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To reach Customer Service:

Elizabeth Bain
Available 8:00 AM-5:00 PM Eastern Time
(401) 431-4837
baine@adr.org

Jurisdictional Issues in Enforcement of International Arbitration Agreements in Pakistan: A Critical Analysis—Part I

Rana Rizwan Hussain[1]

The enforcement of international arbitration agreements and foreign awards is a subject that is dealt with by the New York Convention, 1958. In this regard, the New York Convention in Article V envisages a competent authority at every Contracting State to enforce foreign awards. To that end, the High Courts in Pakistan have been conferred the jurisdiction to deal with all enforcement actions of foreign awards. The Convention envisions no competent authority for the purpose of enforcing international arbitration agreements. Thus, the enforcement of arbitral agreements completely remains a subject of domestic law of the Contracting States. In Pakistan, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, is promulgated to implement the New York Convention. The relevant provisions of the Act which confer jurisdiction for enforcement of arbitration agreements are worded in a manner that has brought the High Courts across the country at conflicting opinions. One view favours the exclusive jurisdiction of the High Courts to enforce international arbitration agreements, whereas the other supports the concurrent jurisdiction of the Civil Courts to do so. This article deals with this conflict of opinions between the High Courts of Pakistan, keeping in view the requisites of domestic law besides the fundamentals of the New York Convention and the Vienna Convention on the Law of Treaties, 1969. This multipart article aims at critically analysing

[1] The author, founding partner of Hussain and Associates in Lahore, may be contacted at rizwan@hussainnassociates.com.

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the question of jurisdiction faced by the courts in Pakistan with regard to enforcement of international arbitration agreements. In this first part, this article delves into case law on the point of jurisdiction as held by the Superior Courts. It then discusses the points of consistency and inconsistency in those judgments. The conclusion of this article, to be published in an upcoming issue of *Dispute Resolution Journal*, will evaluate the court decisions in light of domestic and international law and will set forth the correct position for the sake of harmony in legal practice in Pakistan.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) was adopted in New York City on June 10, 1958, and went into effect on June 7, 1959. The object of developing the Convention was primarily to enforce the arbitral awards which were non-domestic to the jurisdiction of enforcement. However, the drafting history reveals that at the concluding stage, the scope of the Convention was enhanced to also encompass the arbitration agreements and resultantly Article II was included in the Convention. The Convention was finally promulgated with two clear objectives: first, the enforcement of arbitration agreements as stipulated in Article II of the Convention; and second, the enforcement of foreign arbitral awards as provided in Articles III, IV, and V of the Convention.

Article II of the Convention, while directing the Contracting States to recognize an agreement in writing under which the parties undertake to submit to arbitration does not distinguish between international and domestic arbitration agreements. Therefore, the first impression of Article II is that it embraces both types of arbitration agreements. However, the juristic comments and scheme[2] of the Convention clarify that the subject matter of Article II is merely the international arbitration agreement. It is for this reason that the Convention was promulgated

[2] Gary Born, International Commercial Arbitration (Wolters Kluwer, 2021).

to replace the Geneva Protocol[3] and Geneva Convention,[4] and the former in its Article 1 encompassed only those arbitration agreements which involved parties from two different States. Thus, the subject matter of the Convention in its Article II is an arbitration agreement which is either transnational or the one that is capable of producing an award which is non-national to the place of enforcement.

With regard to the enforcement of foreign awards, the Convention envisages a competent authority in each Contracting State to perform the job.[5] However, no such expectation is included for the enforcement of arbitration agreements. Article II of the Convention that deals with arbitration agreements in its subclause 3 uses the expression, "The court of a Contracting State, when seized of an action. . . ." The expression "The court" connotes any court and not any particular court desired by the Convention to deal with the arbitration agreements. Therefore, the enforcement of arbitration agreements remains a subject of domestic law in each Contracting State. Thus, every country can have its own mechanism of enforcing international arbitration agreements under its domestic law.

Pakistan signed the Convention on December 30, 1958; however, Pakistan being a dualist state had to legislate the Convention for its domestic implementation. That implementation of the Convention was made by Pakistan on July 14, 2005, through an ordinance.[6] However, after several renewals, the Convention was finally made the Act of the Parliament through "The Recognition and Enforcement (Arbitration Agreements and Foreign Awards) Act, 2011" (the 2011 Act).

The preamble of the 2011 Act clarifies its object and purpose that is to give effect to the Convention for the purpose of recognition and enforcement of arbitration agreements and foreign awards in Pakistan. Section 1 elucidates the applicability of the

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[3] The Geneva Protocol on Arbitration Clauses of 1923.

[4] The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

[5] See Article V of the Convention.

[6] The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance (VIII of 2005).

2011 Act besides the limitations of it. Section 2 gives definitions to the material terms used in it and its subsection (d) defines a crucial term for the purpose of determining jurisdiction, that is, "Court" as:

> 2(d) "Court" means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette.

Thereafter, Section 3(1) of the 2011 Act starts with a non-obstante expression and provides:

> 3(1) Jurisdiction of Court.—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 Act.

In this Section, the 2011 Act gives an exclusive authority to the High Courts to exercise jurisdiction on the matters related to or arising from the 2011 Act. Whereas, the 2011 Act deals with both subject matters, that is, arbitration agreements as well as the foreign awards. Thus, it appears from Section 3 of the 2011 Act that the High Courts are vested with the exclusive jurisdiction to deal with all the matters pertaining to international arbitration agreements and the foreign awards. However, this impression is dispelled by Section 4(1) of the 2011 Act, which generalizes the authority and extends to any court before which the proceedings are instituted by a party relating to a subject that is covered by an arbitration agreement. Section 4(1) further directs that the court seized with such a matter must refer the parties to arbitration upon an application by one of the parties subject to exceptions stipulated in Section 4(2) of the 2011 Act. In this regard, Section 4 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 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 sub-section (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, in operative or incapable of being performed.

The court referred to in Section 4(1) of the 2011 Act can be the High Court or any other court before which the proceedings have been instituted in breach of the arbitration agreement. The apparent clash between Sections 3 and 4(1) of the 2011 Act with regard to the competence of court(s) to enforce international arbitration agreements has caused a difference of opinion between the judges of the High Courts in Pakistan. The core issue is whether the High Courts are vested with the exclusive jurisdiction to examine the validity of arbitration agreement on the parameters of Section 4(2) of the 2011 Act and refer the parties to arbitration or any court which comes across such an arbitration agreement has a parallel jurisdiction to that effect, as reflects from Section 4(1) of the 2011 Act.

