

**THE PAKISTAN RECOGNITION AND ENFORCEMENT
(ARBITRATION AGREEMENTS AND FOREIGN
ARBITRAL) AWARDS
ORDINANCE, 2005**

WITH COMMENTARY BY JAMIL & JAMIL



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PART I

Acts, Ordinances, President's Orders and Regulations

GOVERNMENT OF PAKISTAN

MINISTRY OF LAW, JUSTICE, HUMAN RIGHTS AND
PARLIAMENTARY AFFAIRS

(Law, Justice and Human Rights Division)

Islamabad the 3rd December, 2005

No F 2(2)/2005-Pub —The following Ordinance promulgated by the President is hereby published for general information: —

ORDINANCE NO. XX OF 2005

AN
ORDINANCE

to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards

WHEREAS Pakistan is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;

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;

AND, WHEREAS, the National Assembly is not in session and the President is satisfied that circumstances exist which render it necessary to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1), of Article 89 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to make and promulgate the following Ordinance:—

1. Short title, extent, application and commencement.— (1) This Ordinance may be called the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005.

- (2) It extends to the whole of Pakistan.
- (3) It shall apply to arbitration agreements made before, on or after the 14th day of July, 2005, on which the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005 (VIII of 2005) came into force.
- (4) It shall not apply to foreign arbitral awards made before the 14th day of July, 2005, on which the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005 (VIII of 2005) came into force.
- (5) It shall come into force at once and shall be deemed to have taken effect from the 11th day of November, 2005.

2. Definitions.— In this Ordinance, unless there is anything repugnant in the subject or context,-

- (a) “Contracting State” means a State which is Party to the Convention;
- (b) “Convention” means the United Nations Convention on the Recognition and Enforcement of Foreign ‘Arbitral Awards, done at New York on 10 June 1958, set forth in the Schedule to this Ordinance;
- (c) “Court” means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette; and
- (d) “foreign arbitral award” means a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the official Gazette.¹

¹ The definition of ‘foreign arbitral award’ has to be read with section 8 of this Ordinance and also the second sentence of Article I(1) of the New York Convention as listed in the Schedule which states that “[the Convention] shall also apply to arbitral awards **not considered as domestic awards** in the State where their recognition and enforcement are sought.” It will be the duty of the Courts to interpret, establish and give meaning to the term ‘not considered as domestic’ in trying to determine whether an award is truly ‘foreign’ or not. A variety of factors influence whether or not an award is determined to be ‘international’ in character *inter alia* the nationalities of the parties; venue of the arbitration; the subject matter of the arbitration; etc. 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
- (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.

Also, under US legislation 9 U.S.C. §202 states that:

“An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An 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.**”

3. Jurisdiction of Court.— (1) Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Ordinance.

(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.

(3) In the exercise of its jurisdiction, the Court shall —

- (a) follow the procedure, as nearly as may be provided in the Code of Civil Procedure, 1908 (Act V of 1908) as amended from time to time; and
- (b) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908) as amended from time to time.

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 party 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*², in operative or incapable of being performed.³

It is also important to note that the Ordinance does **not** include section 9(b) of the Arbitration (Protocol and Convention) Act 1937 which automatically made all awards decided under Pakistani law to be deemed to be domestic awards and was the basis of the reasoning of the Supreme Court in *Hitachi Limited v Rupali Polyester* 1998 SCMR 1618 and also the Indian Supreme Court decision of *National Thermal Power Corporation v. Singer Company* (1992) 2 Comp. L.J. SC. It would thus seem that these authorities and the reasoning behind them, including the theory of concurrent jurisdiction, have been overruled by this Ordinance.

² Ed note. The italicization of the words ‘null and void’ is a mistake appearing in the official gazetted copy of the Ordinance.

³ Considerations of natural justice and the ‘convenience of the parties’ in enforcing arbitral agreements have not been retained in this Ordinance. As such, it seems that the judicial precedent of *Eckhardt and Co v Muhammad Hanif* P L D 1993 Supreme Court 42 seems to have been overruled. The Justice Khilji Arif Hussain of the High Court of Karachi in a judgment announced on the 14th of February 2006 in Suit No. 1318 of 2004 has in fact specifically held that section 4(2) has taken away the discretion of the Court on whether or not to stay the proceedings even on the ground of inconvenience except where the arbitration agreement is itself null and void, inoperative or incapable of being performed.

