

# Commercial Arbitration: A Messiah for the Dying Economy of Pakistan

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## Abstract

The article titled "Commercial Arbitration: A Messiah for the Dying Economy of Pakistan" discusses the role of commercial arbitration in Pakistan's economy. It highlights how commercial arbitration can be a solution to economic challenges by providing a fair and efficient mechanism for resolving disputes. The article likely delves into how the implementation of commercial arbitration can attract foreign investment, promote business growth, and enhance economic stability in Pakistan. Additionally, it may explore the benefits of arbitration over traditional litigation, such as confidentiality, flexibility, and neutrality in decision-making. The main argument of the article is that commercial arbitration can be a solution to economic challenges by providing a fair and efficient mechanism for resolving disputes. The implementation of commercial arbitration can attract foreign investment, promote business growth, and enhance economic stability in Pakistan. The article also explores the benefits of arbitration over traditional litigation, such as confidentiality, flexibility, and neutrality in decision-making.

**Keywords:** Commercial arbitration, Investment, domestic, arbitral award, procedural irregularities, corruption

## 1 Introduction and Historical Background

Black's Law Dictionary defines arbitration as, "A method of dispute resolution involving one or more natural third parties who are usually agreed to by the disputing parties and whose decision is

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binding” (West, [2009](#)). Pakistan appeared on the World map as a sovereign state on August 14, 1947, after independence, and inherited the legal system of India as common law for Pakistan (Hussain, [2018](#)). The Arbitration Act, 1940 (the “AA”) and the Arbitration (Protocol and Convention) Act, 1937 (the “APC”) have ruled international arbitration dominion for up to 60 years in Pakistan. The purpose of “The AA” enactment was to regulate local arbitration, while “APC” formed to endorse the 1923 Protocol on Arbitration Clauses (the “Geneva Protocol”) and the 1937 Convention on the Execution of Foreign Arbitral Awards (the “Geneva Convention”) (Ghouri, [2013](#)). Pakistan became a signatory to the New York Convention on December 30, 1958, and the ratification process was completed quite late on July 14, 2005, through a Presidential Ordinance on 15 July 2011 a statutory legislation was made by Pakistani parliament: The Recognition and Enforcement (Arbitration and Foreign Arbitral Awards) 2011 Act (Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, ([2011](#)) and for the foreign investment the Arbitration (International Investment Disputes) Act, 2011 (the “AIDA Act, 2011”) (Khan, [2015](#)).

Nevertheless, the laws of “AA” and “APC” have been applied in a very distinct way and juxtaposition by Pakistani national courts while adjudicating the issues, relating to the recognition and enforcement of foreign arbitration agreements and awards, because of vague and uncertain laws of both “AA” and “APC” concerning jurisdiction and powers, in arbitration matters, of the courts (Ghouri, [2013](#)). Despite the application of the 1958 New York Convention, Pakistan is even now far behind in the race to recognize and enforce the arbitral awards of foreign jurisdiction among the universal arbitration community (Hussain, [2018](#)). The features of international arbitration are acknowledged universally. However, without the capability to implement international awards on arbitration, in the occasion of the party in the arbitration process waning, declining, or not recognizing the award, the international award of arbitration turns into a piece of paper merely (Kerin, [2017](#)).

The recognition process and execution of arbitration awards of a foreign jurisdiction is the chief target and fundamental concern in Pakistan and the Globe, as well as the gist of the New York Convention of 1958. Pakistan has to be in an urgent necessity for foreign investment and to make its position business-friendly among the transnational business community and needs to present a solid and foreseeable procedure for the application of foreign arbitral awards (Bilal, [2014](#)). Pakistan couldn’t be a friendly business or attractive arbitration market and will be left far behind among international arbitration community without spotting and removing the hurdles or challenges in the recognition process and enforcement or execution of award of foreign jurisdiction even in the presence of “REA, 2011” (Hussain, [2012](#)).