The purpose of this article is to figure out the correct position under Pakistani law, that is, whether the High Courts are vested with the exclusive jurisdiction to deal with the matters relating to international arbitration agreements or that authority is also shared by the Civil Courts of the country. For the sake of analysis, this article first delves into case law on the point of jurisdiction deposited by the Superior Courts. At the second stage, it discusses the points of consistency and inconsistency in those judgments. At the final stage, this article evaluates the court decisions in the light of domestic and international law and sets forth the correct position for the sake of harmony in legal practice in Pakistan.

Case Law in Favour of Exclusive Jurisdiction of the High Courts

Tradhol International v. M/s Shakarganj

The parties had entered into a contract of ethanol trading which contained an arbitration clause. After the disputes arose, Tradhol filed the request for arbitration before the London Court

of International Arbitration (LCIA) and the tribunal was accordingly constituted. Shakarganj challenged the jurisdiction of the tribunal on the ground that the arbitration agreement was not valid. The tribunal seized with the question eventually ruled in favour of having jurisdiction on the subject matter. Shakarganj instead of participating into the arbitration proceedings, filed a civil suit before the Civil Court at Lahore challenging the validity of the arbitration agreement. Subsequently, the award on merits of the dispute was rendered by the tribunal in favour of Tradhol and against Shakraganj, which was brought before the Lahore High Court for enforcement. Shakarganj joined the enforcement proceedings and asserted that the enforcement of the award would be against the public policy of Pakistan for its having been rendered in the pendency of a challenge to the arbitration agreement before the Civil Court. Confronted with this proposition, the High Court came across the question whether the Civil Court had the jurisdiction to adjudicate upon the validity of an international arbitration agreement. While answering this question, the High Court came across Sections 3 and 4 of the Act and it held:

> If we examine the jurisdiction of this Court as defined under section 3 of the "Act" which states that the Court shall exercise exclusive jurisdiction to adjudicate and settle matter relating to or arising out from this "Act," the Court has to enforce (i) foreign arbitral award and (ii) foreign agreements; although foreign agreements are not defined under the "Act" but the agreements are defined under Article II of the "NY Convention" therefore, any issue with regard to enforcement of foreign arbitral award or foreign agreement, as defined under the "Act" and the Article II, is arisen, then this can further be examined under section 3(2) of the "Act" where again in proceeding regarding the stay application may be filed in the Court. The word "Court" is defined in capital which means the High Court and has been referred in various sections of the "Act" which again means the High Court but under Section 4, the word "court" is not in capital but it still means it is in capital and would be the High Court notified by the Federal Government. Section 3 of the

> "Act" gives exclusive jurisdiction to this Court in terms of section 2(d) of the "Act" and the section ibid starts with '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 the "Act." If section 3 of the "Act" be read with Section 4 of the "Act" it makes it clear that jurisdiction is only confined to the High Court because section 4(1) of the "Act" do mentions the word "court" and it is intertwined with section 3 of the "Act" under the doctrine of intertwined. . . .[7]

In this case, the Lahore High Court came across an award which had been opposed on the ground of invalidity of the arbitration agreement. Since that agreement had already been challenged by one of the parties before the Civil Court, therefore, the Lahore High Court expressly dealt with the jurisdiction of the Civil Court to decide upon the validity of arbitration agreement. As the above findings reveal, the Lahore High Court held in favour of exclusive jurisdiction of the High Courts to deal with the matters relating to or arising from the 2011 Act, including the enforcement of arbitration agreements. While holding so, the Lahore High Court also added that the word "court" used in Section 4 of the Act as non-capital would still mean that it is in capital and resultantly the High Court would have unparalleled jurisdiction to deal with international arbitration agreements.

Orient v. SNGPL

In a gas supply agreement, certain disputes arose between the parties which triggered the arbitration proceedings before the LCIA, which eventually rendered the award against Orient. The award was brought before the Lahore High Court for its enforcement under the 2011 Act. The Single Judge of the Lahore High Court recognized the award and allowed the enforcement

[7] Tradhol International SA Sociedad Unipersonal v. M/s Shakarganj Ltd., PLD 2023 Lahore 621.

application.[8] An intra-court appeal against the enforcement order of the Single Judge was filed before the Division Bench of the High Court, wherein the award-debtor contended that the Civil Court under the Arbitration Act, 1940 ("the 1940 Act") had the concurrent jurisdiction to enforce the award whereas the Single Bench declined the opportunity to Orient to avail appropriate remedies before the Civil Court. The contention of the award-debtor was repelled by the Division Bench of the Lahore High Court with the following findings:

> Section 3 grants exclusive jurisdiction to the High Court to fulfil the objective of the Act and the Convention. Section 3 of the Act has also been interpreted by a learned Division Bench of the Honourable Sindh High Court in *Taisei Corporation v. A.M. Construction Company (Pvt.) Ltd.* (2018 MLD 2058) wherein it has declared that the High Court has exclusive jurisdiction to adjudicate and settle matters related to and arising from the Act. The Court also held that these words are clear and broad enough to encompass the question whether an award is foreign arbitral award or not as well as reference to objections under Article V of the Convention. Therefore, the Court found that Section 3 of the Act leaves little room to argue that recognition and enforcement of foreign arbitral award does not fall exclusively within the jurisdiction of the High Court and there is a concurrent jurisdiction between the High Court and the civil court.[9]

The subject of the proceedings before the High Court was the enforcement of foreign award unlike the enforcement of international arbitration agreement. Therefore, the High Court did not explicitly deal with the enforcement of arbitration agreements. However, a notable aspect of the findings given by the Division Bench in this case is that while canvassing the exclusive

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[8] SNGPL v. Orient Power Co. Ltd., C.O.S. No. 16/2017—Final order of the Single Bench dated April 04 2018.

[9] Orient Power Company (Pvt.) Ltd. v. Sui Northern Gas Pipeline Ltd., 2019 CLD 1082.

jurisdiction of the High Court under Section 3 of the Act, the High Court enunciated, "Section 3 grants exclusive jurisdiction to the High Court to fulfil the objective of the Act and the Convention." The use of expression "objective of the Act and the Convention" includes their Objective to enforce arbitration agreements under Section 4 of the Act and Article II of the Convention. Thus, the findings given in this case can easily be stretched to include the exclusive jurisdiction of the High Court to enforce international arbitration agreements. The order of Division Bench of the Lahore High Court was further assailed before the Supreme Court where the contention pertaining the concurrent jurisdiction of the Civil Court was neither made nor addressed by the Supreme Court.[10]