5. Furnishing of documents.— The party applying for recognition and enforcement of foreign arbitral award under this Ordinance shall, at the time of the application, furnish documents to the Court in accordance with Article IV of the Convention.

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.— The recognition and enforcement of a foreign arbitral award shall⁴ not be refused except in accordance with Article V of the Convention.

8. Inconsistency.— In the event of any inconsistency between this Ordinance, any other law, or any judgment of any court and the Convention, the Convention shall prevail to the extent of the inconsistency.

9. Rules.— The Federal Government may, by notification in the official Gazette, make rules to carry out the purposes of this Ordinance.

10. Repeal and saving.— (1) The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937) (hereinafter in this section referred to as “the Act”) is hereby repealed.

(2) Notwithstanding the repeal of the Act, it shall continue to have effect in relation to foreign arbitral awards made –

(a) before the date of commencement of this Ordinance; and

⁴ The word ‘shall’ is to be read with the word ‘may’ in the chapeau of Article V(1) and Article VII of the Convention. 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.

- (b) within the meaning of section 2 of the Act which are not foreign arbitral awards within the meaning of section 2 of this Ordinance.⁵

SCHEDULE

[See section 2(a)]

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Done at New York on 10 June 1958

Entry into force: 7 June 1959

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of

⁵ It is important to note that the Arbitration (Protocol and Convention) Act 1937 has only been repealed to the extent that this Ordinance will supercede that Act in relation to awards that arise out of a country that has ratified the New York Convention. This is in compliance with and (in accordance with section 8 of the Ordinance) must be read in conjunction with Article VII of the Convention. Thus, an arbitration award from the UK (which is both a Geneva and New York Convention Country) would be governed by the New York Convention, and therefore this Ordinance. Thus this Ordinance largely resolves problems seen by the Pakistani courts due to the *Yangtze (London) Ltd. v. Barlas Bros (Karachi)* (PLD 1961 SC 573) and *Continental Grains Co. v. Naz Bros* (1982 CLC 2301) where the courts refused to enforce arbitral awards rendered in countries that had not been expressly declared by the Central Government to be reciprocating territories falling under the 1937 Act.

The partial repeal of the Act has been done to save arbitral awards arising out of countries that are signatories to the Geneva Protocol and Convention on Arbitral Awards but that have not yet ratified the New York Convention.

Countries which are purely Geneva Convention countries and not New York Convention countries as of 13/08/2005 to which the Act would continue to apply include the Bahamas, Gambia, Gibraltar, Guyana, Iraq, some of the Leeward and Windward Islands, Liechtenstein, Myanmar and St. Helena.

another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) The duly authenticated original award or a duly certified copy thereof;
 - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, Failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting, aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of

taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

GENERAL ,

PERVEZ MUSHARRAF,

President

JUSTICE (RETD.)

MANSOOR AHMED,

Secretary.

THE 1958 NEW YORK CONVENTION
Convention on the Recognition and Enforcement of Foreign Arbitral
Awards, New York, 10 June 1958

List of Contracting States (upto September 2005)

