INTERNATIONAL COMMERCIAL ARBITRATION IN PAKISTAN, NAVIGATING BETWEEN THE THE NEW YORK CONVENTION AND THE DRAFT ARBITRATION ACT 2005

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1. Introduction

On 14th July 2005, after forty-seven years of being an original signatory to the United Nation's Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the NY Convention), Pakistan promulgated the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005 (REAO), Ordinance No. VIII of 2005 and finally ratified and implemented the NY Convention. This implementation is however due to become ineffective with the lapse of the REAO on 14th November 2005[1]. It is hoped that the implementation of the NY Convention will be sustained by the passing of an act of the National Assembly that enforces the NY Convention.

However, the provisional reform of the promulgation of the REAO has come about as a result of the tireless lobbying of various private sector players (most notably the Pakistan National Committee of the International Chamber of Commerce) as well as through key players in the Government of Pakistan; specifically the Committee on Updation and Development of Laws on Arbitration which drafted the REAO.

The REAO replaces the Arbitration (Protocol and Convention) Act 1937 (APC Act) which previously applied the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927[2] (the Geneva Convention) to the enforcement of foreign arbitral awards in Pakistan.

The REAO represents the recognition by the Pakistani government for the need for the enablement and protection of Foreign Direct Investment. A principle benefit that is expected from the promulgation of the REAO, and, after the REAO lapses, from any subsequent NY Convention legislation, is to enhance the image of Pakistan's investment climate in the eyes of the global community; something that has been severely tarnished after many debacles with major investment giants including among others, Societe Generale de Surveillance[3], National Power[4], Seimens Westinghouse[5].

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[1] Art 89 of the Constitution of Pakistan deems all Ordinances to lapse after four months of their promulgation.

[2] 92 League of Nations Treaty Ser. 2302

[3] In *Societe Generale de Surveillance S.A. v Pakistan,* (2002 SCMR 1694) the Supreme Court of Pakistan denied the enforceability of an ICSID arbitration clause contained in a Pak-Swiss BIT since, firstly, the ICSID Washington Convention 1965 had not been implemented into Pakistani domestic legislation, and secondly, since the Supreme Court controversially held that the provision of pre-shipment inspection services offered by SGS to the Pakistani government did not fall under the definition of 'investment' as contained in the Pak-Swiss BIT. The ICSID Tribunal however in its Decision on Jurisdiction rendered on 6th August 2003 in ICSID Case No. ARB/01/13, disregarded the decision of the Pakistani Supreme Court in finding that the Tribunal did indeed have competence to hear the case.

[4] In *The Hub Power Company Limited v Wapda,* (PLD 2000 Supreme Court 841), the Supreme Court of Pakistan refused to enforce an arbitration agreement between Hubco (a subsidiary of Britain's National Power set up with World Bank support) and the Pakistani government. The decision has been severely criticized by the international investment community. See Louise Barrington, *HUBCO v WAPDA: Pakistani Top Court Rejects Modern Arbitration,* The American Review of International Arbitration 2000/Vol. 11 No.3 page 385.

[5] In *Wak Orient Power and Light Limited v Westinghouse Electric Corporation,* (2002 SCMR 1954) the Pakistani Supreme Court remanded a case back down to the Lahore Civil Court to decide an application for

In light of this tarnished record, the Pakistani legislature has attempted to clarify and reform the law governing arbitration by ushering in the NY Convention and cleanse Pakistan's investment image in the international community.

The criticisms in this paper will be three fold:
Firstly, it is argued that in order to continue the pro-investment efforts of the Government of Pakistan, it is imperative that the REAO, and any Act of Parliament that replaces the REAO, is given as 'pro-arbitration' an interpretation as possible; particularly by extending the scope of application of the REAO to as many forms of international commercial arbitral awards as possible. Unfortunately, the REAO has left a lacuna in the law by not fully defining or giving a clear criterion to determine what would constitute a 'foreign award' under Pakistani law. This paper will aim to highlight the implications of this lacuna and argue that a criterion for such a character determination of an award is vital for enabling arbitration within Pakistan.

Secondly, the Government of Pakistan (through the Committee on Updation and Development of Laws on Arbitration) has taken a pro-active initiative to reform the law applicable to domestic arbitrations by commissioning a Draft Arbitration Act 2005 (the Draft Act) to replace the Pakistan Arbitration Act 1940. Although the Draft Act, in its present form, is largely based on the UK Arbitration Act 1996, it is argued in this paper that the Draft Act, inter alia:
1) also fails to lay down a criterion for the character determination of a foreign award; and
2) does not enforce arbitral agreements effectively; which is a step back from the reforms achieved in the REAO.

Thirdly, some other deficiencies in the Draft Act that effect the efficiency of the arbitral process will be commented upon.

2. The Benefits of the REAO:

The REAO recognises Pakistan's international legal obligations as laid down by the NY Convention and stresses on the compliance of the legislation with the NY Convention's provisions.[6] Notably, one of the REAO's most important effects is that it applies to the

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the recognition of an arbitral agreement under s.34 of the Arbitration Act 1940. However, the Supreme Court further required the appellant Westinghouse to deposit a USD 1bn bank guarantee with the court before allowing the lower court to commence with the hearing.

[6] This is seen in the second recital to the REAO which states, "WHEREAS it is expedient to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards pursuant to the said Convention and for matters connected therewith;" as well in §8 which states,

> "**Inconsistent laws.—** In the event of any inconsistency between this Act, any other law, or any judgment of any court and the Convention, the Convention shall prevail to the extent of the inconsistency."

enforceability of arbitral agreements as well as arbitral awards[7] and both these aspects of the REAO will be now considered below.

a) Arbitral Agreements

The provisions of the REAO have been drafted because of a recognition of the importance of the enforcement of arbitral agreements as laid down in Article II(3).[8]

This is a welcome reform since, despite § 3 of the APC Act providing for the enforcement of arbitral agreements,[9] Pakistan's case law had begun to deviate substantially from the APC's specific statutory direction. Instead, Pakistani courts were exercising excessive judicial activism to secure a protectionist bias against international commercial arbitration.

As a particularly startling example of this parochial overreaching, the Supreme Court in *Eckhardt & Company Marine GMBH, West Germany v Mohammad Hanif*[10] refused to enforce a foreign arbitration agreement on the grounds that it would be too inconvenient and expensive for the Pakistani party to bear the cost of adducing evidence at a foreign

[7] The REAO, second recital to the REAO states, "AND WHEREAS it is expedient to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards pursuant to the said Convention and for matters connected therewith;"

[8] §4 of the REAO provides:

"4. Enforcement of arbitration agreements,- (1) A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other parties to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter.

