Arbitration Law in Pakistan

The Statute

The law of arbitration in Pakistan is contained in the Arbitration Act, 1940 (a pre-partition enactment, which still continues in force). Its main features are summarised as under:

The Act provides for three classes of arbitration:–

(a) arbitration without court intervention (Chapter II, sections 3-19);

(b) arbitration where no suit is pending, (but through court) (Chapter III, section 20) and

(c) arbitration in suits (through court) (Chapter IV, sections 21-25).

The Act also contains further provisions, common to all the three types of arbitration (Chapter V, sections 26-38).

Arbitration agreement

Whatever be the class of arbitrations there must be an arbitration agreement. As defined in the Arbitration Act, 1940, it means a written agreement to submit present or future differences to arbitration, whether an arbtirator is named therein or not [section 2 (2)].

Arbitrators

The number of arbitrators can be one, two, three or even more. In the case of an even number of arbitrators, an umpire is to be appointed according to the procedure given in the Act [First Schedule. Where the arbitration agreement does not specify the number, the arbitration shall be by a sole arbitrator (First Schedule).

An arbtirator may be named in the arbitration agreement or may be left to be appointed by a designated authority (First Schedule).

Where the arbitration agreement is silent about the mode of appointment of arbitrators and the parties cannot agree about the choice of the arbitrator, the Act gives power to the court to make the appointment, after following the prescibed procedure (sections 8-10).

An arbitrator who does not diligently conduct the proceedings, or who is guilty of misconduct, can be removed by the court after due inquiry (section 11).

Death of a party does not terminate the arbitration proceedings, if the cause of action survives (section 6).

The arbitrator has got certain statutory powers, including the power to administer oaths to witnesses, power to “state a case” for the opinion of the court etc.

Court intervention

If a party to an arbitration agreement refuses to go to arbitration, the other party can seek intervention of the court to compel a reference to arbitration (section 20).
Procedure

The Arbiration Act, 1940, is totally inadequate, in regard to matters of procedure. Of course the arbitrator must observe the essentiats of natural justice, failng which, the arbitrator’s award can be set aside for misconduct (section 30). But various stages of the process are not dealt with in the Act.

In practice, arbitration is conducted on the basis of (i) the pleadings (statement of claim and statement of defence), whereupon (ii) issues may be framed (if necessary), followed by (iii) affidavits, (iv) oral evidence, and (v) arguments.

The award

The award must be prounounced within the time limits laid down in the arbitration agreement or (failing such agreement), within 4 months of the commencement of hearing. However, the time limit can be extended by the court in certain circumstances (section 28, and First Schedule).

The award has to be in writing and signed by the arbitrator. If there are more than one arbitrator, the majority view prevails. The Act itself does not provide that the arbitrator shall give reasons for the award. When the award is a non-speaking award, the scope for interference by the court with the award becomes somewhat limited.

Court control over the award

An award cannot be enforced, by itself. Judgment of the court has to be obtained in terms of the award (section 17).

In the scheme of the Arbitration Act, 1940, the court may:–

(a) pass judgment in terms of the award (section 17), or

(b) modify or correct the award (section 15), or

(c) remit the award (on any matter referred to arbitration), for re-consideration by the arbitrator or umpire (section 16), or

(d) set aside the award (section 30).

In short, the court may (i) totally accept the award, or (ii) totally reject it, or (iii) adopt the intermediate course of modifying it or remitting it.

Modifying the award

Modification of award by court

The Court may, by order, modify or correct an award:–

(a) where it appears to the court that a part of the award is upon a matter not referred to arbitration and can be separated from the other and does not affect the decision on the matter referred, or

(b) where the award is imperfect in form, or contains an obvious error which can be amended without affecting such decision, or

(c) where an award contains a clerical mistake or an error arising from an accidential slip or omission (section 15).

Remiting the award

The court may remit the award (or any matter referred to arbitration):–

(a) here the award has left undertermined certain matters or where it determines matters which are not referred to arbitration, and which cannot be separated from the rest or

(b) where the award is so indifinite, as to be incapble of execution or

(c) where an objection to the legality of the award is apparent on the face of it (section 16).

Setting aside the award

The court can set aside the award, only on one or more of the following grounds, namely:–

(a) that the arbitrator or umpire has misconducted himself or the proceedings;

(b that the award has been made after issue, by the court, of an order superseding the arbitration; or

(c) that an award has been improperly procured or is otherwise invalid (section 30).

Misconduct of the arbitrator (Setting aside the award)

One of the principal grounds for setting aside the award under the Act of 1940 is the ground of misconduct. Section 30 of the Act expresses it in rather cryptic terms by phrasing it in this manner "the arbitrator has misconducted himself or the proceedings". No exhaustive definition of "misconduct" in this context can be given because misconduct is as large as life itself.

Because of the endless variety of situations in life, treatment of the subject in an

exhaustive manner is likely to degenerate into a mere catalogue of instances. It will be more useful if selected instances of misconduct are collected and are classified under a few convenient groups. In arranging the cases under such group, one should bear in mind the fact that misconduct may arise from the arbitrator's conduct of the case, the arbitrator's relations with the parties, the arbitrator's mode of arriving at the decision (in regard to the materials relied on by the arbitrator or the tests applied), and the arbitrator's mode of formulating his award.

Specific heads of misconduct

Here are some specific heads of misconduct which recur frequently in practice:–
proceeding ex parte, without justification (and analogous acts);
private inquiries by the arbitrator;
absence of the arbitrator;
delegation by the arbitrator, or the arbitrator associating strangers with the arbitration;
use of wrong criteria by the arbitrator;
use of wrong material (by the arbitrator);
irregularities in the award.

