillani, “Recognition and Enforcement of Foreign Arbitral Awards in Pakistan.” 37 04 International and Comparative Law Quarterly, p 926-935 (1988).

, Stephen Lyon, “Local Arbitration and Conflict Deferment in Punjab, Pakistan.” 40 1 Anthropologie, p 59 (2002).

10) Section 14 The Arbitration Act Islamic Republic of Pakistan 1940 Act X

11) Sohaib Mukhtar, “Settlement of Disputes by Way of Arbitration in Pakistan.” 3 4 World Journal of Social Science Research, p 518 (2016).

12) Preamble The Arbitration Act Islamic Republic of Pakistan 1940 Act X

Arbitration Act 1940 and may revoke the recognition and enforcement of an arbitral award on one of the grounds mentioned under article 5 of the New York Convention 1958.¹³⁾

1. Place of Challenge

Place of challenging an arbitral award is usually seat of arbitration where the agreement of an arbitration is solemnized between the contracting parties of an arbitration and arbitration proceedings took place or where recognition and enforcement of an arbitral award is sought. When arbitration proceedings took place in a separate country and recognition and enforcement of an arbitral award is sought in another state, the place of challenging recognition and enforcement of an arbitral award would be the place where recognition and enforcement of an arbitral award is sought. If recognition and enforcement of a decision of an arbitrator is sought by the contracting parties in Pakistan under the Recognition and Enforcement Act 2011, the place of execution is Pakistan so the place of challenge for revocation of its enforcement is Pakistan because it is where the effect of the arbitral award is to be made.

The New York Convention 1958 is applicable in Pakistan through the Recognition and Enforcement Act 2011, which does not deal with the issue of the seat of arbitration and we have to look into the UNCITRAL Model Law 1985. Article 20 of the UNCITRAL Model Law 1985 deals with the place of arbitration, which states that the parties to an agreement of arbitration are free to agree on place of arbitration and if parties do not agree on seat of arbitration, the arbitral tribunal is required to resolve the issue of the place of arbitration, keeping in view the circumstances of the decision and in accordance with the convenience of the parties to an arbitration agreement.¹⁴⁾

One important case which demonstrates this situation is case of the Queen's Bench in which the court of law stated that when the arbitral award is made after arbitral proceedings and submitted in a court of law for its execution and parties to an arbitration agreement do not challenge an arbitral award within a prescribed time limit, the court of law is required to pronounce the judgment followed by a decree which perfects the

13) Inaamul Haque and Naeem Ullah Khan, "International Commercial Arbitration & Enforcement of Foreign Arbitral Awards in Pakistan." *Pakistan Law Journal*, (Accessed at: <http://www.pljlawsite.com/2008art2045.htm>) (1996).

, Ahmad Ali Ghouri, *Law and Practice of Foreign Arbitration and Enforcement of Foreign Arbitral Awards in Pakistan*, Springer Science & Business Media, 2012.

14) Articles 20 The UNCITRAL Model Law The United Nations 1985

arbitral award and it is normally the place of challenge, the court of law held that where the award is perfected determines where it is made and where the award is made and submitted in a court of law for its execution, it is the place of challenge.¹⁵⁾

If parties to an arbitration agreement do not decide the place of arbitration, the court of law is required to decide the matter. One case which provide us a clear idea about the seat of arbitration is the case between *Sulaikha Clay Mines v Alpha Clays* of the Kerala High Court, India. The court of law stated in a decision that the arbitral tribunal is required to decide the place of arbitration, if parties to an agreement of arbitration have not decided it or reluctant to decide it, the arbitral tribunal must treat the parties equally and there should not be any biasness and the arbitral tribunal is required to act fairly and justly while deciding the matter.¹⁶⁾

One more case demonstrates the situation of seat of arbitration is the case of the English High Court between *Dubai Islamic Bank PJSC v PAYMENTECH* in which the court of law stated that the arbitral tribunal while deciding the question of place of arbitration is required to look into the circumstances in relation to parties of an arbitration agreement, the subject matter of an agreement of arbitration, the arbitration procedure and the issuance of an arbitral award.¹⁷⁾

In view of article 20 of the UNCITRAL Model Law 1985 and above mentioned cases it is observed that the place of challenge is normally the seat of arbitration, parties may go to the court of law at place of arbitration for modification, remission or for annulment of an arbitral award or for challenging proceedings of an arbitral tribunal. The challenge of an arbitral award for setting it aside or for the rejection of its recognition and enforcement is required to be made where recognition and enforcement of an arbitral award is sought.