(2) On an application under subsection (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

Furthermore, the jurisdiction of a court to stay proceedings has been laid down in §3(2) which states:
"(2) An application to stay legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court in which the legal proceedings are pending."

[9] §3 of the APC Act provided that

> **"3. Stay of proceedings in respect of matters to be referred to arbitration** —Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking other steps the proceedings, apply to the Court to stay the proceedings: and the Court, unless satisfied that the agreement or arbitration has become inoperative, cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

[10] *Eckhardt & Company Marine GMBH, West Germany v Mohammad Hanif,* P L D 1993 Supreme Court 42. The High Court decision in *Eckhardt* (PLD 1986 Karachi 138) was affirmed by the Supreme Court and was in fact based on a body of case law of both Pakistani and Indian jurisdictions. See *Akber Cotton Mills Ltd. v. Messrs Ves/Ojuanojo Objedinenije Tech/Amesh Export*, 1984 C L C 1605 ; and *Messrs Mercantile Fire and General Insurance Co. of Pakistan Ltd., Karachi v. Messrs Arcepey Shipping Co. U. S. A.*, P L D 1978 Kar. 263

forum. The reasoning of the court was focused squarely on considerations of natural justice rather than on laying down any test for a *forum conveniens* for a particular dispute. Thus the court focussed more on considerations of the availability of foreign exchange over trying to enforce the contractual nature of the arbitral agreement[11]. Cases such as *Eckhardt* represent the suspicion with which the Pakistani legal community has viewed international commercial arbitration. The high fees involved, coupled with the general perception that foreign arbitrators invariably rule against Pakistani parties, fed into this suspicion of international commercial arbitration.

Furthermore, the Supreme Court in *Eckhardt* did not clearly lay down a test for the enforceability of arbitral agreements, merely stating that "No hard and fast rule can be laid down or fine of demarcation can be drawn to say in what cases refusal can be made. Each case has different, facts and grant or refusal of stay is dependent upon peculiar facts and circumstances of each case. The Court can make objective assessment and come to the conclusion whether stay of legal proceedings can be granted or refused."[12] This reasoning has subsequently led to several conflicting judgments which leave unclear when Pakistani courts would enforce foreign arbitral agreements.[13]

As such, to deal with this lack of clarity on the enforceability of arbitration agreements (which was a major cause for concern for foreign investors) the REAO seems to create a presumption (in line with Article II(3) of the NY Convention) that an arbitral agreement would be enforceable unless it is "null and void, inoperative or incapable of being performed". It is arguable that the promulgation of the REAO, as a special law designed to increase the efficiency of the arbitral process would impliedly repeal the previous case law and hopefully provide the 'hard and fast rule' or, at the very least, the clear criteria that the Supreme Court was seeking in *Eckhardt*.

b) Arbitral Awards

The REAO establishes a pro-enforcement arbitral award regime that is also compliant with the New York Convention[14] and the sparse provisions of the REAO seem to

[11] See *Messrs V/0 Techmash-Export v. Messrs Akbar Cotton Mills Ltd.* (1987 MLD 600); *S. E. Asia Co. Ltd. v. H. & M. (Ind.) P. Ltd.* (A I R 1962 Cal. 128); *Michael Gotodetz & Co. v. Serajuddin* (AIR 1963 Supreme Court 1044); *M. M. Yaseen v. Messrs Irving R. Boody & Co.* (P L D 1957 Kar. 755); *New England Industries Inc. v. The Province of East Pakistan* (20 D L R 226 (S C))

[12] supra note 10 paras 17&18

[13] See *Manzoor Textile Mills Ltd v Nichimen Corporation* (2000 MLD 641) in which the High Court of Sindh held that §3 of the APC Act leaves no discretion to the judiciary to decline the enforcement of a foreign arbitral clause in contradistinction to §34 of the Arbitration Act 1940 (this reasoning was further affirmed in *Hassan Ali Rice Export Co. v Flame Maritime Limited*, (2004 CLD 334)) and Ahmed J in *Lithuanian Airlines v Bhoja Airlines* (2004 C L C 544) further held that §3 of the APC Act would be a mandatory provision subject to its conditions being fulfilled. Also see *Hashmi Can Co. v Hysong Corp of Karachi* (P L D 1999 Karachi 25) Cf. *Hubco v WAPDA* supra note 4; *Excelsior Cotton Company v Trading Corporation of Pakistan*, (2003 YLR 461) where Mujeebullah Siddiqui J in the High Court of Sindh refused to enforce a foreign arbitration agreement as being too expensive and inconvenient on the Pakistani party.

[14] Arbitral Awards can be recognised and enforced under §§ 6 and 7 of the REAO which state that:

implement the New York Convention into Pakistani legislation in both letter and spirit; thus enabling international commercial arbitration in Pakistan.

3. Problems with the Scope of Application of the REAO:

Certain problems and oversights however do still subsist in the scope of application of the REAO as promulgated.

This problem is contained in that the REAO only applies to 'foreign arbitral awards' made after the commencement of the REAO.[15] Unfortunately, the REAO does not clearly define what constitutes a 'foreign arbitral award'. Foreign awards are defined in § 2(d) as:

> "(d) "Foreign arbitral award" means a **foreign arbitral award** made in a Contracting State to the Convention, or a State notified by the Federal Government, by notification in the Official Gazette." [Emphasis added]

This tautological definition in the REAO does not clearly define what character determining factors would make an award a 'foreign' award. There can be many factors that determine the character of an award: For example, would it be the nationalities of the parties?; the venue of the arbitration?; the substantive law of the contract?; the substantive law of the arbitral agreement?; the law governing the procedure of the arbitration?; the location of the salient factors of the dispute?

All these factors (among other things) can provide clues to determining the character of an award. The question that is left open by the REAO is: which one of these factors is the most important? **Thus it seems that the REAO has left it to case law to develop a test of character determination for an award being considered foreign or domestic.**

The practical implications of the above definition would effect the following four situations:

1. the REAO would apply to the 'vanilla situations' of a Pakistani and a foreign party conducting arbitration outside of Pakistan under a non-Pakistani substantive law.
2. the REAO would most likely not apply to the domestic situations of two Pakistani parties (even though one is a foreign controlled company) conducting arbitration within or outside Pakistan under Pakistani substantive law. Similarly, the case

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"6. Enforcement of foreign arbitral awards.- (1) Unless the court pursuant to Section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the court shall recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan.
(2) A foreign arbitral award which is enforceable under this Ordinance shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.