Case Law in Favour of Parallel Jurisdiction of the Civil Court

Zaver Petroleum v. Saif Energy

In this case, the parties belonging to Pakistan entered into an arbitration agreement which provided for LCIA arbitration in case of any dispute. After the issues erupted, Saif Energy instituted a civil suit before the Civil Court at Kohat challenging the validity of the arbitration agreement. Within that suit, Zaver Petroleum filed an application under Section 34 of the 1940 Act to stay the proceedings and refer the parties to arbitration. The said application of Zaver Petroleum was confronted with an objection by Saif Energy that the subject arbitration agreement was international and thus the provisions of the 1940 Act were not applicable. Zaver Petroleum conceded to that objection and resultantly withdrew the application. Simultaneously, Zaver Petroleum filed another application under Order VII Rule 10 of the Code of Civil Procedure, 1908 (CPC), praying for return of the suit to be filed before the competent forum, that is, the High Court. The said application of Zaver Petroleum was accepted by the Civil Court and the suit filed by Saif Energy was returned. The

[10] Orient Power Company (Pvt.) Ltd. v. Sui Northern Gas Pipeline Ltd., 2021 CLD 1069.

order of the Civil Court was assailed through an appeal before the Peshawar High Court which declined the same acceding to the ground that the High Court under the Act had the exclusive jurisdiction on the subject matter. The order of the Peshawar High Court was further assailed by Saif Energy before the Supreme Court, which remained pending.

In the course of the above proceedings, Zaver Petroleum had also filed a request for arbitration before LCIA in which arbitration proceedings took place and the award was rendered against Saif Energy. Zaver Petroleum initiated the enforcement action of the award before the Islamabad High Court, wherein Saif Energy filed objections. One of the objections raised by Saif Energy was that the arbitration agreement between the parties was not valid, which had also been challenged before the Civil Court and an appeal on that matter was pending before the Supreme Court. The Islamabad High Court once came across the entire proposition analysed the same thoroughly and held:

> Section 4(1) of the 2011 Act is explicit in its terms that 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 insofar as they concern that matter. In the instant case, since the proceedings (i.e. the civil suit) had been brought by Saif Energy before the Civil Court at Kohat, it is that very Court to which Zaver Petroleum could have applied under Section 4(1) to stay the proceedings. The legislature has been conscious in not using the term "court" in capitalized form in Section 4 unlike other provisions of the 2011 Act including Sections 3, 5 and 6 of the said Act. It is only where the term "Court" is used in capitalized form in the 2011 Act that it would be given the meaning as given to it in the definition Section of the said Act. Thus, where a party to an arbitration agreement brings legal proceedings before a court other than the High Court, it is the court where the legal proceedings have been brought that the other party to the

arbitration agreement is to file an application for stay of the proceedings. To hold that the term "court" used in Section 4 only means the High Court would amount to attributing surplusage to the expression "apply to the court in which the proceedings have been brought" appearing in Section 4(1). The mere fact that Section 3(1) contains a non-obstante clause would also not mean that an application under Section 4 for stay of legal proceedings could only be brought in the High Court. This is because the non-obstante clause in Section 3(1) reads this: "notwithstanding anything contained in any other law for the time being in force."

Therefore, the High Court is to have the exclusive jurisdiction to adjudicate and settle the matters related to or arising from the 2011 Act regardless of "any other law" which expression is relatable to other statutes presently in force but would certainly not include the other provisions of the 2011 Act, including Section 4 thereof. . . . It ought to be borne in mind that Saif Energy, in its civil suit, had not made a claim or agitated a dispute arising from or related to the Letter Agreement or the Farmout Agreement. Saif Energy had challenged only the arbitration clause contained in the Farmout Agreement. One must appreciate the distinction between a case where one of the parties to a contract providing for a foreign seated arbitration makes a claim under such contract against the other party in a civil suit or proceedings instituted before Courts in Pakistan and a case where one such party challenges the validity of a clause in a contract providing for a foreign seated arbitration or even the very contract containing such a clause through a civil suit or proceedings before Courts in Pakistan. In the former case, if the defendant asserts its right to arbitration through an application under Section 3(2) or 4 of the 2011 Act filed before the Court where the proceedings are pending, the Court will have no discretion but to stay the proceedings unless it finds that the arbitration agreement is null and void or incapable of being performed. In the latter case, the Court will, in my view, have two options. It can either stay the

> proceedings and leave the matter regarding the validity of the arbitration agreement to be adjudged by the Arbitral Tribunal under the principle of competence-competence or it can return the plaint by invoking the provisions of Order VII, Rule 10 C.P.C. leaving the plaintiff with the option to file a suit questioning the validity of the arbitration agreement before the High Court under Section 3(1) of the 2011 Act.[11]

In its detailed findings, the Islamabad High Court not only explained the difference between the use of two different expressions, that is, "Court" and "court" within the 2011 Act, but also thoroughly discussed the jurisdiction of the Civil Court or any other court to enforce the arbitration agreement where it is seized with a subject matter which is covered by an arbitration agreement. However, the High Court held that the Civil Court would not have the jurisdiction to deal with an independent challenge to the arbitration agreement. It was added by the court that where an independent challenge against an arbitration agreement is brought, the Civil Court would either hold its hands in favour of arbitral tribunal to adjudicate upon that challenge under the doctrine of competence-competence or would return the plaint to be filed before the concerned High Court to deal with the challenge.

Tallahasee Resources v. Director General Petroleum Concessions

In this case, the agreement between the parties provided for the arbitration before ICSID or ICC tribunal at a foreign seat. After the dispute arose, one of the parties instituted a civil suit before the Civil Court at Islamabad, which was confronted by the other through a miscellaneous application under Section 34 of the 1940 Act seeking stay of suit proceedings in favour of arbitration. The plaintiff objected to the maintainability of the application with the contention that the provisions of the 1940

[11] Zaver Petroleum Corporation (Pvt.) Limited v. Saif Energy Limited, 2025 CLD 695, 24.10.2024.

Act were not applicable to international arbitration agreements. This objection was spurned by the Islamabad High Court in the following manner:

> The learned Civil Court had ample jurisdiction to treat respondent No.1's application seeking a stay of the proceedings in the appellant's suit as an application under Section 4 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011.... There is no denying the fact that the learned Civil Court had jurisdiction under Section 4 of the Act to stay the proceedings in the appellant's suit on the basis of the arbitration clause in the PCA.[12]

In the above findings, the Islamabad High Court clearly held in favour of jurisdiction of the Civil Court to refer the parties to a foreign-seated arbitration. The Civil Court would exercise this power on the application of a party, where one of them initiates a civil suit in contravention to the arbitration agreement. The court categorically held that the Civil Court being the competent court can refer the parties to arbitration in consonance to the arbitration agreement.

Ovex Technologies (Pvt.) Ltd. v. PCM PK (Pvt.) Ltd. Etc.