This research paper will rely mainly on doctrinal analysis and comparative methodology along with a partial empirical research approach. The analytical study examines why the already established legal customs and laws are ambiguous and difficult to understand i.e. in this research project the arbitration laws in Pakistan. The doctrinal analysis is a common, traditional, and most adopted methodology in legal research.

## **2 The Relevant Legal Framework in Pakistan**

### **2.1 The Arbitration Act, 1940**

The Arbitration Act, of 1940 is for domestic or national arbitration only and talks about three modes of arbitration: initiation process of arbitration by the court, initiation of the process of arbitration by the parties or by the help of a person appointed or designated without involving the court, and lastly in cases where suits are pending in courts and parties are agreed to settle the dispute via arbitration (Kazi, [2020](#)). The Arbitration Act, of 1940 came into force in British India and Pakistan inherited this act after the partition in 1947. In this modern world, domestic arbitration is regulated by this ages-old unchanged arbitration act, 1940, and still waiting for alignment with

modern legislation (Hosain, [2023](#)). The Arbitration Act, of 1940 provides the right of appeal against the final award and kick starts the new round of lengthy and costly litigation in conventional courts which is against the gist of the arbitration (Kalanauri, [2017](#)).

## **2.2 The Arbitration (Protocol and Convention) Act 1937**

The Arbitration (Protocol and Convention) Act, 1937 is a colonial legislation and was in force in Pakistan for more than 60 years. The prime purpose for the enactment of the Act 1937, was to regulate the awards of foreign jurisdiction in Pakistan. The act, 1937 came into existence for the enforcement 1923 Protocol on Arbitration Clause (the “Geneva Protocol”) and the 1927 Convention on the Execution of Arbitral Awards (the “Geneva Convention”) (Ghour, [2013](#)). That act, 1937 came with a very narrow scope to cover those foreign arbitral awards, which are given in section 2. The definition of ‘foreign arbitration’ can be found in the precedents by courts in Pakistan that it is an arbitration by a foreign jurisdiction, by the overseas arbitrators, governing law is of foreign land, and inclusion of the foreign national must be involved for the application of section 2 of the act 1937 (Kwon, [2014](#)). Although, the Act, of 1937 has been repealed by the very new and comparatively modern legislation the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (“the 2011 Act”) (Raza, [2018](#)).

## **2.3 The REA Act, 2011**

Pakistan was the signatory of the famous 1958 Convention on Recognition and Enforcement of Foreign Commercial Awards (“the New York Convention”) very soon after this Convention but ratified very late in 2005 via Presidential Ordinance and stayed operational until 2010 as a Presidential Ordinance. In the end, this piece of legislation was passed by the both lower and upper houses and came into existence in 2011 as an enactment called ‘The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) 2011, Act’ to regulate foreign Investment and Commercial arbitration in Pakistan (Ghour, [2013](#)). The 1958 Convention was implemented in Pakistan through the 2011 act, and the very purpose of this enactment is to make the recognition and enforcement of foreign arbitral awards mandatory in Pakistan, which is the first step towards meeting the standards of the global arbitration regime. The 2011 act is a pro-enforcement legislation for the implementation of awards of foreign jurisdiction in Pakistan and also provides a right to parties to challenge the arbitral awards, which are exceptions of execution for awards of foreign jurisdiction as described by Article V of the New York Convention 1958 (Mukhtar, [2016](#)).

## **3 Responsibility of the Responsible**

### **3.1 The Role of the Judiciary**

The support of the judiciary is a basic and main pillar for the success of commercial arbitration all over the globe and it is very evident that all the leading arbitral territories in the world are backed by the local judiciary to keep the process of commercial arbitration smooth and efficient which makes the arbitration a reliable mode of settling the commercial disputes among the global business community, regardless of territorial differences (Bilal, [2014](#)). Nevertheless, the courts in Pakistan have taken a different and confusing approach since 1947 in decisions of cases by courts related to foreign commercial arbitration due to procedural and substantive laws operating in Pakistan including (“AA 1940”), (“APC 1937”). After the REA Act, 2011 a much-awaited, modern legislation but a replica of the Convention 1958, which targets the recognition and enforcement of awards of foreign jurisdiction in Pakistan, uncertainty for foreign commercial arbitration still exists in Pakistan (Tahir, [2023](#))