7. Unenforceable foreign arbitral awards.- Recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention."

[15] REAO, §1(4).

would likely be the same where a Pakistani party and a foreign party conduct their arbitration within Pakistan under Pakistani substantive law. These would be governed by the Arbitration Act 1940.

3. it is not clear if the REAO would apply to an award rendered in an arbitration between a Pakistani and a foreign party conducted outside Pakistan but applying Pakistani substantive law.
4. it is not clear if the REAO would apply to an award rendered in an arbitration between a Pakistani and a foreign party conducted within Pakistan but applying a non-Pakistani substantive law.

It is the second, third and fourth situations which this paper will argue should also be treated as foreign arbitrations for the purposes of the NY Convention and the REAO.

It must also be mentioned here that determining the character of an award is important, since the practical consequence that flows is that a domestic award can be set aside by the Pakistani court under s.30 of the Arbitration Act 1940 (and thus potentially be unenforceable in other NY Convention countries)[16]. However, if the award is considered foreign, than the powers of a Pakistani court are restricted to refusing or accepting the recognition and enforcement of a foreign arbitral award under the REAO and the award can still potentially be enforced in other jurisdictions. More will be said on this later in the paper when discussing Article V(1)(e) of the NY Convention.

Situation 2: Pakistani law applicable in an arbitration conducted within Pakistan between a Pakistani party and a foreign-controlled Pakistani Company (Multinational):

The very intent and purpose of the NY Convention has been to protect Foreign Direct Investment in a member state. As such, the biggest stakeholders of FDI are obviously those multinationals that invest within Pakistan either by incorporating subsidiaries in Pakistan or by buying an existing Pakistani corporation. This is especially so in light of those foreign investors who have purchased major privatized organizations.

Unfortunately, due to the legal form of their investment, it is obvious that these foreign investors are to acquire the nationality of Pakistan; thus, under the REAO, any arbitrations that they may conduct within Pakistan would be considered to be domestic arbitrations to which the REAO would not apply.[17]

[16] See NY Convention Art V(1)(e). Although the international best practice understanding of Article V(1) of the Convention (as seen in *Hilmarton Ltd (UK) v Omnium de Traitement et de Valorisation- OTV (France). France, Cour de cassation [Supreme Court]*, 1994. 20 Yearbk. Comm. Arb'n 663 (1995)) has been interpreted to suggest that even though an arbitral award may be successfully challengeable on the grounds listed in Article V(1), the court still has the discretion to enforce the award if the court so deems fit. This is in keeping with the pro-enforcement policy of the Convention. Also see Mustill & Boyd, Commercial Arbitration, 2nd edn, 2001 Companion, at p 87.

[17] *Hubco v Wapda* 1999 CLC 1320

Thus, for example, an arbitration between Esso Pakistan (Pvt) Ltd and Pakistan International Airlines (PIA) would not be given the protection or privileges of the REAO and would be outside the scope of the NY Convention for the purposes of Pakistani law. Interestingly however, such an award would most likely be considered to be a NY Convention award in the UK and thus would be enforceable against PIA's assets in the UK.[18]

In comparison, other jurisdictions around the world have tailored their legislations to protect such types of arbitrations and treat them as NY Convention awards.

Notably, UK law on such arbitrations is highly protective of foreign investors. The definition of domestic arbitration as laid down in the UK is mainly based on a combination of the nationality of the parties as well as the situs of the arbitration. An interesting aspect of the UK law is that it does not adopt a strict formalistic view of exercising jurisdiction on the basis of nationality or territory. §85(2)(a)&(b) has the effect of excluding from the definition of a domestic arbitration any arbitrations conducted within the UK if one of the parties to the arbitration is a foreign resident or "a body corporate which is incorporated in, **or whose central control and management is exercised in**, a state other than the United Kingdom" [Emphasis added].[19] **This statutory example of piercing the veil thus allows even the UK subsidiary of a non-UK resident to engage in international commercial arbitrations; despite such arbitrations being conducted within the UK.**

This is a legislative device that could have been incorporated into the REAO to give some real substantive protection to large foreign investors within Pakistan. It is recommended that a similar provision as the UK Act be placed within Pakistani legislation.

Other examples[20] of such protection include Article 1(3)(c) of the UNCITRAL Model Law which allows the parties to 'opt in' to foreign arbitration when it states:

> "(3) An arbitration is international if:…

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[18] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* ([2005] EWHC 726 (COM)) where the Queen's Bench Division ordered a Nigerian company to provide security to a UK controlled Nigerian company under §103(5) of the UK Arbitration Act. Also see *Soleh Boneh International Ltd v Government of Republic of Uganda and National Housing Corpn* ([1993] 2 Lloyd's Rep 208)

[19] Further, Part II of the UK Arbitration Act 1996 applies to domestic arbitration. §85(2) of the Act states that:

> "85(2) …a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is-
> (a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or
> **(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom,**
> **and** under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom."

[20] Infra note 41

(c) **the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country**." [Emphasis added]

This provision is also seen in the Chilean law on International Commercial Arbitration.

Furthermore, the United States has employed a similar, but less subjective, provision in Title 9 U.S.C. §202 which states:
"[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves **property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states**." [Emphasis added]

The highlighted parts of the above extract indicate how far some countries will go to ensure that the NY Convention applies to as many different types of arbitrations as possible.

The intent behind the NY Convention to protect such awards is also seen in the travaux préparatoires of the NY Convention. Notably, a note by the Secretary General of the United Nations ref E/Conf. 26/2 dated 06/03/1958 details the original intent behind the drafting of the NY Convention at 2 where it states:

> "3. ……Some of the comments pointed out, however, that the provision in the Committee's draft limiting the application of the new Convention solely to awards made outside the territory of the State of enforcement might still be too restrictive, and favoured a further broadening of the scope of application of the Convention so as to include also certain other classes of arbitral awards relating to international commercial transactions.
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> 4. Thus, it was suggested that the new Convention should apply **also to arbitral awards rendered in the territory of the State in which the award is being enforced, provided that the dispute submitted to arbitration arose between parties domiciled (or having their main establishments) in the territories of different States**. An extension of the scope of applicability of the new Convention to this class of awards would not be novel, as such awards were enforceable under the 1927 Convention, provided that they were made between persons subject to the jurisdiction of the Contracting States.
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> 5. It was also suggested that the scope of the application of the Convention should be further extended to a third class of arbitral awards, comprising all arbitral awards "made in disputes involving legal relationships implemented in whole or in part in the territories of different states", irrespective of whether or not such awards were rendered abroad, and regardless of the domicile of the parties between which arbitration took place. In the ECE Working Group on Arbitration, several delegations expressed their preference for a similar proposal providing in arbitration cases for an exemption from ordinary national jurisdiction "for all disputes relating to foreign trade, on the understanding that foreign trade would be taken to mean a movement of goods, services or currencies across frontiers". The

