

## ALTERNATIVE DISPUTE RESOLUTION IN THE LIGHT OF ARBITRATION LAWS

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### ABSTRACT

*Expeditious justice has become a most challenging feature of the Pakistani judicial system. The backlog of pending cases is increasing over time. To meet these challenges, Alternative Dispute Resolution is the track for the revival of speedy justice and it is a tool that avoids formal and lengthy litigations. This research paper discusses the need for alternative dispute resolution techniques in Pakistan and its discourses in civil laws. To this end, this piece after perusal of Pakistani courts' judgments describes the scope of arbitration in the expeditious resolution of disputes. Moreover, the article scrutinises the powers of an arbitrator and the effect of its biasness.*

**Keywords:** Alternative Dispute Resolution; Expeditious justice; Delayed Justice Arbitration; Arbitrator; Award

### INTRODUCTION

The Pakistani Judicial system faces high criticism for not providing expeditious justice. It is inherent to dispense justice in the light of the law. Pakistani courts are true prisoners of law so they usually never deviate from the complex procedures incorporated by law. The elaborative and comprehensive judgments of the Pakistani courts discuss the law but they remain unsuccessful in describing the intricacy of procedures and procedural laws. Moreover, the intricate procedures and judicial delays are accruing the backlog of pending in the courts over time. To this end, mediation, compromise, negotiation, reconciliation, and arbitration are the mechanisms of Alternative Dispute Resolution (ADR) to avoid formal and delaying litigations. Formal litigations are a waste of money and time for the parties and the commercial or corporate companies as they are unable to choose their jury, jurisdiction, and judge. In this way, for the amicable resolution of disputes, Alternative Dispute Resolution provides exceptional opportunities. Alternative Dispute Resolution is a speedy road without any hurdles.

The courts of Pakistan have started promoting Alternative Dispute Resolution. This piece is an endeavor to condense the importance and significance of Alternative Dispute Resolution to highlight the procedural and judicial delays affecting justice and provide a road map in the light of Pakistani courts' judgments for the amicable resolution of disputes with the help of Arbitration law. The article discusses the existence of Alternative Dispute Resolution in civil cases. Moreover, it inspects the scope of arbitration and explains the importance of an arbitration agreement. To this end, this paper describes what the powers of the arbitrator are and how he makes an award that is binding on the conflicting parties. This study has great significance because it scrutinizes the Pakistani courts' judgment to highlight the attitude of Pakistani courts towards arbitration. The scope of this study is obvious because alternative dispute resolution with respect to arbitration is an emerging field and soon it will become a part of the practice. Arbitration has a flourishing future because it gives freedom to the conflicting parties from the hassle of lengthy court queues.

### **The Need for Alternative Dispute Resolution in Pakistan**

The expeditious disposal of justice is very necessary for a stable society. The speedy resolution of the conflicts and redressal of grievances of aggrieved parties by the administration of justice is also a requirement for a civilized community (Muhammad, 2021). Pakistani courts are required to dispose of expeditious justice to the public. They are obliged to listen to the arguments of parties, record evidence, and make a reasonable judgment without making any delays (Nasima, 2020). It was held by

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the Supreme Court of Pakistan that courts of law should not make an excuse for a “rush of work.” Hence, dispense justice speedily because “justice delayed is justice denied.” *MFMY Industries v. Federation of Pakistan* can be cited.

Due to the adversarial judicial system of Pakistan, the courts follow all the procedures incorporated in the laws. Such procedures are old and complex and are not modified. Consequently, the courts remain unsuccessful in determining the cases either civil or criminal on time due to intricate procedures. Hence, the prolonged and delayed proceedings happened. Along with it the money and the time of the parties are wasted. Hence, justice is delayed (Brohi, 1977). Delayed justice is injustice and it generates an assumption that whether or not justice has been done. Delayed justice affects the well-being of a person. It also affects the fundamental rights of an individual. In Pakistan, expeditious justice has become a myth. The Pakistani legal system is unable to provide expeditious justice as it has become hope and the delayed justice has become fate. Justice in Pakistan is delayed as is evident from the backlog of pending cases in the courtrooms of Pakistani courts (Bilal & Farqaleet, 2021).