State	Ratification	Reservation
Afghanistan	30 Nov 2004	1 - 2
Albania	27 June 2001	-
Algeria	7 Feb 1989	1 - 2
Antigua and Barbuda	2 Feb 1989	1 - 2
Argentina	14 Mar 1989	1 - 2
Armenia	29 Dec 1997	1 - 2
Australia	26 Mar 1975	-
Austria	2 May 1961	-
Azerbaijan	29 Feb 2000	-
Bahrain	6 Apr 1988	1 - 2
Bangladesh	6 May 1992	-
Barbados	16 Mar 1993	1 - 2
Belarus	15 Nov 1960	-
Belgium	18 Aug 1975	1
Benin	16 May 1974	-
Bolivia	28 Apr 1995	-
Bosnia and Herzegovina	1 Sep 1993	1 - 2
Botswana	20 Dec 1971	1 - 2
Brazil	7 June 2002	-
Brunei Darussalam	25 July 1996	1
Bulgaria	10 Oct 1961	1
Burkina Faso	23 Mar 1987	-
Cambodia	5 Jan 1960	-
Cameroon	19 Feb 1988	-
Canada	12 May 1986	-
Central African Republic	15 Oct 1962	1 - 2
Chile	4 Sep 1975	-
China	22 Jan 1987	1 - 2
Colombia	25 Sep 1979	-
Costa Rica	26 Oct 1987	-
Côte d'Ivoire	1 Feb 1991	-
Croatia	26 July 1993	1 - 2
Cuba	30 Dec 1974	1 - 2
Cyprus	29 Dec 1980	1 - 2
Czech Republic	30 Sep 1993	-
Denmark	22 Dec 1972	1 - 2
Djibouti	14 June 1983	-
Dominica	28 Oct 1988	-
Dominican Republic	11 Apr 2002	-
Ecuador	3 Jan 1962	1 - 2
Egypt	9 Mar 1959	-
El Salvador	26 Feb 1998	-
Estonia	30 Aug 1993	-
Finland	19 Jan 1962	-
France	26 June 1959	1
Georgia	2 June 1994	-
Germany	30 June 1961	1

Ghana	9 Apr 1968	-
Greece	16 July 1962	1 - 2
Guatemala	21 Mar 1984	1 - 2
Guinea	23 Jan 1991	-
Haiti	5 Dec 1983	-
Holy See	14 May 1975	1 - 2
Honduras	3 Oct 2000	-
Hungary	5 Mar 1962	1 - 2
Iceland	24 Jan 2002	-
India	13 July 1960	1 - 2
Indonesia	7 Oct 1981	1 - 2
Iran, Islamic Republic of	15 Oct 2001	1 - 2
Ireland	12 May 1981	1
Israel	5 Jan 1959	-
Italy	31 Jan 1969	-
Jamaica	10 July 2002	1 - 2
Japan	20 June 1961	1
Jordan	15 Nov 1979	-
Kazakhstan	20 Nov 1995	-
Kenya	10 Feb 1989	1
Korea, Republic of	8 Feb 1973	1 - 2
Kuwait	28 Apr 1978	1
Kyrgyzstan	18 Dec 1996	-
Lao People's Democratic Republic	17 June 1998	-
Latvia	14 Apr 1992	-
Lebanon	11 Aug 1998	1
Lesotho	13 June 1989	-
Liberia	16 Sep 2005	-
Lithuania	14 Mar 1995	-
Luxembourg	9 Sep 1983	1
Macedonia, the former Yugoslav Republic of	10 Mar 1994	1 - 2
Madagascar	16 July 1962	1 - 2
Malaysia	5 Nov 1985	1 - 2
Mali	8 Sep 1994	-
Malta	22 June 2000	1
Mauritania	30 Jan 1997	-
Mauritius	19 June 1996	1
Mexico	14 Apr 1971	-
Moldova, Republic of	18 Sep 1998	1
Monaco	2 June 1982	1 - 2
Mongolia	24 Oct 1994	1 - 2
Morocco	12 Feb 1959	1
Mozambique	11 June 1998	1
Nepal	4 Mar 1998	1 - 2
Netherlands	24 Apr 1964	1
New Zealand	6 Jan 1983	1
Nicaragua	24 Sep 2003	-
Niger	14 Oct 1964	-
Nigeria	17 Mar 1970	1 - 2
Norway	14 Mar 1961	1
Oman	25 Feb 1999	-
Pakistan	14 Jul 2005	1
Panama	10 Oct 1984	-
Paraguay	8 Oct 1997	-