The seat of arbitration and the place of challenge may differ which is elaborated by the Indian Supreme Court in a case between *Shin Satellite Public Company Limited v Jain Studio Limited* in which the court of law stated that the place of arbitration and the place of hearing are two different things. The parties to an agreement of arbitration are free to choose their place of arbitration, they may change the arbitration place and they may choose another place for enforcement of an arbitral award.¹⁸⁾

15) *HISCOX v OUTHWAITE* Queen's Bench Division, Commercial Court, Lloyd's Rep 1991, p 524.

16) *Sulaikha Clay Mines v Alpha Clays*, High Court of Kerala, All India Reports, 2005, p 3.

17) *Dubai Islamic Bank PJSC v Paymentech*, High Court of England, LLR, 2001, p 65.

18) *Shin Satellite Public Co. Ltd. v Jain Studios Ltd*, Supreme Court of India, SSC, 2006, p 628.

2. Limitation on Challenge

Limitation on challenge an arbitral award is the prescribed time limit to challenge an arbitral award. An award is the outcome of arbitration proceedings and an output of labor and skills of one or more arbitrators. The arbitrator is required to submit a domestic arbitral award in the concerned District Court of Pakistan under section 14 of the Arbitration Act 1940 and an international award is required to be submitted before the concerned High Court under the Recognition and Enforcement Act 2011 for its implementation in Pakistan and the parties to an agreement of arbitration may challenge an arbitral award before the court of law where the award is submitted for its execution.

An arbitral award may be challenged within 30 days in Pakistan as per article 158 of the Limitation Act 1908, starting from the date of filing of an arbitral award in a court of law and its issuance of notices to the parties. One case which illustrates the idea of limitation on challenge of an arbitral award in Pakistan is the case of the Lahore High Court between *Messrs Fabnus Construction Private Limited v Iftikhar Ahmad* in which the objection is filed by the respondent after expiration of the prescribed time limit of thirty days and he has not made any request for the condonation of delay under Order 7, Rule 6 of the Code of Civil Procedure 1908, therefore, the court of law stated that there is no sufficient cause to believe that the delay has been occurred due to unavoidable circumstances thus the Lahore High Court rejected the objection raised by the respondent after expiration of the prescribed time limit.¹⁹⁾

It is pertinent to mention here that the court of law may allow the aggrieved party to submit an application to challenge an arbitral award even after expiration of the prescribed time limit if there is a sufficient cause to believe that the delay has been occurred due to unavoidable circumstance. It is upon the court of law to decide the matter of unavoidable circumstances, whether to allow the aggrieved party to challenge an arbitral award after expiration of the prescribed time limit or not. One case which demonstrates the limitation on the challenge of an arbitral award and its condonation decided by the court of law is the case of the Peshawar High Court between *Mian Asmat Shah v Mian Faiq Shah*. The dispute between the parties were pending before the court of law, the court of law referred the matter to an arbitrator for arbitration with the consent of both disputing parties, both parties participated in arbitration proceedings thereafter the arbitral award is

19) *Fabnus Construction v Iftikhar Ahmad*, Lahore High Court, Pakistan Law Digest, 2010, p 452.

filed by the arbitrator before the court of law in the presence of both contracting parties. The aggrieved party to an agreement of arbitration objected upon the arbitral award after expiration of the prescribed 30 days and took a plea that no notice is served to him by the concerned authorities under section 14-2 of the Arbitration Act 1940. The court of law held that there is no need of issuance of the notice of filling of an arbitral award as both parties were present during submission of an arbitral award by an arbitrator before the court of law thus the objector's plea is not admissible having no force under relevant laws of the land.²⁰⁾

It is pertinent to mention here that article 33 of the UNCITRAL Model Law 1985 states that after receipt of the arbitral award within 30 days, an aggrieved party to an arbitration agreement may apply in the tribunal for the correction of any error in computation or any typographical error or a clerical fault or any kind of similar mistake and if the request is justified, the arbitral tribunal is required to fulfill the request within 30 days and may make an additional award within 60 days. Article 34 of the UNCITRAL Model Law 1985 states that a request for the annulment of an arbitral award has to be made within 90 days from the date of pronouncement of the decision of an arbitrator.²¹⁾