In August 2021, 2,177,527 cases were pending in the Pakistani courts. “54043 cases were pending before the Supreme Court of Pakistan and Federal Shariat Court; 350495 cases were pending in High Courts of Pakistan and 1,773,171 cases were pending in district courts of Pakistan” (Consolidate statement, 2021). However, in January 2021, 2162042 cases were pending in all courts of Pakistan (Statement, 2021). Hence, it is a fact that expeditious justice has become a myth in Pakistan.

Delayed justice causes an increase in the crime rate, and torture as well as promotes denominational conflicts in society. The technical defects in the Pakistani judicial system are the foremost causes of delayed justice. Due to less number of judges, the backlog of pending cases is increasing day by day which led to delayed justice. Moreover, less number of the courtroom, inadequate judicial staff and less budget, procedural and judicial delays, and unreasonable adjournments are also causes of delayed justice. Procedural delays occur due to the presence of old, complex, and intricate procedural laws in Pakistan (Bilal & Farqaleet, 2021).

It became very difficult for investors to invest in the business of a country that has a sluggish legal system. Pakistan is facing the same issue as the investors are not willing to invest in Pakistan as they are aware of the fact that the judicial system of Pakistan is weak and slow so they do not want any risk by making such investments. The entrepreneur and the capitalist are active people who do not take a risk by investing in a country having old and outdated laws. In the 21<sup>st</sup> century, business markups, profitability, and corporate competition have increased. However, the courts are still formal and are unable to provide speedy and amicable resolution of corporate and commercial disputes. The inflexible legal system has become an impediment to international trading opportunities in Pakistan (Ali & Mumtaz, 2020).

For the expeditious and amicable resolution of the dispute, Pakistan has to promote alternative dispute resolution and has to meet the modern age need by providing the speedy disposal of commercial and corporate cases. Equity and fairness do not only require justice but also need speedy justice by speedy disposal of the cases. Delayed justice, procedural complexities, judicial delays, and the backlog of pending cases in courts require the establishment and promotion of alternative dispute resolution techniques that are more vigilant in conflict resolution.

#### **Alternative Disputes Resolution in Civil Laws**

The concept of alternative dispute resolution has been entrenched in the civil laws of Pakistan. This segment discusses the existence of alternative dispute resolution in Pakistani civil laws. Section 89 (A) of the Code of Civil Procedure 1908 (hereinafter CPC 1908) encourages ADR with an aim of the expeditious disposal of cases. The court, after the perusal of the facts of the case, gets the consent of the suit parties for the adoption of ADR including the mediation and conciliation for the resolution of their disputes.

Moreover, Order X, Rule 1(a) of CPC 1908 states that:

“The Court may: (i) conduct preliminary proceedings and issue orders for speedy processing of the case; (ii) issue, with the consent of the parties, commissions to examine witnesses, admit documents, and take other steps for trial; (iii) adopt, with the consent of the parties, any alternative method of dispute resolution.”

*Messrs U.I.G. (PVT.) Limited through Director and others v Muhammad Imran Qureshi* describes the ways of ADR. It includes mediation and arbitration as the method that can be adopted at any stage of trial for quick resolution of disputes.

While the resolution of the cases of Small Claims and Minor Offences, under Rule 5 of Order V, a summary procedure can be initiated and adopted at the initial stages by summoning the parties for the final disposal of the case in front of a proper forum. Order X of CPC 1908 will be helpful for the expeditious disposal of the case after the reasonable and appropriate service of the summons. The expeditious disposal of the case can be made on the first hearing as well as adjournment can be granted, if it is required. The parties to the suits can produce the evidence if the dispute is going to be resolved in the first hearing. The disputes of such nature can be settled by the ADR and more specifically through mediation and arbitration. The court observed that the Pakistani legal system should adopt ADR to avoid delays during the conventional or conservative trial procedure. The court appreciated the applicability of the Small Claims and Minor Offences Courts Ordinance 2002 for the execution of the ADR. The High Court stated that the Salis should be appointed to try the claims up to Rs. 1,00,000. Salis will perform its role for quick disposal of the suit. *Muhammad Ramzan v Afridi Variety Center through Proprietor* can be cited.