> ECE Working Group on Arbitration felt, however, that this proposal should first be given close examination by Governments. The Conference may wish to consider the respective merits of these alternatives both from the point of view of best satisfying the requirements of international commerce and of compatibility with the existing principles of relevant national procedural laws."[21]

As can be seen from the above, the scope of application of the NY Convention was meant to cover a confluence of different forms of international commercial arbitrations. Unfortunately, the Convention left it up to member states to define when an arbitral award would be foreign or domestic. Such a task ought not to be left to develop under case law since it is not possible for courts to legislate and judicial activism can only go so far.

More will be said on this when considering the Draft Arbitration Act 2005 below.

Situation 3: Pakistani law applicable in an arbitration conducted outside Pakistan between a Pakistani and a foreign party:

a) The Current Law in Pakistan:
Character determination in situation 3 above would be dependent on the previous case law that has existed in Pakistani law. As will be seen, prior to the REAO this situation was clearly defined under the APC Act in §9(b) of the APC Act (the 'Savings Clause'[22]) which clearly made the substantive law applicable to the dispute the determining factor. Thus Pakistani courts did not concern themselves with this analysis in too much detail.

The Pakistan Supreme Court has previously interpreted the Savings Clause of the APC Act in determining when an award would be considered to be a foreign award as opposed to a domestic one in *Hitachi Ltd v Rupali Polyester*,[23] where it was held that the substantive law applicable to the arbitration would be determinative of the foreign or domestic character of an award.

However, it should be noted that the reasoning of the *Hitachi* case in determining the character of an award was based specifically on the Savings Clause which has been specifically omitted from the REAO. Therefore, because of this omission, although there is a strong argument to suggest that the *Hitachi* test for character determination has been overruled, the reasoning of *Hitachi* may still be applicable to a certain extent. This is especially so since *Hitachi* is a highly respected judgment in Pakistani legal circles, and one of the few cases in which the character of an arbitral award has been considered. Thus *Hitachi's* emphasis on the substantive law as a determining factor of the character

[21] 06/03/1958, E/CONF. 26/2 at 2-3
[22] §9(b) of the APC Act is a Savings clause that states:
> "Nothing in this Act shall….
> (b) apply to any award made on an arbitration agreement governed by the law of Pakistan."
[23] *Hitachi Ltd v Rupali Polyester*, (1998 SCMR 1618)

of an award deserves consideration in envisaging how the courts will seek to apply the REAO.

Interestingly, the Supreme Court in *Hitachi* relied on and discussed a rather controversial judgment of the Indian Supreme Court. In *National Thermal Power Corporation v. The Singer Company*[24] the Supreme Court of India held, in paragraph 26 of its opinion, that under an arbitration agreement governed by Indian substantive law,

> "the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement." [25]

The opinion of the Indian Supreme Court in the *Singer* case, which lays down a theory of 'concurrent jurisdiction' over an award, had been severely criticized as being contrary to the spirit of the NY Convention.[26] *Singer* not only applied the Indian Savings Clause[27] to deem awards rendered through arbitrations conducted outside India to be domestic, but also reasoned that the courts of the country would have jurisdiction over the conduct of such arbitrations.

The *Hitachi* opinion discussed the theory of 'concurrent jurisdiction' as laid down in the *Singer* case at some length. It must be noted however, that the Pakistani Supreme Court differed from the analysis of the *Singer* opinion. The Pakistani Supreme Court found the theory of 'concurrent jurisdiction' to be unworkable and impractical and rejected the Lahore High Court's findings on this theory. Sadly, however, the Pakistani Supreme Court did not completely reject the theory. In para 15 of the *Hitachi* opinion, the Supreme Court states:

> "We are not inclined to subscribe to the view that this jurisdiction of the English Courts in respect of curial law will be concurrent with the Pakistani Courts for the reason that the Pakistani substantive law governs the arbitration agreement. **Theoretically the above view of the Indian Supreme Court may be correct** but

[24] *National Thermal Power Corporation v. The Singer Company*, 80 AIR SC 998 (1993)
[25] *id*. Also note: this passage was erroneously attributed to Mr. Justice Potter in *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45, at para 11 of the Hitachi judgment and was thus incorrectly assumed to be a statement of the law in England.
[26] See Jan Paulsson, Comment, *The New York Convention's Misadventures in India*, Mealey's Int'l Arb'n Rep., June 1992 (Vol.7, Issue 6), at 18-21. Also see Peter J. Turner and Jan Paulsson, *Grounds for Refusal of Recognition and Enforcement Under the New York Convention: A Comparative Approach* prepared for the UNCITRAL and OECD Experts Group Meeting on Dispute Resolution and Corporate Governance. Also, for a discussion on the *Hitachi* case's use of the *Singer* judgment see Khalid Anwer, *The Rupali Case and the Theory of Concurrent Jurisdiction*, in a paper delivered at the ICC Pakistan's Regional Foreign Direct Investment Conference held at Karachi, Pakistan on 17-18 February 2002.
[27] Infra note 29

> it is not practicable. The Courts of the seat of the arbitration can deal with, procedural matters more effectively and conveniently." [Emphasis added]

The focus of the Supreme Court in the above extract were concerned with the issue of the exercise of jurisdiction by a Pakistani court over arbitrations taking place outside of Pakistan. As such, although the Supreme Court did not clearly deal with the issue of laying down a test for character determination (since this was already determined by the Savings Clause). **However, it is this author's opinion that the words highlighted in the above extract affirm the theoretical basis for the theory of concurrent jurisdiction and thus give weight to the substantive law applicable to an arbitration as the principle character determining factor of an arbitral award.** A party resisting enforcement could use these words to argue that Pakistani courts have an 'overall jurisdiction' over awards rendered under Pakistani law and that a generalized supervisory interest of the state exists to ensure that a proper application of its domestic law is effected[28].