In this case, the parties had entered into a business agreement that contained an arbitration clause to arbitrate all the disputes except those which included injunctive reliefs and interim orders. The parties in their agreement had consented upon the jurisdiction of courts in California. After the differences arose, one of the defendants, En Pointe, filed a suit before Californian court seeking an interim relief. The court in California denied the relief, after which En Pointe withdrew the suit and filed a request for arbitration in consonance to the arbitration agreement. Meanwhile, Ovex Technologies filed a suit for declaration

[12] Tallahasee Resources Incorporated v. Director General Petroleum Concessions, 2021 CLC 423.

and permanent injunctions against En Pointe at Lahore wherein different declaratory and injunctive reliefs were sought by Ovex Technologies. Within that suit, En Pointe filed an application under Section 4 of the 2011 Act seeking stay of court proceedings in favour of arbitration according to the arbitration agreement. The court instead of referring the parties to arbitration under Section 4 of the 2011 Act, suo motu returned the suit to be filed before the competent forum, that is, Californian court. The order of the Civil Court was assailed before the Islamabad High Court which set aside the decision with the findings that the Civil Court while dealing with an application under Section 4 of the 2011 Act can at the most stay the proceedings in favour of arbitration but not return the suit. The High Court held:

> [T]he learned Civil Court could only have stayed the proceedings in the suit to the extent of En Pointe, but could not have returned the plaint.[13]

In this case, the question before the High Court was whether the Civil Court while dealing with an application under Section 4 of the 2011 Act could only stay the proceedings in favour of arbitration or it could also return the plaint under Order VII Rule 10 CPC in exercise of its ex officio authority. While answering the same, the court held that the Civil Court could only stay the proceedings in favour of arbitration. The implied meaning of the court's ruling is that the Civil Court does have the authority to refer the parties to a foreign-seated arbitration under Section 4 of the 2011 Act by staying its proceedings.

Point of Consistency: Jurisdiction to Entertain an Independent Challenge to Arbitration Agreement

The courts of Pakistan are uniformly of the opinion that where a party brings an independent challenge to the arbitration agreement, the jurisdiction to deal with that challenge rests exclusively

[13] Ovex Technologies (Pvt.) Ltd v. PCM PK (Pvt.) Ltd. etc., PLD 2020 Islamabad 52.

with the High Court of competent jurisdiction. It is for this reason that Section 4(1) of the Act that generalizes the jurisdiction to "any court" does it only in a specific scenario where one of the parties to the arbitration agreement institutes legal proceedings in respect of that matter which is within the scope of the arbitration agreement. It is in this narrow situation that the Civil Court or any other court that is seized with a matter entailing an international arbitration agreement, upon an application by one of the parties, would refer the parties to arbitration subject to the exceptions stipulated in Section 4(2) of the 2011 Act. Unlike that where an independent action has been initiated to challenge the vires of an arbitration agreement, no court but the High Court can deal with such a challenge. In the Zaver Petroleum case,[14] one of the parties had independently challenged the validity of the arbitration agreement through a civil suit. It was in this situation that the Islamabad High Court held that the Civil Court had no jurisdiction to deal with the matter. The High Court in this case added that the Civil Court once comes across any such challenge can either surrender jurisdiction in favour of the foreign arbitrator to decide the question of validity of arbitration agreement under the doctrine of competence-competence or it can return the plaint to file it before the High Court.

Point of Inconsistency: Jurisdiction to Refer the Parties to Arbitration at a Foreign Seat

The point on which the High Courts are at difference with each other is whether the Civil Courts keep the authority to refer the parties to a foreign-seated arbitration where they come across any such matter that is covered by an arbitration agreement. It is different from that independent legal action which is initiated by a party merely to challenge the validity of an arbitration agreement. The difference of opinion that exists between the courts pertains to those legal proceedings which are brought on a subject matter, which is covered by an arbitration agreement. In this regard, judges at the Lahore High Court appear to be at

[14] Supra note 11.

consensus[15] that the High Courts of the country are vested with the exclusive jurisdiction to refer the parties to a foreign-seated arbitration. Their view is based on Section 3 of the 2011 Act, which provides for the exclusive jurisdiction of the High Court. The Lahore High Court, in the *Tradhol*[16] case added that the word "court" used in Section 4 of the 2011 Act as non-capital would still mean that it is in capital and resultantly the High Court would have unparalleled jurisdiction to deal with international arbitration agreements and foreign awards.

Unlike the above, the Islamabad High Court has taken a contrary view[17] which leans in favour of parallel jurisdiction of the Civil Court to refer the parties to arbitration where it comes across a legal action that is covered by an arbitration agreement. The Islamabad High Court has based its view on Section 4 of the 2011 Act and has interpreted the word "court" in Section 4 of the 2011 Act as a conscious decision on the part of legislature to confer parallel jurisdiction to all those forums which may come across a subject that is covered by an arbitration agreement. The court explained that Section 3(1), bearing a non-obstante clause, would not mean that an application under Section 4 for stay of legal proceedings could only be brought in the High Court. This is because, by virtue of a non-obstante clause, the High Court keeps exclusive jurisdiction on those subject matters which relate to or arise from the 2011 Act regardless of any other law which does not include the other provisions of the 2011 Act.

* * *

Editor's note: This article will conclude in an upcoming issue of *Dispute Resolution Journal*.

[15] Supra notes 7 and 9.

[16] Supra note 7.

[17] Supra notes 11, 12, and 13.

Jurisdictional Issues in Enforcement of International Arbitration Agreements in Pakistan: A Critical Analysis—Part II

Rana Rizwan Hussain[18]

The enforcement of international arbitration agreements and foreign awards is a subject that is dealt with by the New York Convention, 1958. In this regard, the New York Convention in Article V envisages a competent authority at every Contracting State to enforce foreign awards. To that end, the High Courts in Pakistan have been conferred the jurisdiction to deal with all enforcement actions of foreign awards. The Convention envisions no competent authority for the purpose of enforcing international arbitration agreements. Thus, the enforcement of arbitral agreements completely remains a subject matter of domestic law of the Contracting States. In Pakistan, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, is promulgated to implement the New York Convention. The relevant provisions of the Act which confer jurisdiction for enforcement of arbitration agreements are worded in a manner that has brought the High Courts across the country at conflicting opinions. One view favours the exclusive jurisdiction of the High Courts to enforce international arbitration agreements, whereas the other supports the concurrent jurisdiction of the Civil Courts to do so. This article deals with this conflict of opinions between the High Courts of Pakistan, keeping in view the requisites of domestic law besides the fundamentals of the New York Convention and the Vienna Convention on the Law of Treaties, 1969. This multipart article

[18] The author, founding partner of Hussain and Associates in Lahore, may be contacted at rizwan@hussainnassociates.com.