Peru	7 July 1988	-
Philippines	6 July 1967	1 - 2
Poland	3 Oct 1961	1 - 2
Portugal	18 Oct 1994	1
Qatar	30 Dec 2002	-
Romania	13 Sep 1961	1 - 2
Russian Federation	24 Aug 1960	-
Saint Vincent and the Grenadines	12 Sep 2000	1 - 2
San Marino	17 May 1979	-
Saudi Arabia	19 Apr 1994	1
Senegal	17 Oct 1994	-
Singapore	21 Aug 1986	1
Slovakia	28 May 1993	-
Slovenia	6 July 1992	1 - 2
South Africa	3 May 1976	-
Spain	12 May 1977	-
Sri Lanka	9 Apr 1962	-
Sweden	28 Jan 1972	-
Switzerland	1 June 1965	-
Syrian Arab Republic	9 Mar 1959	-
Tanzania, United Republic of	13 Oct 1964	1
Thailand	21 Dec 1959	-
Trinidad and Tobago	14 Feb 1966	1 - 2
Tunisia	17 July 1967	1 - 2
Turkey	2 July 1992	1 - 2
Uganda	12 Feb 1992	1
Ukraine	10 Oct 1960	-
United Kingdom of Great Britain and Northern Ireland	24 Sep 1975	1
United States of America	30 Sep 1970	1 - 2
Uruguay	30 Mar 1983	-
Uzbekistan	7 Feb 1996 -	
Venezuela	8 Feb 1995	1 - 2
Vietnam	12 Sep 1995	1 - 2
Yugoslavia	12 Mar 2001	1 - 2
Zambia	14 Mar 2002	-
Zimbabwe	29 Sep 1994	-

Reservations:

1. Awards will be recognised and enforced only if made in the territory of another Contracting State.
2. The Convention applies only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.

MEMORANDUM

On the Pakistan Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005
implementing the New York Convention 1958

Shahid I Jamil
30th October 2005

Introduction:

The main purpose behind the drafting of the New York Convention on Arbitral Awards (NY Convention) has been to encourage the recognition and enforcement of commercial arbitration agreements and awards arising out of international contracts and to substantially unify the standards under which this is done. The Convention's facilitative role is reflected in proactive provisions which compel parties to arbitration as well as enforce arbitral awards in an orderly and effective manner.

Now that the Government of Pakistan has ratified the NY Convention and promulgated implementing legislation in the form of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 (the Ordinance), the underlying policy considerations of the NY Convention will have a major impact on the law relating to international commercial arbitration and arbitral laws relating to the enforcement of foreign awards in Pakistan which had become anachronistic and in need of reform. The purpose of this paper is to delineate some of the issues that are likely to be faced and changes that the Ordinance brings in due to ratification of the NY Convention is ratified. This paper will first analyse the law applicable to foreign awards in Pakistan prior to the coming into force of the Ordinance and highlights its shortcomings. Next, the changes that the Ordinance and the NY Convention will bring in will be analysed. Finally, a short analysis will be made regarding the advantages of the NY Convention's ratification.

The Law Applicable in Pakistan Today (Geneva Convention):

The enforcement and recognition of arbitral awards currently being applied in Pakistan is embodied in the Arbitration (Protocol and Convention) Act of 1937 (the 1937 Act) which was implemented pursuant to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the Geneva Convention). The parties to the said convention are few and not as economically viable as compared to the parties of the NY Convention. Further, the concepts embodied in the Geneva Convention are not as facilitative of the recognition and enforcement of arbitral awards as would be ideal.

1. Restrictive Scope of the Geneva Convention:

The first issue concerning the 1937 Act concerns its scope in enforcing arbitral awards rendered in countries not party to the Geneva Convention. The jurisdiction of the 1937 Act, according to §2 (b) and (c), only extends to awards made:

“...between such persons of whom one is the subject to the jurisdiction of some one of such Powers as the Central Government being satisfied that reciprocal provisions have been made, may by notification in the official Gazette, declare to be parties to the Convention...and of whom the other is subject to the jurisdiction of some other of the Power aforesaid; and....