In other words, these words can be read to infer that, under Pakistani law, the substantive law applicable to an arbitration would be the major factor that determines the character of an award.

The counter argument to this would be that because of the deliberate omission of the Savings Clause in the REAO, the legislature has consciously altered the position of character determination away from the choice of substantive law and towards other factors, such as the venue of arbitration i.e. a more territorial approach has been adopted. However this argument has also been used in India where the Indian Arbitration Act 1996 replaced the Indian Savings Clause contained in the Indian Foreign Awards (Recognition and Enforcement) Act 1961 (FARE Act)[29] with mixed results.[30]

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[28] See *International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera* 1990, 745 F. Supp. 172 (S.D.N.Y.) where the United States District Court of the Southern District of New York held that such arguments were contrary to the spirit of the NY Convention. The Court stated:

> "Finally we should observe that the core of petitioner's argument, that a generalized supervisory interest of a state in the application of its domestic substantive law (in most arbitrations the law of contract) in a foreign proceeding, is wholly out of step with the universal concept of arbitration in all nations. **The whole point of arbitration is that the merits of the dispute will not be reviewed in the courts, wherever they be located**. Indeed, this principle is so deeply imbedded in American, and specifically, federal jurisprudence, that no further elaboration of the case law is necessary. **That this was the animating principle of the Convention, that the Courts should review arbitrations for procedural regularity but resist inquiry into the substantive merits of awards**, is clear from the notes on this subject by the Secretary-General of the United Nations."

[29] Cf. supra note 22. §9(b) of the Indian Foreign Awards (Recognition and Enforcement) Act 1961 Act was a Savings clause identical to § 9(b) of the Pakistan APC Act that stated:

> "Nothing in this Act shall….
> (b) apply to any award made on an arbitration agreement governed by the law of India."

[30] In *Hindustan Copper Limited vs. Centrotrade Minerals and Metals Inc.* (AIR 2005 Calcutta 133), the Division Bench of the High Court of Calcutta did not see much relevance in the omission of the Savings Clause in the new Indian Arbitration Act 1996. The Division Bench expressed the view that the effect of the deletion of sub-section (b) from §9 of the FARE Act was that "the Court is now compelled to see on its

As such, if the Indian example is an indication, the ghost of the theory of concurrent jurisdiction could still haunt Pakistan's interpretations of foreign awards and can be used to argue that awards rendered under situation 3 fall outside the definition of 'foreign award' as given in the REAO since they are decided under Pakistani substantive law.

The strength of such arguments would obviously depend on the protectionist sentiments of the courts at the time such arguments are made. In India, courts have shown themselves to be fairly protectionist in deeming Part I of the Indian Arbitration Act 1996 to have extraterritorial effect on arbitrations conducted outside India[31].

It is important to note that the Pakistani courts have not been as protectionist as the Indian courts in this regard. The *Hitachi* opinion itself recognizes that, at least in relation to procedural supervision, the courts of the seat of arbitration ought to have competence over the arbitral proceedings. Further this reasoning has been followed subsequently in *Hassan Ali Rice Export Co. v Flame Maritime Ltd*[32] in the Sindh High Court. This gives hope to the argument that Pakistani courts would employ a more pro-arbitration policy in interpreting the effect of the repeal of the Savings Clause.

b) The New York Convention:
Since the NY Convention has been promulgated into Pakistani law, it would thus be helpful to see how the NY Convention would determine the character of an award. Fortunately, Pakistani courts have the benefit of drawing on a vast array of case law already developed by NY Convention countries on this regard. The NY Convention does provide certain indications on how such character determination is to be effected when it states that it shall apply to "arbitral awards **not considered as domestic awards** in the State where their recognition and enforcement are sought".

Further, Article V(1)(e) of the Convention allows a court to refuse recognition and enforcement if "the award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"

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own, even if the proper law of the contract is Indian law, whether the Indian Courts would have jurisdiction to set aside the Award made on foreign soil"

This reasoning has been rejected by the learned Single Judge, Mr. Justice Vikramjit Sen, in Bharti Televentures Ltd. v DSS Enterprises Private Ltd. CS(OS) No.1769/2003 decided on 17/08/2005 who stated in para 19 that "The deliberate decision not to incorporate §9(b) of FARE assumes great significances, and leads inexorably to the conclusion that the factum of Indian laws in the 1996 Arbitration regime, especially Part II thereof, venue/territoriality is all important."

These two judgments are pertinent since they show that Indian courts are not resolved on what effect the omission of the Savings Clause will have on the character determination of an arbitral award.

[31] *Bhatia International vs. Bulk Trading S.A. and Another*, ((2002) 4 SCC 105)

[32] supra note 13. *Hassan Ali Rice Export Co. v Flame Maritime Ltd* (2004 CLD 334) per Mushir Alam J.

Professors Varady, Barcelo and von Mehren [33] describe this feature of the NY Convention thus:

> "The New York Convention only indirectly indicates the relevant criteria for determining "domesticity". According to Article V(1)(e), recognition and enforcement may be refused, if the award has been set aside by a competent authority "of the country of which, or under the law of which" the award was made. It follows that a distinction has been drawn between countries whose competence for setting aside is internationally recognized, and all other countries. Setting aside may be accepted and given force in a member-state of the New York Convention if it was effected in the country in which the award was rendered, or in the country under the law of which the award was rendered."[34]

A great deal turns on the use of the phrase "under the law of which" that is contained in Article V(1)(e) and, through various decisions of the courts of NY Convention member states, it is now settled law that this phrase refers to the procedural/curial law of the arbitration rather than the substantive law of the arbitration.[35]

Thus, it seems that under the NY Convention, the law governing the procedure of the arbitration (which is usually the law of the territorial seat of the arbitration, unless the parties specifically chose otherwise) is a major determinative factor in ascribing

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[33] Varady, Barcelo and von Mehren, *International Commercial Arbitration,* West Group, American Casebook Series, St. Paul., Minn., 1999.

[34] Id. Page 625-6

[35] Supra note 28 where the court concluded that:

> "We conclude that the phrase in the Convention "[the country] under the laws of which that awards was made" undoubtedly referenced the complex thicket of the procedural law of arbitration obtaining in the numerous and diverse jurisdictions of the dozens of nations in attendance at the time the Convention was being debated."