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aims at critically analysing the question of jurisdiction faced by the courts in Pakistan with regard to enforcement of international arbitration agreements. In the first part, published in the January-February 2026 issue of *Dispute Resolution Journal*, this article delved into case law on the point of jurisdiction as held by the Superior Courts. It then discussed the points of consistency and inconsistency in those judgments. The conclusion of this article, published here, evaluates the court decisions in light of domestic and international law and sets forth the correct position for the sake of harmony in legal practice in Pakistan.

Analysis of Civil Court's Jurisdiction to Refer the Parties to Arbitration at a Foreign Seat

Whether the Civil Court has the authority to refer the parties to arbitration at a foreign seat or this authority vests exclusively with the High Court is a point of difference between the High Courts across the country. In this regard, the Islamabad High Court in three of its judgments has extensively addressed this issue and has held in favour of concurrent jurisdiction of the Civil Court. Unlike that the Lahore High Court in the *Tradhol* case[19] has clearly held in favour of exclusive jurisdiction of the High Courts. In this judgment, the Lahore High Court also observed that the word "court" used in Section 4 of the 2011 Act as non-capital would still mean that it is in capital and resultantly the High Court would have unparalleled jurisdiction to deal with international arbitration agreements. Moreover, the findings given by the High Courts in the *Orient*[20] case also lead to the understanding that the High Courts have the exclusive jurisdiction to refer the parties to foreign arbitrations. Irrespective of the difference of opinion between the High Courts, it is established that any court which refers the parties to a foreign seated arbitration under Section 4(1) of the 2011 Act, exercises this authority subject to exceptions stipulated in subclause (2) of it. A careful reading of Section 4(2) reveals that it is in pari materia with Article II(3) of the Convention. In this way the obligations enshrined in Section 4

[19] Supra note 6.

[20] Supra note 8.

of the 2011 Act are international in nature as they have been derived from Article II(3) of the Convention. Pakistan being a Contracting State legislated the Convention through the 2011 Act for its domestic implementation. Thus, the 2011 Act is certainly a domestic legislation but it contains international obligations to be discharged by the concerned authorities. Consequently, when a court refers the parties to a foreign seated arbitration, it effectively discharges an international responsibility imposed by the Convention. In this backdrop, it becomes abundantly easy to debate the capacity of the Civil Court to discharge international obligations by considering the provisions of international treaties and conventions.

Authority of Civil Court to Enforce International Obligations

The jurisdiction of the Civil Court is defined in Section 9 CPC which provides:

> 9. Courts to try all civil suits unless barred. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

The Civil Court has been conferred the jurisdiction to try the suits of civil nature under Section 9 CPC. The term "suit of civil nature" has not been defined in CPC, however, it is established from the case law that any suit that involves the assertion or enforcement of civil rights or civil obligations is a civil suit.[21] In *Kishen Chand & Co v. Nur Muhammad*, the Supreme Court defined a suit of civil nature in the following manner:

[21] Hussain Bukhsh v. Settlement Commissioner Rawalpindi, PLD 1970 SC 1; Abur Rahman Mubashir v. Syed Amir Ali. Shah Bokhari, PLD 1978 Lah 113; Lal Bux v. IInd Additional District Judge, Hyderabad, PLD 2021 Kar 388.

> A suit of a civil nature may be defined as a suit, the object of which is the enforcement of a civil right or civil obligation.[22]

The Indian Supreme Court explained the scope of Section 9 CPC by holding that "civil nature" is wider than "civil proceeding" and the section would be available in every case where dispute has the characteristics of affecting one's right which are not only civil but of civil nature.[23] The interpretation of Section 9 CPC by the courts reveals that the assertion of a civil right or a civil obligation is an essential characteristic for a suit of civil nature. When a civil suit is brought before the Civil Court, the court becomes duty bound to protect those civil rights by conducting a trial on the subject matter.

What Is a Civil Right or Civil Obligation?

The civil rights and obligations are described as the rights and obligations of the citizens of a State.[24] In *Kishen Chand & Co v. Nur Muhammad*, the Supreme Court explained the concept of civil rights as:

> The word "civil" simply means "of or becoming a citizen." So a suit brought for the enforcement of the rights or obligation of a person as a citizen of the State is a suit of a civil nature. The right or obligation may relate to another citizen or to the State itself.[25]

The civil rights may accrue under the statute or under the common law.[26] The jurisdiction of Civil Court is limited to trying the suits in which one party asserts its civil rights and prays for

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[22] Kishen Chand & Co v. Nur Muhammad, PLD 1949 Lah 30.

[23] Rev. P.M.A. Metropolitan, etc. v. Moran Mar Marthoma, AIR 1995 SC 2001.

[24] The Assessing Authority Ludhiana v. Mansa Ram, AIR 1965 Pun 459.

[25] Kishen Chand & Co v. Nur Muhammad, PLD 1949 Lah 30.

[26] Mian Sultan Ali Nanghiana v. Mian Nur Hussain, PLD 1949 Lah 301; E. Achuthan Nair v. Narayanan Nair, AIR 1987 SC 2137; Mian Sultan Ali

the protection of those rights from the court. In return, the legislature has imposed a duty upon the Civil Court to protect the civil rights of the parties which accrue either under the statute or otherwise.

What Is an International Obligation?

An international obligation is something that is owed by one or more subjects of international law to one or more subjects of international law.[27] When a State on an international plain is required to do or not to do something toward other states or their subjects, that requirement becomes the international obligation of that State. ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 (ARSIWA) further help in understanding the concept of international obligation. Article 2 of ARSIWA provides:

> Element of an internationally wrongful act of a State: There is an internationally wrongful act of a State when conduct consisting of an action or omission
>
> (a) Is attributed to the State under international law; and
>
> (b) Constitutes a breach of an international obligation of the State.

The plain reading of the above Article reveals that any responsibility which is attributed to a State under international law constitutes an international obligation of that State. It further enunciates that when a State contravenes its international obligation, it commits an internationally wrongful act. Thus, an international obligation is that duty of a State which it cannot forego. Where a State undermines its international obligation, it commits an internationally wrongful act triggering its consequences under ARSIWA.

Nanghiana v. Mian Nur Hussain, AIR 1949 Lah 131; The Assessing Authority Ludhiana v. Mansa Ram, AIR 1965 Pun 459.

[27] Rustel Silvestre J. Martha, The Financial Obligations in International Law (Oxford University Press, 2015).

Difference Between Civil Right and International Obligation

The above discussion reveals that a civil right in its nature is entirely different from an international obligation. There exists a sharp contrast between a civil right and an international obligation. That contrast can further be refined through the comparison shown in Table 1.