... in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies”

The problem with this provision rests on two factors. Firstly, interpreting the phrase “subject to the jurisdiction of” has been found in various jurisdictions to

cause many difficulties in being far too restrictive and territorial in its application. Secondly, a practical problem occurs where a sizeable number of nations cannot enforce awards within Pakistan either because they have not become parties to the Geneva Convention or they have not been declared by the Central Government to be parties to which the 1937 Act would apply. Numerous awards rendered in the major trading nations of the world, including the US, have not been enforced within Pakistan due to this jurisdictional problem. (Yangtze (London) Ltd. v. Barlas Bros (Karachi) (PLD 1961 SC 573) and Continental Grains Co. v. Naz Bros (1982 CLC 2301) where the courts refused to enforce arbitral awards rendered in countries that had not been expressly declared by the Central Government to be parties falling under the 1937 Act).

A related issue is that the 1937 Act applies only to 'foreign awards.' This is a definitional problem concerning the scope of the Act that is restrictive of the types of awards the Geneva Convention is applied to within Pakistan. This point will be further discussed when dealing with the impact of the Ordinance and the NY Convention.

2. Enforcing Arbitration Agreements:

Another issue in relation to the 1937 Act is that there is no specific provision that deals with the enforcement of arbitral agreements. Although the Geneva Protocol did make provisions for the enforcement of arbitration agreements, this provision was merely left in the First Schedule of the Act rather than being made a substantive provision in the main Act. In addition Article 3 of the Protocol which provides for compelling parties to arbitration does not precisely enunciate the circumstances under which the courts could refuse to compel the parties to arbitration. This has led to problems of interpretation in the Pakistani courts leading to cases such as HUBCO v. WAPDA (PLD 2000 SC 841). Such problems will be dealt with further when dealing with the NY Convention.

3. Effect of Grounds for Enforcement:

The grounds for enforcement of the award in the Geneva Convention have not proved to be very efficient in encouraging the enforcement of arbitral awards. An illustration of this is that the burden of proof in the Geneva Convention on the issue of the validity of an award is placed on the party seeking to enforce the award. This results in the creation of procedural and substantive burdens on the winning party to arbitration and thus hinders the efficiency of the arbitral process.

In addition, the inefficiency is compounded by the fact that the grounds on which a party can seek to resist the enforcement of an award under the Geneva Convention are also exceedingly cumbersome and not clearly defined. For example, the requirement in Article 1 (d) of the Geneva Convention that an award become “final in the country in which it has been made” has proven to be conceptually problematic in other jurisdictions (bringing an issue of whether or not *double exequatur* would be required) and results in delays or obstructions to the award merely on the ground that the losing party to the arbitration can simply institute proceedings against the award in another state. Such a state of affairs is unsatisfactory in light of current international and domestic policies geared towards facilitating arbitration and increasing the efficiency of the arbitral process.

4. Powers of the Courts of the Country of Enforcement:

The powers of the courts in relation to enforcing arbitration agreements and awards are not adequately distributed under the Geneva Convention. The first example of this is seen in the mandatory provisions of Article 2 of the Geneva Convention which lays down grounds for the refusal of enforcement by the Courts and then says that if those grounds are satisfied “recognition and enforcement of the award shall be refused” [emphasis added]. This leaves very little scope for the courts to exercise their own discretion in allowing the enforcement of an award. Under the 1937 Act, even if only one of the grounds for

resisting recognition is proved, the courts will be bound to refuse enforcement of the award.

In addition, on the issue of enforcing agreements to arbitrate the courts are required by Article 4 of the Protocol on Arbitration Clauses to refer the parties to arbitration without any clear criteria as to when this should be denied thus forcing the Pakistani courts to develop their own criteria which may or may not be conducive to an arbitration friendly policy. Such mandatory provisions bind the courts far too restrictively and resultantly cause the enforceability of the arbitral process to be less effective.

The New York Convention:

Pakistan has recently ratified the NY Convention on 14/07/2005 and promulgated the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 on the same date to give effect to the NY Convention. This marks the end of a period of 47 years where Pakistan was the only country in the world that had been an original signatory to the NY Convention but had not ratified it. However, with the ratification of the NY Convention, Pakistan has sent out a clear signal to the international community that it is an investor-friendly country that facilitates and protects foreign investment. This will go a long way in stimulating growth within the economy that will benefit the country as a whole. The ratification of the NY Convention would mark the end of an era of isolationism and parochialism and allow Pakistan to increase its commercial intercourse with the international community.