In Malik Ali Akbar V. Metro Goldwyn Mayer India Ltd, the first reported case related to commercial arbitration after the partition in 1947, the District Court declined to proceed with the plaint due to lack of jurisdiction due to the insertion arbitration clause in the agreement which gives powers to foreign jurisdiction, without mentioning that under what law this court is rejecting

the case of the applicant, section 34 of the AA and section 3 of the APC are relevant, but they do not demand plaint to be dismissed due to the inclusion of the arbitration clause in agreement which give power to foreign jurisdiction, appeal of it was dismissed by the Lahore High Court (Ghouri, [2013](#)).

Maulana Abdul Haque V. Government of Balochistan (PLD 2013 SC 641), the most famous Reko Diq case, became undoubtedly a landmark case in the judicial history of Pakistan. This landmark case is a clear violation of the substantive rules of arbitration and the gist of the international arbitrational regime which says that due to foreign arbitration provision, exclusive jurisdiction shall only be exercised tribunal have the power to arbitrate to conduct the trial of the case and announce the arbitral award after settling the commercial dispute. (Gujjar, [2020](#)) The superior courts of Pakistan took cognizance of this arbitration-related case while assuming the original jurisdiction, conducting a full trial, and announced the judgment while discussing the unsettled principles of public policy in Pakistan (Finnigan, [2019](#)). A very unusual observation was given by the Lahore High Court in Jess Smith and Sons Cotton LLC versus D.S Industries, Civil Original No.628 of 2014, in which Lahore High Court in appeal gave the order for framing of issues and conducted evidence for the disposal of the case in hand for recognizing and enforcing of a foreign arbitral award in Pakistan (Raza, [2018](#)).

A unique observation given by the Highest court in Pakistan in Messrs Eckhardt & Co, Marine GmbH V Muhammad Hanif (PLD 1993 Supreme Court 42). In this case, the Court declined the request for staying legal proceedings in conventional courts of Pakistan by saying that it could not be convenient for litigants to go to London while carrying evidence for solving the issues through the process of arbitration as per the contract. Apex Court of Pakistan in M/s Uzin Export & Import Enterprises for Foreign Trade v M/s Iftikhar & Company Limited (1993 SCMR 866) declined to entertain an arbitration agreement where seat for it was Paris, with the contention that this route would be inconvenient for the parties and will be an expansive one. Again, in Hub Power Company Limited V Pakistan WAPDA through Chairman and others (PLD 2000 Supreme Court 841), one of the High Courts of Pakistan restrained one of the parties from pursuing international arbitration regarding a corruption base case with the argument that ‘Matters’ required probe into criminality are not advantageous to arbitration, and this kind of judgment of high Court in Pakistan was upheld by the Apex Court of Pakistan (Majeed, [2023](#)).

In Taisei Corporation vs A.M. Construction Company (Private) Limited (PLD 2012 Lahore 422), the Lahore High Court gave the verdict that powers under the act, 2011 are narrower for recognizing and enforcing an award of foreign jurisdiction therefore a convenient remedy for the recognition and enforcement would be under s14 of the AA 1940. The enforcement of the award of foreign jurisdiction was refused by Quetta High Court after the recognition in Rossmere International Limited vs Sea Lion International Shipping Inc (PLD 2017 Baluchistan 29) with the contention that the awards debtor does not provide any asses or bank accounts in the territorial jurisdiction of the Quetta High Court Baluchistan, Pakistan. The National Courts of Pakistan remained off track in the 20th century due to procedural irregularities in the Pakistani arbitrational legal framework and for international commercial and investment arbitration. The problem remained majorly after the arrival of the REA Act, 2011 due to the absence of a procedural framework regarding foreign awards in the act, which strengthened the inconsistency of judicial rulings regarding foreign arbitration including the superior judiciary of Pakistan (Raza, [2018](#)).