Section 11 of *Dastoor ul Amal Diwani, Riasat Kalat 1952* promotes the amicable method for the resolution of conflicts. It obliged the Qazi to try for the reconciliation of the parties. This law rests well with the enlightenments of section 89(A) of the CPC 1908. However, the court specifically promoted conflict resolution between Hindu and non-Muslim communities through Panchayat and Jirga systems. *Muhammad Akbar Azad and another v Federation of Pakistan* can be cited in this regard.

Lahore High Court in *Messrs Alstom Power Generation v Pakistan Water and Power Development Authority* considered ADR as a means for amicable dispute resolution. The court stated that ADR is an inexpensive, less cumbersome, and less time taking method for the resolution of conflicts. The court called ADR a beneficial and fruitful method. However, the court specified the application of section 89 (A) and Order X, Rule 1(a) to the cases of commercial contracts. The court stated that for dispute resolutions in commercial contract cases, there is always room for negotiations. The court encouraged the companies and conflicting parties to adopt the ADR.

Additionally, in *Dr. Mrs. Yasmeen Abbas v Rana Muhammad Hanif and others*, Lahore High Court recognised ADR as a process that relieves the conflicting parties from the protracted agonizing litigation. The court stated the ADR helps to save the court's precious time. The case encouraged the parties to enter into a compromise in the dispute regarding the evacuee's property. The court stated that once the parties entered into the compromise agreement then they will be bound by it. However, this case generates an ambiguity about whether the consent of the parties is a sine qua non for adopting the ADR as the court had suggested entering into compromise without taking the consent of the parties.

There are requisites set by the law that should necessarily be fulfilled before adopting ADR like the court should take the consent of the parties for adopting ADR. Moreover, the law has not specified any civil cases in which ADR would be adopted. ADR according to the law can be adopted in any civil case or during any step of the proceeding so specifying the case where ADR is applicable is a subjective approach rather than specifying the realm of ADR, the courts should promote ADR.

Section 89 (A) of CPC 1908 read with Order X, Rule 1(a) describes mediation and conciliation as the method of amicable dispute resolution. Pakistani courts have encouraged some other methods that include mediation, compromise, reconciliation, negotiations, and arbitration. Hence, the methods of ADR are divided into two categories that are adjudicatory and non-adjudicatory. The adjudicatory method involves the unbiased third party for dispute resolution that pronounces its award after listening to the arguments of both parties to suit. This process is called Arbitration. In the non-adjudicatory method, the dispute is not settled by an impartial third party. The third party is incompetent in making decisions (Hensler & Deborah).

#### **Arbitration a Method of Alternative Dispute Resolution**

Arbitration is a quasi-judicial method of amicable dispute resolution outside the courtroom (Shafi, 1994). The Arbitration Act 1940 (hereinafter 1940 Act) and Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 describe the Pakistani law on Arbitration. Although the 1940 Act is an old document that is begging for innovation and modernity

by modification of its orientation with modern International Arbitration Laws, however, it is a commendable document that is shouldered with the precedents of Pakistani Courts. This segment focuses on the scope of Arbitration, how it is adopted and proceeds in the resolution of commercial disputes.

### **The Scope of Arbitration**

Arbitration resorts in cases where a conflict arises related to the arbitration agreement. It is a judicial determination and a method for the resolution of conflicts between the parties. There are necessary elements for arbitration. These include the existence of a controversy; presentation of the suit from both conflicting parties; production of the necessary evidence and record; application of the arbitrator's mind; making and implementation of the award (Ziauddin, 1999).

Arbitration is a process done without adopting any lengthy procedural formalities. All the technical procedures that are enshrined in the CPC 1908 are usually not followed in Arbitration (Port Services, 2006). Hence, it saves the parties from cumbersome civil litigation. It settles disputes within the ambit of substantive law (Nilofer, 2000). Arbitration encourages the resolution of conflicts through a third party having the trust of the conflicting parties. The conflicting parties choose the domestic forum of their own choice (Amanullah, 1997).