The NY Convention is a successor to the Geneva Convention and deals with the problems delineated in the first section in a more effective and more arbitration friendly manner:

1. Expansive Scope of the Convention:

a. Parties to the Convention:

Firstly, there are more nations that are parties to the NY Convention than the Geneva Convention. In fact nearly all of the Geneva Convention states have also ratified the NY Convention. Therefore the potential scope of application of the NY Convention to international arbitral awards is much wider than that which exists under the Geneva Convention.

Furthermore, the NY Convention shall apply to all arbitral awards that are rendered in a NY Convention state even if that state is a party to the Geneva Convention. This is clearly highlighted in Article VII(2) of the NY Convention and also given force through § 10 of the Ordinance. Thus, an arbitration award rendered in the UK (which is both a Geneva and NY Convention country) would be governed by the NY Convention.

Countries which are purely Geneva Convention countries and not New York Convention countries as of the writing of this memorandum to which the Act would continue to apply include the Bahamas, Gambia, Gibraltar, Guyana, Iraq, some of the Leeward and Windward Islands, Liechtenstein, Myanmar, and St. Helena.

b. Problem of interpretation- US v. India:

Secondly, the second sentence of Article I (1) states that “[the Convention] shall also apply to arbitral awards not considered as domestic awards” in the enforcing State. This is an issue that goes right to the heart of a problem faced by certain jurisdictions in trying to define differences between foreign awards and domestic awards. The 1937 Act poses just such a problem in that it applies the Geneva Convention only to “foreign awards.” Section 2 Arbitration (Protocol and Convention) Act of 1937. The provisions of the NY Convention are clearly meant to apply to awards that are not only “foreign” in the sense that they have been

made in a state other than the enforcing state, but also to awards that have an international element.

The Ordinance, in § 2(d) does not clearly delineate this distinction. It merely applies the application of the NY Convention to ‘foreign foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the Official Gazette.’”

As such, it will be the duty of the Pakistani Courts to interpret, establish and give meaning to the term ‘not considered as domestic’ in trying to determine whether an award is truly ‘foreign’ or not. A variety of factors influence whether or not an award is determined to be ‘international’ in character *inter alia* the nationalities of the parties; venue of the arbitration; the subject matter of the arbitration; etc. 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

(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.

Furthermore, the US legislation is even more expansive where 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.**”

Such an interpretation of a non-domestic award expands the scope of the NY Convention to a large number of awards that are sought to be enforced in the US.

Conversely, the definition of a foreign award under the 1937 Act and case law prior to the coming into force of the Ordinance is restrictive and ought to be adapted and interpreted to meet the international best practice definitions expounded above. §9 of the Act of 1937 states that:

“Nothing in this Act shall....

(b) apply to any award made on an arbitration agreement governed by the law of Pakistan.”

The Supreme Court of Pakistan in Hitachi Ltd. v. Rupali Polyester (1998 SCMR 1618) had applied §9 to arbitration awards rendered in a foreign country but governed by Pakistani substantive law. This has had the effect of raising a barrier of high risk for both domestic and foreign investment, and harmed Pakistan’s commercial and trade opportunities.

The problems with this legal interpretation was also found in India where an identical provision existed in §9 of the Indian Foreign Awards Act 1961 ('Savings Clause') which stated that:

"Nothing in this Act shall....

(b) apply to any award made on an arbitration agreement governed by the law of India."

The problems in this clause were recognised by the Indian legislature which repealed the §9 Savings Clause through a new arbitration act in 1996.

The faults of the Savings Clause were seen in the interpretation of the term 'foreign award' in India. Through the Savings Clause, and converse to the American interpretation, the types of awards to which the NY Convention applied in India had been very narrowly construed. In National Thermal Power Corporation v. The Singer Company 80 AIR SC 998 (1993) the Supreme Court of India held, in paragraph 26, that under an arbitration agreement governed by Indian substantive law,

"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."