90 days are prescribed for challenging a decision of the civil court of law before the concerned authority in Pakistan under section 96 of the Code of Civil Procedure 1908. Arbitration is a civil matter and arbitration proceedings are civil nature procedure and the arbitrator is required to sign and file an arbitral award before the competent civil court of law under section 14 of the Arbitration Act 1940. 30 days are prescribed for challenging an arbitral award in Pakistan under article 158 of the Limitation Act 1908, which should be increased to 90 days as it is the prescribed time limit for challenging all types of civil nature decisions in Pakistan.²²⁾

20) *Waqar Ali v the State*, Supreme Court of Pakistan, Pakistan Law Digest, 2011, p 181.

21) Article 33-34 The UNCITRAL Model Law The United Nations 1985

22) Article 158 The Limitation Act Islamic Republic of Pakistan 1908 Act IX.

3. Waiver of Challenge

Waiver of challenge an arbitral award is a situation where parties do not object upon arbitration proceedings during proceedings and do not challenge an arbitral award within a prescribed time limit without any sufficient cause. If parties to an arbitration agreement do not challenge an arbitral award within 30 days in Pakistan, it would then be considered as they have waived their right to challenge an arbitral award.²³⁾

The waiver is either actual or constructive, actual waiver is a waiver when parties to an agreement of arbitration exclusively object on some points of the decision of an arbitrator and do not object on other mistakes done by the arbitrator. Order 2, Rule 2 of the Code of Civil Procedure 1908 states that when the plaintiff intentionally omits and relinquishes any portion of his claim while suing the defendant, he would not be allowed to sue in respect of that relinquished claim again in future and it would then be considered as the party has himself waived his right.²⁴⁾ Constructive waiver is a waiver when parties to an arbitration agreement do not object upon the arbitral tribunal or do not challenge an arbitral award within a specified time, it would be considered then as they have waived their right to challenge an arbitral award except if there is a sufficient cause to believe that there are some grounds upon which a party can apply in a court of law with the application of challenge, the court of law would then decide whether to give the party right to challenge after expiration of the prescribed time limit or not.²⁵⁾

One important case which elaborates the clear idea of the application filed after expiration of the prescribed limitation time in Pakistan is the case of the Peshawar High Court between *Syed Faqir Shah v Haji Inayatullah Khan* in which the court of law stated that the applicant filed an application for setting aside an arbitral award after expiration of 77 days, the applicant stated that he did not have notice of the time, date and place of arbitration, the court of law held that the point of limitation would not come into the way of justice, the arbitrator misconducts himself, the arbitration award making the rule of the court is not maintainable thus dismissed.²⁶⁾

Article 4 of the UNCITRAL Model Law 1985 states that when arbitral proceedings

23) Nigel Blackaby, Constantine Partasides, Alan Redfern and M Hunter, "An Overview of International Arbitration." Redfern and hunter on international arbitration, p 1-83 (2009).

24) Order 2, Rule, 2 The Code of Civil Procedure Islamic Republic of Pakistan 1908 Act V.

25) Order 7, Rule 6 ibid.

26) *Syed Faqir Shah v Inayatullah Khan*, Peshawar High Court, Monthly Law Digest, 2013, p 689.

carried out against any provision of an arbitration agreement or any section of the relevant statute of place of arbitration and parties to an agreement of arbitration continue with arbitration proceedings without raising objection upon the arbitral tribunal and arbitration proceedings without unreasonable delay, would be deemed to have their right waived.²⁷⁾

The question regarding the jurisdiction of the tribunal of arbitration has to be raised before the expiration of the prescribed time but the objection can be raised after expiration of the time if it is allowed by the tribunal but if sufficient reasons of delay are not given then such kind of challenge is not admissible and liable to be rejected. No outsider is allowed to make an objection upon the tribunal, a third person who contributed in the appointment of an arbitrator and who is not a party to an agreement of arbitration is not allowed to object upon the tribunal of arbitration. When question on the jurisdiction of the arbitration tribunal is raised by the aggrieved party, the question of the substantive jurisdiction is to be made thereof. Article 32 of the UNCITRAL Arbitration Rules 1976 states that if a party fails to object on non-compliance of arbitration from an agreement of arbitration or from the rules of arbitration, it would be considered as the party has waived his right to challenge that irregularity, he would then not be allowed to raise that objection at the time of enforcement but the tribunal or the court of law may allow the party to make an objection later on if the party has sufficient reasons of delay.²⁸⁾