### 3.2 The Role of the Government of Pakistan (GOP)

The role of the Government is a very important factor in enforcing, promoting, regulating, and strengthening laws in a sovereign country. Pakistan as a country inherited its almost entire legal framework from the British-India after the partition in 1947 including the AA 1940 and the APC 1937 to regulate domestic and foreign arbitration in Pakistan. It is a well-known fact that the role

of the Government of Pakistan (GOP) remained questionable, un-satisfactory, shaky, outdated, and still not at a level of encouragement which continues to derail the comprehensive development of foreign arbitration in Pakistan (Bilal, [2014](#)). Although Pakistan was the earliest signatory of the 1958 Convention, the ICSID Convention 1965, and the model law UNCITRAL 1985 to get in the race for a global arbitration regime, the GOP failed to transform the global arbitral policies and the model law into the national commercial and investment arbitration law of Pakistan to form and promote a comprehensive domestic and international arbitration in Pakistan. The lack of interest of the GOP was very prominent which delayed the arrival of a new, modern, and comprehensive arbitral legislation and affected directly and indirectly the economy of Pakistan (Faizan, 2024). The much-awaited legislation of the REA act in 2011 after the repetitions of the Presidential Ordinances since 2005, was the first practical approach towards the flourish-ness of international commercial arbitration in Pakistan but replicating the 1958 Convention into a national commercial arbitral law does not amount to the fulfillment of the duties of the GOP. There are many famous foreign arbitration-related cases in Pakistan including The Reko Diq case which says that the intentional negligence, recklessness, incompetence, and corruption on the part of the government officials are the main factors that derailed the whole arbitral project and resulted in the hefty arbitral court's fines up to 6b GBP (Ghouri, [2019](#)).

#### 4 Importance and Status of International Arbitration in Great Britain

Great Britain is a country that started paying attention to arbitration in the 17th century, but the acceptance of the new alternative to the conventional courts was not greeted majorly. As history tells us the acceptability of commercial arbitration grew after the 18th century and the revolution started in the arbitration regime at the start of the 19th century (Dynaex, [2012](#)). The United Kingdom acknowledged the importance of local and foreign or cross-border commercial and investment arbitration industry at the earliest and took radical steps to formulate a comprehensive arbitration policy to regulate cases regarding domestic and foreign arbitration. The first effort of Great Britain to promote arbitration was the Locke Act which was enacted by the British parliament in 1698, which regulated arbitration more than a century and repealed by the 1854 act. The 1885 act was succeeded by the Arbitration Act 1889 with the addition of substantial pro-arbitration provisions (Honcharenko, [2019](#)). The arbitration regime in the UK started regulated by the Arbitration Act, of 1950 in the 19th century and ruled the arbitration industry for over 25 years but was later on repealed by the Arbitration Act, 1975 which lasted only 4 years and was succeeded by the new Arbitration Act 1979 with the purpose to tackle the boom in the commercial and investment arbitration in modern world to keep the trade and investment smooth along with promise to keep the faith of business community in the English arbitral legal system (Stewarts, [2022](#)).

Great Britain signed the Convention 1958 and the ICSID Convention 1965 in no time and acknowledged the UNCITRAL Model Law 1985 to get aligned with the modern arbitration regime. The Arbitration Act 1979 remained intact till the promulgation of the latest much-awaited Arbitration Act 1996, which came with up-to-date additions in the act to cop the much saturated national and foreign or cross-border commercial and investment arbitration industry in the UK (Coes, 2022). The United Kingdom is one the leading countries in international arbitration while London is the most favorite seat to settle disputes among the global business community. The arbitration industry has grown by 26pc from 2016 to 2020, and the Chartered Institute of Arbitrators offers the services of more than 17000 arbitrators across 149 countries (Parsons, [2022](#)). London tops the list of favorite arbitration seats as the home of the London Court of International Arbitration (LCIA), The International Chamber of Commerce (ICC), the London Maritime Arbitrators Association (LMAA), and the Grain and Feed Trade Association (GFTA) all are in London, resulted for more than 5000 national and international arbitration London seat related cases every year which contributes over 2.5bn GBP to the UK economy yearly (Bramwell &