The decision of the Indian Supreme Court in the *Singer* case had been severely criticized as being contrary to the spirit of the NY Convention. The provisions of the NY Convention, especially Article I (1), applies to arbitrations conducted in one country but applying the substantive laws of another country. The courts of the country, whose substantive laws apply to the arbitration agreement, are not meant to have an appellate/supervisory status in these matters. The only

supervisory jurisdiction is usually reserved to the courts of the seat of the arbitration. (As seen in *Union of India v McDonnell Douglas Corporation* 1993 2 Lloyds Rep 48) However this is precisely the effect that the *Singer* decision along with the Indian Savings Clause had on any arbitration award rendered under Indian substantive law.

A consequence of this decision was that foreign investors in India would always try to avoid Indian law from applying to the substance of their agreement.

Fortunately, the Pakistani Supreme Court in *Hitachi* suggested that this theory of 'concurrent jurisdiction', as developed by the Indian Supreme Court, was unworkable and impractical. However, the *Hitachi* Court still gave credence to the theory as being an internationally acceptable theory. If this interpretation is brought into Pakistan, once the NY Convention is in place, the same result as the *Singer* decision could follow.

This has been seen in India through the two decisions of *Bhatia International v Bulk Trading S.A.* (2003) 5 SCC (Jour) 22 and *ONGC v Saw Pipes* 2003 SOL Case no. 175 which have practically restored the workings of the Savings Clause through interpretive techniques based on constructions of the several Parts of the Indian Arbitration Act 1996.

If the same judicial precedents and interpretations are followed in Pakistan, Pakistani businessmen will always find foreign investors trying to choose their own laws to govern their agreements; since they do not wish the arbitral awards to be subject to the supervisory jurisdiction of Pakistani courts. Furthermore, by interpreting such awards as being domestic awards, these awards shall be subject to the Arbitration Act 1940 and thus subject to problems of limitation and procedure under that Act (eg. §14 of the Arbitration Act 1940 requires the arbitrators themselves to file the award into court; such a procedural requirement

is unheard of in the international commercial arbitration community and creates procedural problems for investors that seriously prejudice their substantive rights).

This will result in Pakistani parties to arbitration not only having to go to the expense of having to conduct arbitrations in other countries, but also having to engage specialist lawyers in other legal systems to represent them. They will be faced with having to deal with legal systems that are highly unfamiliar to them and may not be as favourable.

The *Hitachi* judgment used the legal analysis propounded in *Singer* as well as some English cases that had either been decided before England ratified the NY Convention, or did not specifically deal with the NY Convention's applicability. The faults in this analysis of concurrent jurisdiction were recognized by other nations. This can be seen from the fact that both India and England promulgated new arbitration acts in 1996 and the Indian legislature, although not expressly repealing *Singer*, has nonetheless repealed the §9 Savings Clause, thus removing the basis of the *Singer* decision.

Furthermore, in Pakistan, the Ordinance has been drafted without the inclusion of the 9(b) Savings Clause. As such, a strong argument exists that the intention of the legislature was such as to repeal the Savings Clause as well as the reasoning behind it. Pakistani arbitral jurisprudence thus has the opportunity to benefit from India's misadventures with the NY Convention and allow it to be implemented in its spirit as well as form by interpreting the words 'not considered as domestic' expansively and in line with international best practices. This will benefit both foreign and domestic investors as it will provide a degree of certainty within the law that is conducive to commerce within Pakistan.

2. Enforcing Arbitration Agreements:

The NY Convention enunciates the criteria under which a valid arbitration agreement ought to be enforced and the parties be compelled to arbitration. Article II (3) states:

“The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” [emphasis added]

This is repeated and reiterated in § 4 of the Ordinance and is a lot clearer than the Geneva Convention which merely compelled the courts to refer parties to arbitration whenever an agreement was held to be “valid in virtue of [Article I] and capable of being carried into effect”. Article 4 Protocol on Arbitral Clauses. In this sense, the NY Convention realises the need for an enunciation of the restrictions on the type of agreements that the courts are bound to enforce.