One important case related to the issue of the waiver is the case of the Hong Kong High Court between the *Attorney General v VIANINI LAVORI SAPA*. The court of law stated that the objection as to the jurisdiction of the tribunal of arbitration has to be raised in front of the tribunal first before raising it in front of the court of law later on and in this case the applicant applied for the security of costs and the respondent has not raised an objection within a specified time limit thus has waived his right to object, the court of law decided that now the question of waiver is to be decided by the tribunal of arbitration and not by the court of law.²⁹⁾

27) G Herrmann, "UNCITRAL (United Nations Commission on International Trade Law)Its Background, Salient Features and Purposes." 1 1 Arbitration International, p 6-39 (1985).

, Michael F. Hoellering, "The Uncitral Model Law on International Commercial Arbitration." The International Lawyer, p 327-339 (1986).

28)Article 32 The UNCITRAL Arbitral Rules United Nations 1976

29) *Attorney-General v Vianini Lavori Spa*, High Court of Hong Kong, 1991, p 676.

4. Grounds of Challenge

Grounds of challenge includes grounds to set aside an arbitral award and grounds to revoke recognition and enforcement of an arbitral award in Pakistan. Once the arbitral award is submitted in a court of law for its implementation, the aggrieved party may apply for modification and remission of an arbitral award under sections 15 and 16 of the Arbitration Act 1940. Article 7 of the New York Convention 1958 states that it does not stop the aggrieved party to avail any right under domestic legislation thus grounds for setting aside an arbitral award under section 30 are applicable on domestic as well as on international awards in Pakistan. Section 30 of the Arbitration Act 1940 states that on the request of the parties, the court of law can annul the award if the arbitrator misconducts himself or if the arbitrator misconducts with arbitration proceedings or if the award has been improperly procured or if the award is made after order of the court of law superseding arbitration or if the award has superseded the arbitration or if the award is otherwise invalid.³⁰⁾

One case which give a clear idea about challenging grounds of arbitral awards in Pakistan is the case of the Lahore High Court between *Muhammad Nadeem v Additional District Judge Bhakkar* in which the court of law stated that when an arbitral award is made in accordance with provisions of the Arbitration Act 1940, it cannot be set aside as an arbitral award can only be set aside if the award is improperly procured or if the award is made after decision of the court of law staying proceedings or if the award is superseding court proceedings or if an arbitrator misconducts himself or if he misconducts with arbitration proceedings.³¹⁾

It is pertinent to mention here that more grounds for setting aside an arbitral award are mentioned under article 34 of the UNCITRAL Model Law 1985 and under article 52 of the ICSID Convention 1965. Article 34 of the UNCITRAL Model Law 1985 states that an arbitral award may be declared void if parties to an arbitration agreement do not have the capacity to enter into an arbitration agreement or if the arbitration agreement is otherwise invalid under the governed law; which is the Contract Act 1872 in Pakistan; or parties to an arbitration agreement do not have the notice of arbitration proceedings or arbitration proceedings conducted on non-referred issue or the composition of the arbitral tribunal is

30) Section 30 The Arbitration Act Islamic Republic of Pakistan 1940 Act X

31) *Muhammad Nadeem v Additional District Judge BHAKKAR* Lahore High Court, Civil Law Cases, 2012, p 441.

not made in accordance with the arbitration agreement or arbitral proceedings are not conducted in accordance with agreed terms between the contracting parties or if the dispute is not allowed to be arbitrated or if the arbitral award is against the public policy of the state where recognition and enforcement of an arbitral award is sought.³²⁾

Article 52 of the ICSID Convention 1965 states some procedural grounds for setting aside an arbitral award. It states that parties to an agreement of arbitration may request for annulment of an arbitral award if the arbitral tribunal was not properly constituted as agreed upon between the contracting parties of an arbitration agreement or if the arbitral tribunal has exceeded from its powers or if there was a corruption on the part of its members or if the fundamental rules of procedure were not followed or if the award does not disclose reasons.³³⁾