The courts work as the supervisor when arbitration is adopted for the resolution of conflicts (Adamjee, 2003). The court intervenes in cases where a miscarriage of justice occurred. The court can annul the arbitration agreement by giving reasonable justifications for the annulment of the arbitration agreement (Amanullah, 1997).

### **Arbitration Agreement and its Interpretation**

Section 2 (a) of the 1940 Act defines the Arbitration agreement. Section 2 (a) says that it is a written agreement that refers to the resolution of the present or future conflicts to arbitration. In this agreement, it is not necessary to mention the name of the arbitrator. However, there is no other method except the arbitration agreement for submission of the dispute to the arbitrator (Fazal 2011). Moreover, the award will be binding when it is made concerning the written arbitration agreement (Khadim, 2010).

The arbitration agreement should be a valid contract and should rest well with the requirements of a valid contract enshrined in the Contract Act 1872 (Karachi 2016). Additionally, when the terms and conditions of the arbitration agreement are uncertain, the agreement will be void pursuant to section 29 of the Contract Act 1872. (Noor, 1999) The arbitration agreement should be duly signed by the parties. The dispute will not be referred to or resolved by arbitration if the arbitration agreement is not signed by the parties. In absence of signatures, it will be considered that the parties have no mutual intention to adopt arbitration as a source for amicable dispute resolution (Saleem, 2009).

The arbitration agreement need not be incorporated in any kind of formal document; it can be embedded by adding a clause in the main contract (Saleem 2004). In an independent agreement, the existence of the arbitration clause will be interpreted accordingly (Surriya 2011). The arbitration agreement can be executed by the company's general manager when the board of directors empowered him by passing a resolution. An arbitration agreement on the behalf of any corporate body must be signed by any person that would be empowered by the board of directors. When any person not empowered by the board of directors signs an arbitration agreement on the behalf of the company; such person, on behalf of the company, will be incompetent to refer the matter to arbitration (Rehmat, 2009).

In *Mst. Surriya Rehman v Siemens Pakistan Engineering Company*, the claimant asserted to refer his dispute regarding the illegal termination of his job and recovery of damages to arbitration. The defendant asserted that the conflict disclosed in the plaint does not fall in the domain of the arbitration clause as the arbitration clause says that conflict arising "during the period of the job contract in connection with any of the terms and conditions of this job" will be referred to arbitration. The court considered the arbitration clause a bit ambiguous. However, the court held that the extent and scope of the arbitration clause were limited to the conflict arising during the job contract and the dispute of the claimant except the small portion falls in the ambit of the arbitration clause; however, the principal dispute fell in the arbitration clause's domain.

### **Arbitrator**

An unbiased and neutral third party that listens to the arguments of conflicting parties, and considers and records the evidence that makes an award is called an arbitrator. The arbitrator can be more than one in any arbitration proceeding. An arbitrator is a domestic tribunal that is controlled and composed of conflicting parties with an aim to resolve the matter amicably with minimum expenditure of time and money and without following lengthy procedures and technicalities of law (Waheed, 2002).

### **Power of Arbitrator and its Biasness**

Section 13 of the 1940 Act describes the powers of the Arbitrator. Section 13 reads as follows:

“The arbitrators or umpire shall, unless a different intention is expressed in agreement, have power to:

- (a) administer oath to the parties and witnesses appearing;
- (b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court;
- (c) make the award conditional or in the alternative;
- (d) correct in an award any clerical mistake or error arising from any accidental slip or omission;
- (e) administer to any party to arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.”

It is the power of an arbitrator to make an award according to the terms and conditions of the arbitration agreement and to give effect to that agreement. The arbitrator cannot make a new agreement on the behalf of the conflicting parties (Water & Power 2003). If any amount is due on the claimant, the arbitrator cannot grant any interest on such due amount, it is beyond its power (Province of Punjab 2006). The arbitrator cannot use any power which is not conferred to him by the law (Qutubuddin, 2014). He cannot ignore the principles of natural justice (Faqir 2013). Moreover, it is not the function of the arbitrator to use his experience in finding out the defects in the arbitration agreement (Pakistan 2002).