The efficacy of the arbitration process in addition is still dependant on the attitude of the courts of the parties involved. The enforcement of arbitration agreements is a point that is still under the power of the enforcing court that employs the concepts of separability and the arbitrability of disputes to determine the validity of an arbitration agreement.

An illustration of this point exists in the Pakistani case law in the *HUBCO v. WAPDA* case mentioned above. In that case, the Supreme Court of Pakistan held an arbitration agreement to be invalid due to the commission of corrupt practices by the parties in procuring amendments to their contract. As such, the validity of the arbitration agreement was nullified when the court stated,

“The disputes between the parties are not commercial disputes arising from an undisputed legally valid contract...for...on account of these criminal acts, disputed documents did not bring into existence any legally

binding contract between the parties, therefore, the dispute primarily relates to very existence of a valid contract and not a dispute under such a contract.”

Under this analysis the court felt that the contract “was void under s. 23 of the Contract Act and not voidable simpliciter” and thus held the arbitration agreement to be void as well. This is an important aspect of the case that has wide-reaching implications for arbitration laws in Pakistan since it goes to the heart of the doctrine of separability. Although the court felt that recognising issues of fraud and criminality as being arbitrable would be contrary to public policy, the validity of the arbitration agreement is a concept that would be logically prior to considerations of arbitrability. Thus, since the validity of the arbitration agreement was not recognised, the clause was unenforceable even before such issues could be deemed non-arbitrable.

3. Effects on Grounds for Enforcement:

The NY Convention’s pro-arbitration stance is brought out in the manner in which it has shifted the burden of proof upon the party resisting the enforcement of the award. This is done in Article V (1) which states:

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that ...” [emphasis added]

This clearly places the burden of proof on the party resisting the award and facilitates its enforcement.

Secondly, the grounds for refusing enforcement are clearer and more precise in the NY Convention. For example, unlike the Geneva Convention, which required that an award be ‘final’ before it could be enforced, the NY Convention, in Article V(1)(e), allows the refusal of an award where it “has not yet become binding on

the parties.” This provision is an example of the reversal of the burden of proof enunciated earlier, and it also lays out a more precise ground for refusal of an award.

In addition, the NY Convention also strikes a more balanced difference between the grounds of enforcement available to the party against whom the award is being invoked, and the grounds of enforcement which the courts are supposed to consider on their own cognisance. Under Article V(2) (a) and (b), the courts are meant to consider the issues of arbitrability and whether “recognition of the award would be contrary to public policy”. The other grounds for refusal have to be raised by the parties themselves. This makes the picture a lot clearer for the courts.

4. Powers of the Courts of the Country of Enforcement:

The powers of the courts to facilitate arbitration have been expanded greatly by the NY Convention. In Article V of the Convention (reproduced above) the word ‘may’ is used in relation to whether courts should refuse to enforce an award. This gives the courts the discretion to recognise and enforce an award even if the grounds for refusal have been proven. This is given further impetus by §§6,7, and 8 of the Ordinance which place the NY Convention as being hierarchically superior over the implementing legislation and also mandate that recognition and enforcement of awards are only to be done in accordance with Article V of the NY Convention.

In addition, as mentioned earlier, the grounds for enforcing an arbitration agreement are more precisely laid out in the NY Convention and give the courts more well-defined situations in which to recognise an agreement to arbitrate.

Conclusion:

After this legal analysis it can be seen that the provisions of the NY Convention are more arbitration-friendly in the way they are structured. The Convention is a subtle document with many policy considerations and economic benefits

calculated to enhance the efficiency of the arbitral process. From compelling parties to arbitration to the actual recognition and enforcement of arbitral awards, the NY Convention is more enabling than its predecessor in the manner in which it allocates the burdens of proof and the relative jurisdictions of an enforcing court. It also seeks to balance the amount of control the courts have over the arbitral process with the principle of party autonomy.

All in all the advantages of the NY Convention are numerous. Apart from sending out the right signals to the international community, the Convention also protects Pakistani investors in allowing them a quick process whereby they are able to use the awards they win as a defence to any future claims. In this respect the 'one-stop shop' effect of the arbitration award is strengthened and helps facilitate the smooth running of commercial life within Pakistan.