Table 1

	Civil Right	**International Obligation**
1.	Accrues under domestic law.	Accrues under international law.
2.	Its national in nature.	Its transnational in nature.
3.	Legislature can confer or take away the civil rights of citizens.	Legislature cannot shun off the international obligations.
4.	Breach of civil right constitutes a civil wrong under domestic law.	Breach of international obligation constitutes an international wrongful act under ARSIWA.
5.	Breach can lead to fines, damages, and punishments by national courts.	Breach can lead to sanctions, diplomatic consequences, or legal action before international bodies.

Inconsistency Between the Convention and the 2011 Act

The difference between a civil right and an international obligation is also drawn by the legislature in Section 8 of the 2011 Act, which provides:

> Inconsistency.—In the event of any inconsistency between this Act and the Convention, the Convention shall prevail to the extent of the inconsistency.

According to the rules of statutory interpretation, the provisions of the Act generally prevail upon those of its Schedule in

case of any inconsistency.[28] Whereas in this case, the Schedule which contains the provisions of the Convention keeps an overriding effect upon the provisions of the statute. It is for the reason that the Schedule bears international obligations which Pakistan is duty bound to implement. Whereas, the statute is a domestic piece of legislation which has to succumb to the international instrument.[29]

The above inconsistency provision makes it abundantly clear that the primary intention of the legislature to promulgate the 2011 Act is to give effect to the international obligations as enshrined in the Convention unlike the civil rights or obligations conferred by the statute or the common law.

Scope of Civil Court's Jurisdiction Under Section 9 CPC

The above comparison reveals that the duty to enforce civil rights stands distinct from the duty to perform international obligations. Thus, the Civil Court under Section 9 CPC has the authority to deal with the suits which involve civil rights of the parties but not the international obligations enshrined in the treaty provisions. The enforcement of international obligations is a constitutional subject matter[30] for which a constitutional forum is most suitable to deal with. The Civil Court suffers from

[28] Federation of Pakistan v. Haji Muhammad Sadiq, PLD 2007 SC 133; Excise and Taxation Office, Karachi v. Burmah Shell Storage and Distribution Company of Pakistan, 1993 SCMR 338; Mondi's Refreshment Room & Bar, Karachi v. Islamic Republic of Pakistan, PLD 1983 Kar 214; Aphali Pharmaceuticals Ltd. v. State of Maharashtra, AIR 1989 SC 2227.

[29] LPGCL v. Karadeniz Powership Kaya Bey, 2014 CLD 337—The Sindh High Court explained that why it is important for the States to must implement the international obligations in comparison with legal obligations for which the courts can find a suitable method to implement.

[30] Article 40 of the Constitution of Pakistan, 1973: Strengthening bonds with Muslim World and promoting international peace. The Sate shall endeavour to preserve and strengthen fraternal relations among Muslim countries based on Islamic unity, support the common interests of the people of Asia, Africa, and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations, and encourage the

an inherent lack of jurisdiction to implement the treaty provisions particularly where any such provisions come in conflict with statutory provisions of law. It is for the reason that the Civil Court is duty bound to safeguarding the civil rights of the citizens of Pakistan accruing out of the statutes or otherwise. In this way, while implementing the civil rights it would inherently become incapable to enforce the treaty provisions in case of conflict between the both.

Implied Bar Under Section 9 CPC

Section 9 CPC provides that the Civil Courts have the jurisdiction to decide all the cases of civil nature except those which are expressly or impliedly barred. The courts while discussing the implied bar of Section 9 have held in a range of cases that where a statute confers special jurisdiction to a particular forum it impliedly excludes the jurisdiction of all other forums including that of Civil Court.[31] In *Hakam v. Tassadaq Hussain Shah*, the Lahore High Court while discussing the ouster of Civil Court's jurisdiction on the basis of implied bar held:

> [I]f the ouster is claimed on the basis of implication, the implication must be founded and adjudged on the touchstone that the forum or the tribunal created by the special law have been conferred with the exclusive jurisdiction to try the matter of a specific civil nature.... Thus, for applying the rule of implied bar, it has to be seen that where a special tribunal or a public body is created by or under the authority of an Act of the Legislature for the purpose of determining rights which are the creation of the Act, then the jurisdiction of that tribunal or of that body is exclusive and the jurisdiction of the Civil Court is barred.[32]

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settlement of international disputes by peaceful means. Clause 3, Federal Legislative List, Part I, The Constitution of Pakistan, 1973.

[31] Jodhi Singh and others v. Vedabarat Sharma, AIR 1956 Pat 205.

[32] Hakam v. Tassadaq Hussain Shah, PLD 2007 Lah 261.

In another case, *Trustees of the Port of Karachi v. Gujranwala Steel Industries*, the Sindh High Court enunciated as follows:

> [I]t is true that where a statute creates new rights and also provides a special tribunal for their enforcement recourse to Civil Courts may, impliedly, be barred. The bar, however, will not operate even in such a case where the special tribunal, in its very nature, is a forum of summary remedy.[33]

It is established that the 2011 Act has conferred new rights which were not available to the parties before the implementation of the Convention. A distinct aspect of these rights is that they are backed by the international responsibility of the courts to enforce them.

In the above case,[34] the Sindh High Court while explaining the scope of "implied bar" added that this bar would not apply in those cases where the tribunal created under the special law is a forum of summary remedy. Whereas the proceedings under the 2011 Act are desirably summary in nature,[35] but the Court exercising its jurisdiction under this Act is not bound to follow the summary procedure where disputed questions of fact are involved. It is established from the verdict given by the Lahore High Court in *Jess Smith and Sons Cotton LLC. v. DS Industries*,[36] wherein an ex parte award rendered under English law was brought before the court in Pakistan for enforcement. While opposing the enforcement, the award-debtor completely denied the knowledge of any arbitration having commenced and taken place before the institution and further repudiated the existence of any contractual relationship with the award holder. The award holder presented the certified copy of the award along with

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[33] Trustees of the Port of Karachi v. Gujranwala Steel Industries, 1990 CLC 197.

[34] Ibid.

[35] Louis Dreyfus Commodities Suisse SA v. Acro Textile Mills Ltd., PLD 2018 Lah 597.

[36] Jess Smith and Sons Cotton LLC. v. DS Industries, 2019 CLD 23.

copies of emails containing arbitration agreement which had been exchanged between the award holder and a third person who was alleged to be a dealer between the parties. In the given situation where one of the parties expressly denied the existence of any contractual relationship with the other, the court found that the mere submission of copies of emails, exchanged with a third party, containing arbitration agreement did not suffice the requirement of Article IV(b) of the Convention that expressly requires the original arbitration agreement or a duly certified copy of it to be presented before the court for seeking enforcement of the award. Therefore, the court framed issues for affording opportunity of evidence to the parties to prove before the court, the existence of a valid arbitration agreement.