Shour, [2023](#)). It was reported that over 60bn GBP gross value added (GVA) in 2018 towards the UK economy along with more than 6bn GBP as export of legal services in 2017 recorded, and to remain the most favorite arbitration seat and governing law globally the UK has presented a new English arbitration bill 2024 in the British parliament which is pending for the Royal assent (Hill, [2020](#))

## 5 Conclusion and Suggestions

Pakistan and India initially shared the same laws for domestic and foreign arbitration after the partition in 1947, which were the AA 1940 and the APC 1937 respectively. The AA, 1940 and the APC, 1937 have governed the arbitral regime in Pakistan for more than six decades along with the subscription of the 1958 Convention, the 1965 ICSID convention, and with the help of Model Law UNCITRAL, but the arbitral regime never flourished in Pakistan due to the overlapped legal provisions, incomplete and outdated arbitration legal framework, contradicted judgments of superior judiciary, political uncertainty, lack of arbitral awareness among legal fraternity and lack of arbitral skills on the part of the superior judiciary in Pakistan. Pakistan was one of the earliest subscribers of the 1958 Convention with the clear intention to promote foreign arbitration in Pakistan and to compete with the modern leaders in the global arbitral world but went off track and finally ratified the 1958 Convention after ages in 2005 via Presidential Ordinance. The seriousness of the Pakistani Government regarding strengthening the commercial and investment arbitration can easily be assessed by looking at the REA Act, 2011, and the AIDA Act, 2011 after the delay of more than 50 years.

The UK holds the oldest, most modified, and most comprehensive arbitral history which makes the English arbitral Law one the most successful in the world and London one of the most favorite seats for arbitration globally due to the clear, inclusive, modern, adopted, and efficient arbitral legal framework. The English Arbitration Act, of 1996 is one of the comprehensive and refined arbitral legislation that covers local and foreign or across-the-border commercial and investment arbitration, and due to the one uniform, complete legislation makes the whole arbitration system smooth and efficient, with the support of stable English Government support along with consistent judicial approaches which resulted in more than 60bn GBP to the UK economy every year.

## 6 The Way Forward

### 6.1 Political Stability

Pakistan is a developing country that needs to strengthen its economy and for a strong economy, there should be a strong and stable Government that can make comprehensive pro-arbitral policies to attract the foreign business community.

### 6.2 Adaptation of arbitral policies from developed countries

Pakistan signed the 1958 and 1965 Conventions to promote international arbitration but went off-track due to political instability and never included foreign arbitration in national priorities resulting in a collapsed arbitral industry that directly damaged the economy of Pakistan. Pakistan is in dire need of foreign and domestic investment to boost its economy and for this Pakistan needs to adopt the arbitral policies from the arbitral developed countries.

### 6.3 Public Policy

Public policy is an exception among others against the enforcement and execution of awards of foreign jurisdiction as per the 1958 Convention but there is no clear available default definition of public policy even in the 1958 Convention. The superior courts of Pakistan have also failed to develop a unified public policy till today. The Sharia Law is a substantial part of the law of Pakistan; therefore, Pakistan needs to develop a clear public policy to stop the miserable use of

vague public policy as a weapon against the recognition and enforcement of foreign arbitral awards.

#### 6.4 Procedural Law

The REA Act, 2011, and the AIDA Act, 2011 are special laws that were formed to tackle the modernization in the arbitral regime. These enactments are near-replicas of the 1958 and 1965 Conventions as substantive laws. The Federal Government of Pakistan has failed to bring the procedural law to make foreign arbitration smooth and efficient. The Code of Civil Procedure 1908 is being used for the fulfillment of the process of foreign arbitration.

Many more radical steps need to be taken by the responsible authorities including the promotion of commercial/investment arbitration awareness among the legal fraternity, formation of special courts for commercial/investment arbitration, more strict policy for corrupt public officials, and most importantly pro-arbitral policy on the part of the superior judiciary of Pakistan.

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