The Court also cited an important academic opinion of Professor Van den Berg which stated that:

> The "competent authority" as mentioned in Article V(1)(e) for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase "or under the law of which" the award was made **refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made**." [Emphasis added]

A. Van den Berg, The New York Arbitration Convention of 1958, 350 (1981)

The Court further stated that "This view is consistent with a commentary on the circumstances under which the Soviet delegate offered the amendment embracing the language in issue. See United Nations Conference on International Commercial Arbitration, Summary Record of the 23rd Meeting, 9 June 1958, E/CONF. 26/SR.23 at 15 (12 Sept. 1958), reprinted in Gaja, International Commercial Arbitration: New York Convention III C. 213 (Oceana Pub. 1978)"

Also see American Construction Machinery & Equipment Corp. v. Mechanised Construction of Pakistan Ltd., 659 F.Supp. 426 (S.D.N.Y.)

Furthermore, a similar view has been taken by the Croatian High Commercial Court, in Croatian Company v Swiss Company, 2 Croatian Arb'n Yearbk. 205 (1995).

supervisory powers over an arbitration to a municipal court. **In other words, the law governing the procedure of the arbitration determines which courts will have the power to set aside an award arising out of that arbitration.** As such, it is important to note that when such a competent court sets aside an award, it may not be enforceable in other NY Convention countries as well.[36] However, as Professors Varady, Barcelo and von Mehren suggest above:

> "This means that if setting aside is granted by a court which assumes jurisdiction on a ground other than that of the place of the award or of the law under which it was rendered – for example, the domicile of the defendant – the setting aside judgment would not be relevant in other countries party to the New York Convention."[37]

Thus, if a Pakistani court sets an aside an award out of situation 3 assuming it to be a domestic award solely because the substantive law applied is Pakistani, this will be a contravention of the NY Convention. Further, such a parochial overreaching will not necessarily help Pakistani parties protect their assets outside Pakistan, and will only serve to again tarnish Pakistan's image in the international community. It is thus important that this aspect of the NY Convention be clearly understood and utilized to prevent Pakistani courts from exercising jurisdiction over awards in contravention of the NY Convention.

To summarize, arguments exist on both sides to deem an award rendered under situation 3 above to be characterized either as a foreign or domestic award. However, due to the lack of a clear definition in the REAO, it will be the purview of the Pakistani courts to lay down a test for arbitral award character determination that does not myopically focus on the emphasis given to the applicable substantive law. An interpretation that does not focus on such an emphasis would be compliant with the provisions of the NY Convention.

Situation 4: Non-Pakistani law applicable in an arbitration conducted within Pakistan:

Now that Pakistan has ratified the NY Convention, the possibility of situation 4 arbitrations being conducted in Pakistan has become more likely. Therefore, the treatment of such arbitrations under Pakistani arbitral law will be highly important to enable Pakistan as a venue for quality international arbitrations.

There is no doubt from the above discussions that an arbitration that is conducted within Pakistan that involves the application of non-Pakistani substantive law will nonetheless be subject to the procedural supervisory jurisdiction of the Courts of Pakistan. This

[36] Cf. supra note 16
[37] Supra note 34 page 626

jurisdiction can also be exercised, though to a more limited extent, where the parties chose a non-Pakistani procedural law to apply to their arbitration as well.[38]

As such, if situation 4 awards are to be treated as foreign awards under the REAO, it seems that a Pakistani court would find itself in the unfortunate position where it would be able to set aside such an award under §30 of the Arbitration Act while only being able to recognise or enforce it under the REAO. This overlap is something that has not been dealt with by the REAO and seems to be a further lacuna in the law. However, Article VI of the NY Convention requires a court to adjourn proceedings for enforcement subject to a deposit of security being provided by the party resisting enforcement.

It seems more likely that to avoid the above contradiction, a Pakistani court will interpret awards arising out of situation 4 arbitrations to be domestic awards. However, this may not stop the courts of other NY Convention member states from considering such awards to be NY Convention awards and thus enforceable in other jurisdictions.

As such, although the judicial argument exists to allow situation 4 arbitrations to be foreign arbitrations, to clearly and practically enable such arbitrations to be dealt with in compliance with the NY Convention, it is imperative that there be some enabling legislation that allows such an interpretation to be made. The lack of a clear definition of foreign award is what leads to such interpretive problems for the Pakistani courts and will cause foreign investors to be wary of conducting their arbitrations in Pakistan.

This is the thrust of this paper in dealing with the Draft Arbitration Act 2005, to which we shall now turn.

4. The Draft Arbitration Act 2005:

The Draft Act circulated by the Government of Pakistan, as drafted by the Committee on Updation and Development of Laws on Arbitration, falls under the rubric of the Government of Pakistan's initiative to have quality arbitral laws that are protective of foreign investors. The Draft Act is meant to be compliant with the UNCITRAL Model Law[39] and as such is a positive step forward towards greater multilateral cooperation. [40]

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[38] *Union of India v McDonnell Douglas Corporation* ([1993] 2 Lloyds Rep 48) where the arbitration clause provided for the venue of arbitration to be in London while the procedures for the arbitration to be held under Indian procedural law. The Queen's Bench held that:
"It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, ……..it seems to me that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country…… for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law."

[39] The first recital to the Draft Act states:

> "Whereas the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985, and the General Assembly of the United Nations has recommended that in the interest of uniformity of the law of

It is important to note, however, that the Draft Act is merely substantially reproduces Part I of the UK Arbitration Act 1996. Part II of the UK Act provides a definition of 'domestic arbitrations' and is thus an important aspect of that Act. This has been commented at length above when dealing with situation 2 awards and it is recommended that the Draft Act also incorporate Part II of the UK Act which includes §85(2) of the UK Act.

Furthermore, the Draft Act also tries to reintroduce the earlier case law of *Eckhardt* in the area of enforcing foreign arbitral agreements and thus would retract from the pro-active work achieved by the REAO (as discussed above).

Both these problems and a few others will now be dealt with.

a) Scope of application/Definition of domestic award:
Countries complying with the New York Convention have specifically tried to remedy the situations described above by giving clear criterion with which to identify domestic and foreign arbitral awards.[41]

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arbitral procedures and the specific needs of international commercial arbitration practice, all countries give due consideration to the said Model Law,"

[40] This Model Law has served as the basis for the arbitral laws of the following countries and territories; Germany, Australia, Azerbaijan, Bahrain, Bangladesh, Byelorussia, Bermudas, Bulgaria, Canada, Chile, Cyprus, Croatia, Egypt, certain of the United States of America (California, Connecticut, Illinois, Oregon and Texas), the Russian Federation, Greece, Guatemala, Hong Kong, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macao, Madagascar, Malta, Mexico, Nigeria, New Zealand, Oman, Paraguay, Peru, United Kingdom (Scotland), Singapore, Sri Lanka, Tunisia, Ukraine and Zimbabwe.