It is pertinent to mention here that the irregularity and the jurisdiction of the arbitrator must be raised during arbitration proceedings and not at the time of the enforcement of an arbitral award. The Lahore High Court held in a case between *Muhammad Nadeem v Additional District Judge, Bhakkar* that there was no objection raised upon the jurisdiction of an arbitrator during proceedings of an arbitration and when an arbitral award came out as a result of arbitration proceedings, the aggrieved party objected upon the jurisdiction of an arbitrator later on, this kind of objection is not allowed.³⁴⁾

Article 5 of the New York Convention 1958 states grounds to revoke recognition and enforcement of an arbitral award in Pakistan. It states that recognition and enforcement of an arbitral award may be annulled if parties to an arbitration agreement do not have the capacity to enter into an agreement and the agreement is invalid or if parties to an arbitration agreement do not have the notice of the appointment of an arbitrator or if arbitration proceedings conducted on non-referred issue or if the arbitral tribunal is not constituted in accordance with arbitration agreement or arbitration proceedings are not conducted in accordance with agreed terms of the arbitration agreement or if the award is already set aside by the competent authority or if the award is not allowed to be arbitrated or if the award is against the public policy.³⁵⁾

Public policy is one of the ground to set aside an arbitral award under article 34 of the

32) Article 34 The UNCITRAL Model Law The United Nations 1985

33) Article 52 The ICSID Convention International Center for the Settlement of Investment Disputes of the World Bank Group 1965

34) *Muhammad Nadeem v Additional District Judge, BHAKKAR*, Lahore High Court, Civil Law Digest, 2012, p 441.

35) Article 5 The New York Convention United Nations 1958

UNCITRAL Model Law 1985 and to revoke its recognition and enforcement under article 5 of the New York Convention 1958. Public policy is a disputed matter and it has not been comprehensively defined, somehow the public policy is classified into domestic public policy and international public policy, the domestic public policy is different of every state as the international public policy are acceptable principles at international level by all independent states. The International Law Association suggested international public policy in London Conference 2000 and again recommended in New Delhi Conference 2002, according to which the international public policy is consisted of the fundamental rules of natural law, principles of universal justice, *Jus Cogens* in public international law and general principles of morality.³⁶⁾

Public policy is not defined anywhere in Pakistani statute this matter is ambiguous and needs clarification. Pakistan is an Islamic country and its state religion is Islam and no law can be made in Pakistan against fundamental principles and injunctions of Islam.³⁷⁾ It is pertinent to mention here that majority Muslim jurists are of the opinion that public policy in Islam is consisted of five preservations which includes preservation of religion, preservation of life, preservation of an intellect, preservation of progeny and preservation of Life.³⁸⁾

It is pertinent to mention here that the court of law goes in favor of acceptance of the arbitral award generally and does not disturb the award except in gross miscarriage situation. The High Court of Azad Kashmir stated in a case between *Communication and Works Department v MESSRS Design and Engineering System* that the concerned High Court does not sit upon the award as an appellate court nor as a tribunal of arbitration. If findings of an arbitrator are based upon documentary evidence and there is no misreading or non-reading of an evidence, the court of law would not disturb the award. The court of law would always go in favor of noninterference rather than interference in the findings of an arbitrator based upon documentary evidence. The court of law can only interfere in the award if there is a gross miscarriage of justice.³⁹⁾

36) Audley Sheppard, "International Law Association Report on Public Policy as a Bar to Enforcement of International Arbitral Awards." 19 2 *Arbitration International*, p 217-248 (2003).

37) Article 2 & 227 The Constitution of Pakistan Islamic Republic of Pakistan 1973

38) Imam Al-Ghazali, *Ihya Ulumiddin*, Victory Ajensi, 1988.

39) Ikram Ullah, "Public Policy in Arbitration: Still a Long Way to Go." 9 1 *Contemporary Asia Arbitration Journal*, p 53-86 (2016).

