FOREIGN ARBITRAL AWARDS
(Hitachi Ltd. V. Rupali Polyester)[1]

Edited & Abridged
BY

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The legal facts and the legal questions of the case are that the petitioners and respondents did not reside and were not located within Pakistan. What would be its effect, inter alia, whether procedural law/curial law will be deemed to be lex arbitri or lex force i.e. the law of England under which the English Courts alone have jurisdiction. The Award arose out of an international arbitration agreement (I.C.C). The contract was to be governed and construed by law of Pakistan simpliciter. The factum that the contract was subject to arbitration under the Rules of Conciliation and Arbitration of International Chamber of Commerce will not divest the jurisdiction of the Pakistani courts as to substantive law.

In principle, an action can be maintained when a cause of action wholly or in part arises within the jurisdiction of Municipal Court and it is not necessary that foreigner has to permanently or temporarily reside within the limits of Municipal Court. If an award from an international arbitration agreement is to be filed in a Municipal Court in Pakistan the court will determine whether the Award has attained finality on account of Art-24, Rules of Conciliation and Arbitration of the I.C.C. **or for any other reason**. It is to be noted that the nationality of the award does not depend on the venue of proceedings but it may be treated as a domestic award. This aspect calls for the appreciation of anyone or more of the three laws i.e.

(i) proper law of the main contract.
(ii) Proper law of the arbitration agreement and
(iii) The curial law[2].

In this regard, following principles have been laid down by the Supreme Court in the judgment cited above:

(i) That the proper law of the arbitration agreement governs the validity of the arbitration agreement, which will include whether a dispute is covered by the arbitration agreement.

(ii) The constitution of the Tribunal is to be seen from the view point as to whether the question that an award lies within the jurisdiction of the arbitrator.

(iii) The formal validity of the award is to be looked into from the view point whether the parties have been discharged from any obligation to arbitrate future dispute.

(iv) That the curial law governs the manner in which the reference (terms of reference) is to be conducted, and also governs the

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[1] See Hitachi Ltd. and other v. Rupali Polyster and others, 1998 Supreme Court Monthly Review (SCMR) p.1618-1687.

[2] See generally M.J Chapman "Commercial & Consumer Arbitration, Statutes & Rules", (Glasgow 1997) (Black Stone Press Ltd.); Also see Alan Redfern and Martin Hunter "Law and Practice of International Commercial Arbitration", second ed. (London, Sweet & Maxwell 1991).

procedural powers and duties of the arbitrator and the questions of evidence.

(v) Curial law will govern the determination of the proper law of contract.

(vi) That the strength of "**The Seat Theory**" is that it gives an established legal framework to an international commercial arbitration, so that instead of "floating in the firmament unconnected with any municipal system of law", the arbitration is firmly anchored in a definite legal system.

That an international commercial arbitration is governed by the national law of the country in which it takes place in the absence of any express contrary agreement. In theory, it is open to the parties to specify a national law to govern the **arbitration proceedings** which is not the law of the country in which the arbitration is held, but the same may create complications.

(vii) That a challenge to the validity or effect of an award is addressed to a Court of competent jurisdiction. In general, this will be a Court **at the place in which the arbitration was held**.

(viii) That the possibility exists, in theory, at least, that an award might be challenged under the law of a country other than that in which the award was made, Germany is one of the few countries, which provide for the possibility of an award being set aside by their Courts if the award was made in another State.

(ix) That while the law of an arbitration agreement usually follows the proper law of the main contract, an arbitration agreement is separable from the main contract between the parties and arbitration agreement may have a different law which may be provided within the arbitration agreement.

(x) That the law of arbitration agreement regulates substantive matters relating to that agreement including in particular the interpretation, validity, voidability and discharge of the agreement to arbitrate and similar issues, relating to the reference and enforcement of the award. **An issue as to whether a particular dispute falls within the wording of an arbitration clause will, therefore, be governed by the proper law of the arbitration agreement**.

(xi) That like other jurisdictions, England regards it as essential for arbitration to have a "**seat**" a geographical location to which the arbitration is ultimately tied and **which prescribes the procedural law**.

(xii) That where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate, prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings.

(xiii) That the **procedural law of the arbitration** will determine, how the arbitrators are to be appointed, in so far as this is not

regulated in the arbitration agreement, the effect of one party's failure to appoint an arbitrator e.g. whether an arbitrator be appointed by a Court or whether the arbitration can proceed before the sole arbitrator appointed by the other party, and whether the authority of an arbitrator can be revoked. That law will also determine what law the arbitrators are to apply or whether the arbitrators have been guilty of misconduct.

(xiv) That the validity, effect, and interpretation of an agreement to arbitrate are matters of substantive law, governed by the proper law of agreement and not as a matter of procedure.