[41] Title 9 U.S.C. §202 states:

> "[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves **property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states**." [Emphasis added]

The Chilean Law 19,971, governing arbitration recognizes awards where:

> "(i) the parties to the arbitration have their headquarters in different states at the time they execute an arbitration agreement; and (ii) either the arbitration location, the place of performance of a substantial part of the obligations in the commercial relationship, or the place to which the purpose of the litigation is more closely related are located outside the state in which the parties have their headquarters; and (iii) **the parties have expressly agreed that the matter subject to the arbitration agreement is related to more than one state**." [Emphasis added]

The UNCITRAL Model Law on International Commercial Arbitration can be used as a standard of international best practice in determining the nature of an award. Importantly, Article 1(3) &(4) states:

> "3. An arbitration is international if:
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
>> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

Unfortunately, the Draft Act does not provide such a criterion. It is suggested that since the UK Arbitration Act has been substantially followed, than Part II of that Act may also be utilized for the purposes of determining the character of an award. As mentioned in the section dealing with situation 2 above, this is imperative for the protection of foreign investment in Pakistan. §85(2) of the UK Act lays down clear criterion for determining when an arbitration will be treated as domestic and this is a very important provision that the Pakistani legislature can adopt. Also, as mentioned above, clear criterion also exists in other legislations around the world.

As such, it can be clearly seen that the international best practice in this situation is for the Draft Act needs to have a clearly defined definition of either domestic arbitration or international arbitration.

b) Powers to Enforce Arbitral Agreements:

§2(2)(b) of the Draft Act gives the power to refer parties to arbitration pursuant to a foreign arbitration clause.[42]

However, §7 of the Draft Act, which is the actual provision that lays down the criteria under which the Court shall enforce foreign arbitrations, states:

> "(4) On an application under sub-section (1), the court or the tribunal is **satisfied that the matter is, under the arbitration agreement, to be referred to arbitration**, shall refer it to arbitration." [Emphasis added]

§7(4) gives a discretionary power to the Court to refer parties to arbitration without laying down clear criteria for when the Court's power is to be exercised. International best practice in this regard follows the NY Convention grounds for refusal of enforcing an arbitral agreement i.e. where the arbitral agreement is null and void, inoperative or incapable of being performed.[43]

Further, §4(1)(b) of the Draft Act defines the 'seat of the arbitration' as the seat of arbitration:

> "(a) as agreed by the parties; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

4. For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence. "

[42] §2(2)(b) of the Draft Act states:

"(b) The following Sections apply even if the seat of the arbitration is outside Pakistan or no seat has been designated or determined—

(i) **section 8 (power to refer to arbitration)**, and

(ii) section 57 (enforcement of arbitral awards)." [Emphasis added]

[43] See Article 8(1) of the UNCITRAL Model Law; and the South African Law Commission's Report on Domestic Arbitration Chapter 2, (May 2001)

(b) in the absence of any such agreement as determined by the arbitral tribunals **having regard to the circumstances of the case and the convenience of the parties(to see the language of Rupali and Eckhart)**" [Emphasis added]

Although these words are still in draft form, they indicate that the intent of the drafters is to reintroduce the tests laid down in *Eckhardt*! This would not be desirable from the perspective of international investors since it will reintroduce the confusion that existed prior to the promulgation of the REAO. Furthermore, it cannot be imagined what test for enforcing arbitral agreements can be gleaned from a precedent that itself admits that "no hard and fast rule can be laid down or fine of demarcation can be drawn to say in what cases refusal can be made"[44]

Thus, when §§ 2(2)(b), 4(1)(b) and 7(4) are read together, it seems that the older judicial tests are to be restated and re-applied through this Draft Act. Such a position would be seen as a step back and a detraction from Pakistan's international obligations under the NY Convention.

It would be better if, in following the UNCITRAL Model Law, §4(1)(b) be amended to bring it in line with international best practice. It would be better to continue the work already accomplished by § 4 of the REAO and to apply the international best practice standards of the UNCITRAL Model Law.

Furthermore, although there are many other provisions of the Draft Act that can be critically examined, this paper will only discuss two further issues:

c) A Stand Alone Law?

Many states have opted to apply the UNCITRAL Model Law to govern both their international and domestic arbitrations.[45] It is suggested that this may bring greater clarity

[44] supra note 10

[45] supra note 43 fn 43 of the South African Law Commission's Report states that:
"By 1994 some 22 states had adopted the Model Law: see Sanders P "Unity and Diversity in the Adoption of the Model Law" (1995) 11 ***Arbitration International*** 1-37 and the Commission's Report on International Arbitration para 2.3 n 4; Butler (1994 ***CILSA***) 132-134. Countries which have adopted the Model Law for international arbitration only while retaining a separate law on domestic arbitration include Australia, Scotland, Hong Kong, Singapore and most of the provinces of Canada. Hong Kong adopted the Model Law for international arbitration in 1989. The Hong Kong Arbitration Ordinance of 1963 was further amended in 1996 in the light of the English Arbitration Act of 1996. The revision was necessarily limited in scope because of the pressure on the legislative programme occasioned by the colony being returned to China in 1997. This made it impossible to give effect to a proposal from the Hong Kong International Arbitration Centre for a complete redraft of the arbitration legislation, in terms of which the Model Law would have been adopted for both international and domestic arbitrations with certain "add-on" provisions for domestic arbitrations. See Kaplan N "An Update on Hong Kong's Arbitration Law" 1998 (Special Supplement) ***ICC ICArb Bull*** 11 at 12; Schaefer J K "Leaving Colonial Arbitration Laws Behind: Southeast Asia's Move into the International Arbitration Arena" (2000) 16 ***Arbitration International*** 297 at 313-314."

to the law and not set up dual regimes for international and domestic commercial arbitrations.[46]

Such a cohesive approach seems to be the direction the Committee on Updation and Development of Laws on Arbitration is headed with the Draft Act. Since the various provisions of the Draft Act continually keep referring to 'this Part' it is more than likely that the current state of the Draft Act is merely the domestic arbitral aspects to the law. A new Part that will govern international commercial arbitrations will hopefully be added into the Draft Act to bring it in line with the international practice of having a stand alone law.