The 2011 Act in its Section 3(1) gives exclusive jurisdiction to the High Court to deal with all the matters related to or arising from the 2011 Act. In view of the conferment of exclusive jurisdiction by the legislature to the High Court, the jurisdiction of Civil Court to deal with the matters related to or arising from the 2011 Act comes under the implied bar of Section 9 CPC.

Analysis

The above discussion unfolds that the jurisdiction of the Civil Court is limited to the suits which entail civil rights of the citizens of Pakistan. Whereas, the obligations entailed in Section 4 of the 2011 Act are international in nature and thus beyond the jurisdiction of the Civil Court. Moreover, the "implied bar" enunciated in Section 9 CPC also becomes operative where any statute bestows exclusive jurisdiction on a particular forum to remedy the rights arising out of that statute. In this case, Section 3 of the 2011 Act confers that exclusive jurisdiction to the High Court or any other court as notified by the government in the official Gazette. Thus, the Civil Court has no jurisdiction to enforce arbitration agreements under section 4 of the 2011 Act.

Since, the 2011 Act entails international obligations, therefore, the High Court is the competent forum to deal with the matters which arise out of it. It is not merely for the reason that the jurisdiction of High Court is free from the shackles of Section 9 CPC but also for the fact that the High Court is vested

with different types of jurisdictions, e.g., constitutional, original; appellate and admiralty jurisdiction to adjudicate upon diverse issues including the matters of international obligations.

The Vienna Convention on the Law of Treaties and Interpretation of Article II(3) of the New York Convention

Requirements of Treaty Interpretation

The Vienna Convention on the Law of Treaties, 1969 in its Articles 31-32 stipulates the rules of treaty interpretation to be used by the interpreting authorities. In this regard, Article 31(1) of the Vienna Convention provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The first and foremost requirement of treaty interpretation is "good faith," which is said to have no normative quality.[37] However, it requires the parties to observe the treaty stipulations in their spirit as well as according to their letter.[38] Good faith is needed particularly where a treaty leaves its member States with a large discretion to implement its provisions.[39] In the context of Article 31 of the Vienna Convention, good faith wants the parties to refrain from taking unfair advantage of the treaty provisions and that they must construe them honestly, fairly, and reasonably.[40] It also includes that no term of the treaty should be taken as superfluous but must be given a meaning. Article 31 adds that the terms of the treaty should be given an ordinary meaning in the entire context of the treaty. Thus, the interpreter has to have

[37] Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martin Nijhoff Publishers, Leiden–Boston, 2009) 365.

[38] Ibid. 367.

[39] Ibid. 367.

[40] Ibid. 425.

a complete knowledge of the treaty to ascertain the ordinary meaning of the terms used in that treaty.[41] Since the dynamics of the term "ordinary meaning" are variable from one treaty to another, therefore, the Vienna Convention has simultaneously imposed the requirement of good faith to be observed, so that the interpreting authority can make a best decision in this regard. Article 31 also desires that the interpreting authority should never lose sight of the broader canvas, that is, the object and purpose of the treaty which must be upheld. Where the context of the treaty allows more than one ordinary meaning to a single term used in the treaty, the authority dealing with it should implement the one that best attains the object and purpose of that treaty. The ILC Report also emphasises that "[w]hen a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted."[42]

The national courts while interpreting the terms of international law perform an international function.[43] Therefore, it is considered to be a corollary of international legal obligations of a State to follow the interpretive methods of international law.[44] The national rules of statutory interpretation are irrelevant for the purpose of interpreting the words and phrases of international law.[45] Therefore, it is obligatory for the domestic authorities to interpret the treaty terms in the light of Articles 31-32 of the Vienna Convention. A thorough discussion on the preceding Articles of the Vienna Convention is beyond the scope of this article. However, it suffices to state that for the domestic

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[41] Ibid. 426.

[42] International Law Commission Report 1966, Year Book of International Law Commission, 1966, Volume II 219, 6, https://acrobat.adobe.com/id/urn:aaid:sc:AP:ad710549-fdeb-4fab-bb15-2241b598b1b0.

[43] Odile Ammann, Domestic Courts and Interpretation of International Law: Methods and Reasoning Based on the Swiss Example (Brill, 2020) 17-18, https://www.jstor.org/stable/10.1163/j.ctv2gjwn8t.16.

[44] Ibid. 183-84.

[45] Ibid. 13.

authorities it is sine qua non to adhere to the Vienna Convention while interpreting the treaty provisions.

Odile Ammann in his book has chalked out the rules of interpretation of international law[46] and has thoroughly discussed the significance of using them by the national authorities.[47] He has mainly divided the rules of interpretation in four categories: textual interpretation,[48] systematic interpretation,[49] teleological interpretation,[50] and historical interpretation.[51] He explains that no single method of interpretation guarantees legal, predictable, clear, and consistent judicial decisions. Therefore, the various methods must be used jointly in the interpretation of international law.[52]

ICCA's Guide to the Interpretation of the Convention

ICCA's Guide[53] provides that the national courts should interpret the Convention in an autonomous manner and in favour of recognition and enforcement of arbitration agreements and foreign awards. While referring to Article 31 of the Vienna Convention, the Guide adds that where the interpreting authority comes across any ambiguity in the terms of the Convention, the recourse may be had to the travaux préparatoires of the Convention and the courts should avoid a reference to their domestic law for that purpose. The alteration of meaning of the terms used in the Convention is completely disapproved.[54] It clarifies that the Convention supersedes the national law, unless the national law is

[46] Ibid. 195.

[47] Ibid. 161-90.

[48] Ibid. 197.

[49] Ibid. 202.

[50] Ibid. 208.

[51] Ibid. 213.

[52] Ibid. 220.

[53] ICCA's Guide to the Interpretation of the 1958 New York Convention (2d ed.) with the assistance of Permanent Court of Arbitration Peace Palace (The Hague) 12.

[54] Ibid. 14.

more favourable to the enforcement objective of the Convention.[55] The only situation where the Convention can be disregarded is where more than one treaty is applicable and any other treaty provides a more efficient mechanism to the enforcement object. The principle of maximum efficiency reflects in Article VII of the Convention.

Apart from the above, the Convention in itself bears a great deal of conflict of law rules. The courts seized with a matter relating to the Convention have to ascertain the applicable laws to decide upon the different aspects of that matter. For instance, in an enforcement action, if the award debtor challenges the formal validity of the arbitration agreement, the enforcing court has to carefully ascertain the applicable laws under which the formal validity must be adjudged. Failure to rightly determine the applicable laws can lead to a disastrous decision that would totally undermine the conflict of law approach entrenched in the Convention. Thus, the authority dealing with the provisions of the Convention besides being well versed with the terms of the Convention should also be equipped with the conflict of law rules to be applied in the course of proceedings relating to enforcement of arbitration agreements and foreign awards.