(xv) That it is for the parties not only to choose the law which is to govern their agreement to arbitrate, but also the law which is to govern the arbitration proceedings. If the parties fail to choose the law governing the arbitration proceedings, those proceedings will almost certainly be governed by the law of the country in which the arbitration must have begun.

At the end, it is imperative that the contents of Paras No.16,17 & 18 be reproduced:-

> "Since we have held that in view of Section-9(b) of the Arbitration (protocol and Convention) Act, 1937 the two awards in question cannot be treated as foreign awards as the same are made on an arbitration agreement governed by the laws of Pakistan, it must follows that the same are domestic awards and the provisions of the Act (Arbitration Act, 1940) would be applicable. This was even conceded indirectly by Mr. Bandial when he submitted that before the commencement of the arbitration proceedings an application under section 33 of the Act for challenging the existence or validity of the arbitration agreement or to determine its effect could have been filed. In our view, if an application under the above section was competent prior to the commencement of the arbitration proceedings in England, there cannot be any legal basis to urge that the Pakistani Courts had ceased to have jurisdiction upon the commencement of the arbitration proceedings in England in respect of the matters which fall within their jurisdiction. It may be pointed out that it is an admitted position that till today no application relating to arbitration in question has been filed in English Court, and, therefore, it cannot be urged that there may be conflicting orders/judgments.
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> It may be observed that clause (c) of section 2 of the Act gives the definition of the Court by providing that "Court "means a Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court". In other words, by virtue of above definition the same Court will have jurisdiction in respect of arbitration matter, which would have jurisdiction if the matter would not have been covered by the arbitration

agreement. It may further be observed that section 33 of the Act, referred to hereinabove, not only covers the question as to the existence or validity of an arbitration agreement but also of an award and also to have the effect of either determined.

It may further be observed that section 30 of the Act provides the grounds on which an award can be set aside. The said section reads as under:-

"30. An award shall not be set aside except on one or more of the following grounds, namely:-

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

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

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

"17. It would not be out of context to point out that the Pakistani Courts have the closest connection/nexus with the dispute in issue, inter alia, for the following reasons:-

(i) The agreement was executed in Pakistan.

(ii) The plant and machinery were supplied and installed in Pakistan:

(iii) The alleged breach was committed in Pakistan.

(iv) The agreement itself provides that the proper law governing it would be Pakistani law; and

(v) One of the parties to the dispute resides and carries on business in Pakistan.

It may further be observed that England's only connection or nexus with the subject matter of dispute is that the seat of arbitration is London. None of the parties reside or carry on business in England nor any cause of action has accrued therein."

"18- We are mindful of the fact that the parties should be made to honour their contractual commitment, particularly, involving multi-national parties as was observed by one of us (Ajmal Mian, C.J.) in the case of Messrs Eckhardt & Co. v. Muhammad Hanif (PLD 1993 SC 42, relevant portion at page 52) relied upon by Mr. Bandial, which reads as follows:-

"I may observe that while dealing with an application under section 34 of the Arbitration Act in relation to a foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are same compelling reasons, such an arbitration clause should be honoured as generally the other party to such an arbitration clause is a foreign party. With the development and growth of international Trade and Commerce and due to modernization of Communication/Transport systems in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the Court should not lightly release the parties from their bargain, that follows from the sanctity which the Court attaches to contracts, must be

applied with more vigour to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will tarnish the image of Pakistan in the comity of nations. A ground which could be in contemplation of party at the time of entering into the contract as a prudent man of business, cannot furnish basis for refusal to stay the suit under section 34 of the Act. So the ground like, that it would be difficult to carry the voluminous evidence or numerous witnesses to a foreign country for Arbitration proceedings or that it would be too expensive or that the subject matter of the contract is in Pakistan or that the breach of the contract has taken place in Pakistan, in my view, cannot be a sound ground for refusal to stay a suit filed in Pakistan in breach of a foreign arbitration clause contained in contract of the nature referred to hereinabove. In order to deprive a foreign party to have arbitration in a foreign country in the manner provided for in the contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or would amount to forcing the plaintiff to honour a different contract, which was not in contemplation of the parties and which could not have been in their contemplation as a prudent man of business."

Keeping in view the above dictum, we are inclined to hold that even it if is to be assumed that in procedural matters the Pakistani and English Courts have concurrent jurisdiction in respect of the arbitration in question, this Court will be reluctant to press into service the above concurrent discretionary jurisdiction."

The relevant part of last concluding Para No.19 reads as follows:-

> "In our view, the question whether the arbitrators should be removed or should not be removed is to be determined under the I.C.C Rules or by the English Courts which have jurisdiction to apply English curial law. However, it may be clarified that Pakistan Courts will be competent to go into the question, whether the arbitrators and/or the Chairman have misconducted themselves or the proceedings, while considering the grounds for setting aside the awards under section 30 of the Act."