Proceeding ex parte and analogous acts

It is misconduct for an arbitrator:–
to hear only one party in the absence of the other; or
to fail to give notice of hearing; or
to amend the issues behind the back of the parties, thereby causing prejudice.

But it is not misconduct on his part to amend the issue at the time of writing an award, if no prejudice is caused to the parties.

Competent court

The court competent to exercise various powers under the Arbitration Act, 1940, is the civil court, which would be competent to entertain a civil suit, if a suit were to be filed on the cause of action which forms the basis of the arbitration.

Private inquiries

An arbitrator must decide on the evidence on record, and not on material obtained otherwise. It is misconduct on his part:–

(i) to import his personal knowledge into the decision;
to hold a private conference with a party;
to hold a private meeting behind the back of the party;
to make a private inquiry behind the back of the party;
to listen to confidential information, adverse to a party, even if the arbitration agreement gives him full latitude, (though the position may be different, if the parties had the opportunity of checking and contradicting the information so proposed to be utilised);
to communicate with one party, behind the back of the other party.

Absence of arbitrators

Where there are more than one arbitrator, they must all act together. The award is bad, if one arbitrator is absent. The position may be different if what was done during the absence of one arbitrator is done all over again by all the arbitrators, or if the act performed in the absence of one arbitrator is only ministerial, such as looking into an account book.

Joint deliberations

All arbitrators must deliberate jointly. However, the parties may waive the irregularity. Delegation by arbitrator, or associating strangers with the arbitration.
An arbitrator cannot delegate his functions to another person. It follows, that if the award is given by a person to whom the arbitrator delegates his functions, the award is a nullity. There is, however, an exception to this rule, where the delegation is:–

(i) with the consent of all the parties, or

(ii) a purely ministerial act.

An arbitrator cannot associate a third person with the decision-making process. Here again, there is no misconduct, if there was consent of all the parties, to such a course being adopted.

Use of wrong criterion by arbitrator

Sometimes, an arbitrator, while not guilty of procedural lapses (as in the above categories of misconduct), employs a wrong criterion for coming to a conclusion. The award may then be set aside on that ground. Examples are:

(i) assessment of damages for breach of contract, on the basis of rates prevailing in the black market (instead of the controlled rates);

(ii) ignoring very material documents, at a stage when the evidence has not yet been closed.

Errors of law

Questions of difficulty arise, when the arbitrator's decision is challenged, for an erroneous conclusion reached by the arbitrator on matters of law. the position appears to be a bit complex and cannot be stated with absolute certainty. However, broadly speaking, one can state the law on the subject in the form of the following propositions:–

(a) where a question of law has been specifically referred to the arbitrator for his decision, then his ruling on that question, if bona fide and if not suffering from any other defect, is not open to challenge, merely because it is erroneous;

(b) if a question of law has not been specifically referred to the arbitrator, his ruling on

the point of law (if material to the result) may render the award void.

First as to situation (a) above. Where an arbitrator is called upon to decide the effect of the agreement, he has to really to decide a question of law, (i.e., in interpreting the agreement), and hence his decision on the point is not open to challenge.

In situation (b) above, the award of the arbitrator can be set aside on the ground of an error of law on the face of the award. However, for this purpose, the court cannot look into a document not referred to, in the award.

Generally, the question of error of law can arise only if reasons are given in the award. However, if the very relief granted by the award is illegal, the position is different. Thus, an arbitrator cannot grant specific performance of a contract of service. Nor can a contract for the sale of movable property be enforced specifically, save in exceptional cases.

Decision to be According to Legal Rights

An arbitrator must decide according to legal rights, and not according to his own notions of fairness. There may, of course, be special situations where a different intention of the parties may be inferred and upheld judicially.

Basis of interference by court

The logical basis on which the jurisdiction of the court to interfere for apparent error can be justified, needs first to be explained. The general principle is that an arbitrator is a final judge both of fact and of law. So far as questions of fact are concerned, this jurisdiction has been limited to decisions pronounced after serious procedural lapses, which reveal breach of natural justice or other technical misconduct. So far as errors of law are concerned, the jurisdiction of the court, (though not conferred in so many words by section 30), seems to have been based on the assumption that if the parties have not specifically referred a question for the decision of the arbitrator, then it is implied that the general power of the court to determine legal questions between the parties remains unimpaired. In theory, the jurisdiction can also be supported on the ground that the ultimate arbiters of questions of law should be the courts, so that uniformity is maintained.

Reasoned and unreasoned awards

Where the award is an unreasoned one, the court cannot interfere on the ground of an error therein. If the arbitrator chooses to give reasons, then the award can be set aside on the ground of error of law, although, in general, the reasonableness of the reasons themselves cannot be challenged.

Interpretation of contracts

The same principle is also followed, regarding questions of interpretation of contract as determined in the award. Court can interfere only if the award is a speaking award. It is only if the line of interpretation is set out in the award that the court can interfere.

Breach of natural justice

Of course, the arbitrator would be guilty of misconduct, if there is a breach of natural justice. Thus, it is well established that the arbitrator cannot depend on personal knowledge or arrive at a conclusion behind the back of the parties.

But where the arbitrator decides a question of fact on the basis of the evidence and on the basis of answers given by the parties in response to queries from the arbitrator, the award cannot be said to be based on personal knowledge and cannot be set aside on that ground.

Arbitrator's award may be set aside, if it awards charges for extra work, escalation charges and damages claimed by the construction contractor without any supporting material.

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