Although, such a stand alone law will still require a character determination test between a foreign and a domestic award,[47] it is more than likely that this will be easier to accomplish within a stand alone framework rather than currently exists through two separate legislations such as the REAO and the Arbitration Act 1940. Examples of the interpretive problems that will be faced by the courts due to the overlap of these two legislations have already been described above; especially when discussing situation 4 arbitrations.

Thus by making character determination more certain and providing a stand alone law, the Government of Pakistan will be looking to benefit business communities by making such laws easier to understand and easily accessible.

d) Interim Measures by the Court:

§28 of the Draft Act[48] also gives the power to the court to order interim measures of protection to be taken during the pendency of an arbitral proceedings. Although the

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[46] Id. Para 2.03 states:
"an eminent authority on the Model Law has argued that it "would be suitable also for any advanced system of domestic arbitration"."
The footnote to this statement in the South African Law Commission report, Fn 42 states:
"See Herrmann G "The Role of the Courts under the UNCITRAL Model Law Script" in Lew J D M (ed) ***Contemporary Problems in International Arbitration*** Centre for Commercial Studies Queen Mary College London 1986 164 167. See also Rogers A "The UNCITRAL Model Law: An Australian Perspective" (1990) 6 ***Arbitration International*** 348 349 who states that there is no inherent reason why the Model Law should not be selected as the sole regime for all arbitrations in a particular jurisdiction. He concedes that special treatment may be required in domestic arbitration for contracts of adhesion where the parties have an unequal bargaining position (*cf* the (New Zealand) Arbitration Act of 1996 s 11 which contains special requirements for the enforcement of a consumer arbitration agreement entered into in New Zealand)."

[47] See supra 31 where the distinction now seems to have been blurred by the Indian Supreme Court in applying Part I of the Indian Arbitration Act 1996 extraterritorially to all arbitrations. Such a parochial overreaching combined with a heavy review of the application of substantive law by the arbitral tribunal (see ONGC v Saw Pipes ((2003) 5 SCC 705)) have raised concerns from commentators as to the level of intervention of Indian courts towards international commercial arbitration with Indian parties.

[48] §28 of the Draft Act states:

> **"28. Interim measures etc. by Court.**
>
> (1) A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award before it is enforced, apply to a court for an interim measure of protection in respect of any of the following matters namely:

general power to order interim measures of protection is given to a municipal court under the UNCITRAL Model Law[49], the Model Law does not state the types of measures that can be given. It is heartening to see the Draft Act clearly stating the conditions under which such interim measures will be granted.

The policy considerations for this are of course quite obvious in that such provisions are meant to preserve the value of any assets that a party to the arbitration proceedings may hold in order to ensure that the eventual award can be realised.

A further provision that is also found in international best practice as enshrined in the UNCITRAL Model Law is in Article 17 which, upon the arbitral agreement so authorising the tribunal, gives the power of ordering interim measures to the arbitral tribunal as well.[50] It is suggested that this would be a valuable addition to the Draft Act and would assist the expediency and efficiency of the arbitral process.

However, although the UNCITRAL Model Law is silent on the enforcement of interim measures ordered by the arbitral tribunal, many national jurisdictions[51] have adopted such

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(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
(b) securing the amount in dispute in the arbitration.
(c) the detention preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the Court to be just and convenient.

(2) The Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it, including the issuance of an anti- suit injunction and an injunction preventing the use or transfer of any funds in any bank or other account except upon such conditions as the Court may impose."

[49] Article 9 of the UNCITRAL Model Law states:

"Article 9. Arbitration agreement and interim measures by court
It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

[50] Article 17 of the UNCITRAL Model Law states:

"Article 17. Power of arbitral tribunal to order interim measures
Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

[51] supra note 43 para 2.183 to 2.191 which discusses the South African approach to interim measures awarded by tribunals and fn 232 of the South African Law Commission's Report states that:

legislations to allow arbitral tribunals to award such interim measures and have therefore included additional provisions to enable such orders to be enforced along the same lines as an award.

Enabling such powers and allowing arbitral tribunals to be as effective as possible will be a very important step in making Pakistan a viable venue for quality international commercial arbitrations.

An important point to note here is that Situation 4 arbitrations mentioned above will only take place in Pakistan if international investors feel that the local courts that have supervisory jurisdiction over such arbitrations are enabling of arbitration and look to support the arbitral process. As such, the rents and arbitrage to be obtained regionally by having a competitive arbitral law will make Pakistan a competitive arbitration situs if our law is more enabling than the region. However, these rents can only be exploited to their fullest extent if the domestic law on arbitration that is in place is attractive to international investors.

Conclusion:

To sum up, the promulgation of the REAO has been a great step forward into the globalised economy for Pakistan. The good work and earnest desires to compete globally should be recognized and maintained through other ancillary measures. Primary amongst these ancillary measures is

1) ensuring that a NY Convention compliant law is passed through the National Assembly as soon as possible; and
2) that Pakistani legislation clearly develops a definition of what constitutes foreign arbitral awards through Pakistani legislation.

If, as it is now, the latter is left to the incremental approach of case law, the possibility for NY Convention non-compliance is quite high. As such, a character determinative test of whether an award can be regarded as foreign or domestic is vital to clear up the loopholes in the law on international commercial arbitration that currently exists in the law.

The Draft Arbitration Act that has been drafted by the Committee on Updation and Development of Laws on Arbitration is an excellent step in the right direction towards bringing Pakistan closer towards international harmonisation. However, the Draft Act still needs work on various provisions. Chief among this is by:

1) specifically by providing a clear definition of a domestic award which is in line with international best practice;

"See eg s 23 of the (Australian) International Arbitration Act of 1974 (which is an optional or "opt-in" provision); sch 7 of the Scottish legislation article 17(2), which applies automatically, unless the parties contract out of article 17; and s 26 of the Bermuda International Conciliation and Arbitration Act 1993 s 26. The New Zealand Law Commission (NZLC R20 179-80) recommended a similar provision, but on a contract-out basis (see the Arbitration Act 1996 sch 1 article 17(2)).

2) avoiding the reintroduction of the *Eckhardt* test for enforcing foreign arbitral agreements; and
3) reforming the law on domestic commercial arbitration to be more enabling and supportive of the arbitral process.

By increasing the enabling provisions of the law to support the arbitral process, Pakistan has the opportunity of becoming a competitive arbitral venue. This is especially so since the other countries in our region are much more protectionist in their points of view. Consequently, a liberal framework in Pakistan will make Pakistan more attractive as a venue for dispute settlement for investors dealing in the region. Such an opportunity should be utilized at all cost.