Implementing Article II(3) of the Convention

As it has been discussed above that Section 4 of the 2011 Act is in pari materia with Article II(3) of the Convention and therefore when a court in Pakistan implements Section 4 of the 2011 Act, it effectively discharges an international responsibility under the Convention. Resultantly, it becomes incumbent upon that court to stay closest to the object and purpose of the Convention while doing so. There are certain issues at pre-arbitration stage while implementing Article II(3) of the Convention where the courts generally require guidance, and those issues are as following:

- What is the final stage of the court proceedings, till when a request for arbitration can be made?

[55] Ibid. 28.

- Whether the court can stay its proceedings where no arbitration proceedings have yet commenced?
- What would be the standard of review (*prima facie* or thorough) to find whether the arbitration agreement is null and void, inoperative or incapable of being performed?
- Whether the terms "null and void, inoperative or incapable of being performed" used in Article II(3) would apply in the light of domestic law or under some uniform international standards of validity of arbitration agreements?

The above questions have been extensively addressed by the jurists and commentators. Therefore, it is essential for the domestic authorities dealing with Article II(3) of the Convention to have a complete understanding of them to apply them on a case-to-case basis. Besides that, the court seized with the matter is necessarily obliged to examine whether the arbitration agreement fulfils the writing requirements of Article II(2) of the Convention or not. It is for the reason that the threshold requirement to implement subclause (3) of the Article II is that the arbitration agreement fulfils the requisites of subclause (2) of it. Where an arbitration agreement does not fulfil the formal validity requirements of Article II(2) of the Convention, it can straightaway be nullified by the court. Yet again, the court dealing with the matter must be fully equipped with the developments taking place in the international arena, particularly about the modern means of communication which have been accepted globally as substitutes to letters and telegrams as referred to in Article II(2) of the Convention.

Consequences of Non-Application of the Convention by the Contracting States

The proper application of the Convention is an international responsibility of all its Contracting States. Failing to apply the Convention by any State would expose that State to consequences at international level which in certain circumstances may also constitute international wrongs under ARSIWA. Thus, a strict

responsibility comes upon the national courts to harmoniously apply the Convention. In this regard, ICCA's Guide explains:

> Within the Contracting States, the principal organs in charge of the application of the New York Convention are the courts. In international law, the acts of courts are regarded as acts of the State itself. Thus, if a court does not apply the Convention, misapplies it or finds questionable reasons to refuse recognition or enforcement that are not covered by the Convention, the forum State engages its international responsibility.[56]

The courts in Contracting States, in order to harmoniously apply the Convention, must be abreast of the scheme of the Convention, conflict of law rules of it and very clearly the rules of interpretation of international law. This is how the Contracting States can avoid the consequences of breach of their international responsibility.

Analysis

The civil judges across the country are not trained to deal with the rules of interpretation of international law. There is hardly any training that takes place for the civil judges to be abreast of international conventions ratified by Pakistan. Moreover, the subject matter of those laws, drafting history, deliberations, and consultations which took place in the course of making those laws are completely beyond their judicial duty to know. Let alone the terms of international law, the civil judges are hardly delegated with the duty to interpret the provisions of domestic law. It is for this reason that the interpretation of statutes is taken to be a prerogative of the Superior Judiciary in Pakistan.[57]

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[56] Ibid. 31.

[57] Yousaf Ali khan, Barrister-at-Law v. The West Pakistan Bar Council Tribunal, Lahore, PLD 1972 Lah 404—It was held, "Right to interpret and enunciate laws is an inalienable jurisdiction of superior judiciary (delegated to it by the sovereign)."

Moreover, there is hardly any training or awareness sessions organized for the civil judges to understand the provisions and terms of the Convention in a global context. In absence of any such training, the civil judges can hardly meet the international standards of dealing with the Convention. Therefore, this will be beyond the mandate of a civil judge to interpret the stipulations of Article II of the Convention without having been properly educated and trained for this role. Any such expectation from the lower judiciary can also be construed as against the requirements of good faith enshrined in Articles 31-32 of the Vienna Convention. In International Law Benchbook for Pakistan, it is emphasized that a domestic judge in considering any point of law relevant to international law must possess a solid awareness of those international agreements that the State has ratified and those that it has signed.[58]

Once again, the role to deal with international laws and more specifically the Convention suits more to the High Courts. It goes without saying that the High Court judges also require trainings to be on par with international standards but they have a better capability to be there for the reason that they normally deal with matters of diverse nature involving different aspects of international law.

Conclusion

The above discussion takes us to the conclusion that the Convention requires the Contracting States to honour and execute the international arbitration agreements. In this regard, the Convention gives complete autonomy to the State legislatures to devise their own mechanisms to achieve that object. Resultantly, it becomes a subject matter of domestic law to create rules for referring the parties to foreign seated arbitrations where any one of the parties goes before the State forum in contravention

[58] International Law Benchbook for Pakistan, published by Research Society of International Law Pakistan, https://rsilpak.org/wp-content/uploads/2019/01/International-Law-Benchbook-for-the-Judiciary-in-Pakistan.pdf.

to the arbitration agreement. The 2011 Act in Section 4 gives this authority to every such court before which a party files an action in breach of arbitration agreement. Practically, such matters mostly come before the Civil Courts in the form of civil suits at pre-arbitral stage. The legislature while conferring this authority to the Civil Courts overlooked the fact that the obligations entailed in the Convention are beyond the mandate of the Civil Court to discharge. The reason for it is twofold which is explained in sufficient detail above. Precisely, the jurisdiction of Civil Courts is primarily confined to the matters of civil nature under Section 9 CPC, whereas the subject matter of 2011 Act is the enforcement of international obligations under the Convention. Secondarily, the judges presiding over the Civil Courts are not trained in a manner to be abreast of rules of interpretation of international law under the Vienna Convention. It becomes even more problematic where provisions of international law require harmonious interpretations and any misinterpretation resulting in misapplication of law can trigger consequences under ARSIWA. In this backdrop where the Civil Courts inherently lack the jurisdiction to deal with the international obligations, the High Courts as stipulated in Section 3 of the 2011 Act come up as the most appropriate forums to handle the matters pertaining to or arising out of the 2011 Act. The Civil Court once comes across a matter that is covered by an international arbitration agreement must surrender the jurisdiction in favour of the High Court to test the validity of the arbitration agreement and record its findings on it.