The arbitrator has the power to regulate his procedure and he is not bound to follow any particular procedure (Karachi Fish Harbour 2014). If the evidence has not been produced in front of the arbitrator then his finding should base on his findings on the record available to him (Al-Abdullah 2008).

The Supreme Court of Pakistan in Muhammad Farooq Shah v Shakirullah upheld that the arbitrator must not perform this function beyond his power. After entering into the arbitration proceedings, the arbitrator must not be guilty of performing any act that shows the biasness or partiality. The arbitrator must not be guilty of misconduct. Misconduct by an arbitrator occurs when he remains unsuccessful in performing his duties properly. Moreover, he committed failure in maintaining just treatment, biasness, and fairness or considering the facts or evidence reasonably or properly. Misconduct occurs when the arbitrator receives financial consideration while making the award. Misconduct of arbitrators prejudicially affects the interest of the parties. Misconduct of the arbitrator led to a miscarriage of justice (Civil Aviation 2003).

### **Award**

An award is a legally binding final decision made by an arbitrator. An award is a decision of a part or entire dispute that has been submitted to an arbitrator. The award made by the arbitrator must be signed and he shall give written notice to inform about the making of an award to the parties of the arbitration agreement and inform them to sign it. The arbitrator can ask the parties to pay the amount due regarding the award and arbitration. An arbitrator is a final judge and his award deserves respect and has high weight unless it has not been alleged with the misconduct and such misconduct has not been proved (Fazal, 2007).

The award is a final judgment. When one of the parties applied for the compromise in the court, the court refused to accept the plea and held that the issue had been already decided by making an award by application of the 1940 Act. Hence, the award should be restored without the intervention of the court of law (Gulraiz, 2006).

The award will be unlawful when the arbitration proceedings have been initialised by the person who was not empowered to initiate such proceedings. Hence, if this happened the petitioner can make an application under section 12(2) CPC 1908 against such award or arbitration proceedings

(Abdul Khaliq, 2007). The Supreme Court of Pakistan in *Muhammad Maroof v Muhammad Farooq* stated that the award can get the status of being a rule of court if it satisfies the following criteria.

“whether the submission of award with the signatures of two arbitrators was valid and was not in conflict with the terms of agreement according to which it should have been signed by the three arbitrators; and whether the award being beyond the scope of agreement between the parties could not be made rule of Court and the decree passed on the basis of award was nullity in law.”

In *Abdullah Contractors v Water and Power Development Authority*, the court stated that the arbitrator should after perusal of every point make the award. The court further stated that the award made without recording evidence can be set aside by the court. However, In *China International Water v Pakistan Water and Power Development Authority*, the court held that the jurisdiction of the court is not appellate but supervisory. The award made by the arbitrator is correct and has no mistake of law or fact, in such circumstances, the court is not competent to challenge the award or findings of the arbitrator. The court stated that the arbitrator should not frame the issues or he is not obliged to give reasons on each issue. Moreover, if any point or issue has been missed or has not been considered by him, this will not affect or invalidate the award. Although, this finding of the court was a bit unclear as if any substantial issue has not to be regarded then it can affect the award.

## CONCLUSION

The courts of Pakistan follow a lengthy procedure that causes delayed justice. Delayed justice is denied justice. Moreover, formal proceedings consume a lot of time and money. That is why the judicial system of Pakistan is losing the confidence of the public over time which can be maintained by dispensation of expeditious justice. Alternative dispute resolution techniques are frequently preferred for expeditious dispensation of justice and resolution of disputes. It is an effective method that follows no procedural formalities. It provides self-executable tailored resolution of conflicts. It saves money and time for the parties. Arbitration is a method of alternative dispute resolution. It is an effective technique for the resolution of commercial disputes. The lucidity of the arbitration procedures enhances the confidence of the parties and encourages them to choose arbitration for the resolution of their disputes. The procedural clarity of arbitration results in the socio-economic development of a country. The Pakistani courts promote arbitration as well. Additionally, alternative dispute resolution with respect to arbitration has a very bright future in Pakistan. It can promote investments either domestic or foreign in the country because it can encourage the investors by providing a road map of expeditious solutions to their disputes.

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