IV. Conclusion and Recommendations

Arbitration is one of the modes of alternate dispute resolution, it is a method through which parties resolve their disputes outside the court of law. The decision of an arbitrator is called an arbitral award which is required to be submitted in a competent civil court of law under section 14 of the Arbitration Act 1940 if the award is domestic and before the concerned High Court under the Recognition and Enforcement Act 2011 if the award is international. Thereafter, the aggrieved party may apply before the court of law for modification or remission of an arbitral award under sections 15 and 16 of the Arbitration Act 1940.

The place of challenge is normally the seat of arbitration where arbitration proceedings took place but when the parties submit an arbitral award in another country for recognition and enforcement of an arbitral award, the aggrieved party may challenge an arbitral award there for setting aside an arbitral award or for preventing its recognition and enforcement. Parties to an agreement of arbitration may exclusively exclude the right to challenge a decision of an arbitrator through a provision of an agreement of arbitration in Pakistan under section 28 of the Contract Act 1872. An aggrieved party to an arbitration agreement may challenge an arbitral award within 30 days in Pakistan under article 158 of the Limitation Act 1908. Normally, 90 days are given for an appeal against decisions of the civil court of law under section 96 of the Code of Civil Procedure 1908, it is therefore highly recommended that the Parliament of Pakistan should amend article 158 of the Limitation Act 1908 and increase the time limit for challenging an arbitral award from 30 to 90 days.

An aggrieved party is required to claim his right and challenge an arbitral award within a prescribed time limit but if he omits and relinquishes his claim initially, it would be considered as the party has waived his right to challenge under Order 2, Rule 2 of the Code of Civil Procedure 1908, under article 4 of the UNCITRAL Model Law 1985 and under article 32 of the UNCITRAL Arbitration Rules 1976. It is pertinent to mention here that the court of law may allow an aggrieved party to challenge an arbitral award after expiration of the limitation time if the aggrieved party gives sufficient reasons of delay under Order 7, Rule 6 of the Code of Civil Procedure 1908.

Challenging arbitral awards in Pakistan is either to challenge its validity under section 30 of the Arbitration Act 1940 or to revoke its recognition and enforcement under article 5 of the New York Convention 1958. Challenging grounds include public policy, which is one of the ground to set aside an arbitral award under article 34 of the UNCITRAL Model 1985 and one of the ground to revoke recognition and enforcement of an arbitral award under article 5 of the New York Convention 1958. Public policy is one of the ground to revoke recognition and enforcement of an arbitral award in Pakistan under article 5 of the New York Convention 1958. The public policy is not defined anywhere in Pakistani statute; it is therefore recommended that the concept of public policy should be defined by the Parliament. It is pertinent to mention here that the state religion of Pakistan is Islam, no law can be made in Pakistan against injunctions of Islam laid down in the Holy Quran and Sunnah of Prophet Muhammad ﷺ. It is therefore highly recommended that the concept of public policy should be codified in Pakistan as per principles laid down in the Holy Quran and Sunnah of Prophet Muhammad ﷺ.

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ABSTRACT

The Challenge of Arbitral Awards in Pakistan

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An arbitrator in Pakistan is required to file an arbitral award in a civil court of competent jurisdiction for its recognition and enforcement if an arbitral award is domestic or before the concerned High Court if the arbitral award is international. The court of law is required to issue a decree upon submitted arbitral award if an interested party do not apply for modification or remission of an arbitral award and do not challenge it for setting it aside or for revocation of its recognition and enforcement within a prescribed time limit. The challenging process of an arbitral award can be started by the aggrieved party of an arbitration agreement at the seat of arbitration or at the place where recognition and enforcement of an arbitral award is sought. The aggrieved party to an arbitration agreement is required to challenge an arbitral award within a prescribed time limit if contracting parties have not excluded the right to challenge an arbitral award. Limitation for challenging an arbitral award in Pakistan is 30 days under article 158 of the Limitation Act 1908, starting from the date of service of notice of filing of an arbitral award before the court of law. Generally, 90 days are given for an appeal against decision of the civil court of law under section 96 of the Code of Civil Procedure 1908, it is therefore highly recommended that challenging time of an arbitral award should be increased from 30 to 90 days.

Key Words : Arbitration, Arbitration Agreement, Arbitral Award, Place of Challenge, Exclusion of Challenge, Waiver of Challenge, Limitation on Challenge.