

PAKISTAN

Mansoor Hassan Khan
Khan & Associates

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COMMERCIAL LITIGATION
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1. What is the structure and organization of local courts dealing with commercial claims? What are the main procedural rules governing commercial litigation?

Pakistan is a federation comprising four provinces and the Islamabad Capital Territory (ICT). Each province has a High Court which is the highest court of every province. The ICT has a separate High Court.

The Supreme Court is the highest court in Pakistan and the final appellate court. The High Court acts as the second appellate court, though it also acts as the trial court in certain matters. The Court of the District Judge or the District Courts are subordinate to the High Courts. The District Courts act as the first appellate courts and, in certain matters, as the trial courts and exercise administrative control over the courts below. Functions of the District Courts are also assigned to Additional District Judges. The Court of Civil Judge or the Civil Courts are generally the courts of original civil jurisdiction.

Civil and commercial litigation in Pakistan is regulated mainly by the Code of Civil Procedure, 1908 (the Code), rules laid down by various High Courts, as well as the Supreme Court Rules, 1980. Each High Court has the competence to make rules regulating its own procedure and the procedures of the District and Civil Courts that work under its supervision and control. A High Court can also modify or alter rules as contained in the First Schedule of the Code.

Since each High Court has the authority to issue rules to regulate its procedure as well as the procedures of the courts working under it, deviations exist among the practices of different High Courts and the subordinate courts. This chapter will outline practices and procedures which are common to all the High Courts in Pakistan at the time of writing. However, variations do exist among the practices and procedures of different High Courts and the subordinate courts.

The structure and organization of local courts that deal with commercial claims varies in each province and the ICT. In the Punjab and the Balochistan provinces, there are dedicated commercial courts that exercise original civil jurisdiction at the level of District Courts to decide commercial disputes. In Karachi, which is the capital of the Sindh province and the commercial center of Pakistan, all civil and commercial disputes of a value exceeding PKR 65 million, directly come before the High Court. In other districts of Sindh, all civil and commercial cases start in the Civil Court, regardless of the value of the dispute. Similarly, in the Khyber Pakhtunkhwa province (KPK), all civil and commercial disputes start in the Civil Court regardless of the value of the dispute. In the ICT, if the value of the dispute exceeds PKR 50 million, the case is instituted in the District Court while all other cases are instituted in the Civil Court.

For all the cases instituted in a Civil Court, the first appeal lies either before the District Court, or the High Court, depending upon the value of the suit. Against the order of a District Court a second appeal may be filed before the High Court, and from the order of High Court an appeal may be filed before the Supreme Court, which is the last appellate authority. Where a dispute is instituted directly before the High Court, the first order may be appealed before a two-member bench of the same High Court, through an *intra* court appeal, and the order passed in appeal can then be appealed before the Supreme Court.

2. What pre-action considerations apply?

Under some statutes, a notice of demand is necessary before filing a lawsuit. For instance, the Code requires that a two-month advance notice shall be delivered before a suit may be instituted against the government or a public officer in respect of any act carried out by them in their official capacity. Similarly, under the Companies Act, 2017, a 30 day statutory notice of demand is mandatory to establish that the company is unable to pay its debts, before any other proceedings may commence.

3. What are the main alternative dispute resolution (ADR) methods used to settle large commercial disputes?

The Code recognizes alternative dispute resolution methods such as mediation and reconciliation (ADR). However, consent of the parties is required before the court may adopt the ADR methods under the Code. The relevant provision of the Code on the issue of consent of the parties is ambiguous in Sindh. In large international commercial transactions, recourse is invariably made to international arbitration. Pakistani law differentiates between domestic and international arbitration and the resulting awards therefrom; each is governed and enforced under a separate law.

The Arbitration Act, 1940 (Arbitration Act) governs and regulates arbitration proceedings conducted in Pakistan and the enforcement of domestic arbitral awards.

The parties are free to adopt procedures of their choice for the conduct of arbitration proceedings. If the parties to an arbitration agreement cannot agree upon the appointment of an arbitrator within a prescribed time, either of them may approach a Civil Court, which will make the necessary appointment.

Where a party to an arbitration agreement governed by the Arbitration Act commences legal proceedings against another party to such arbitration agreement in respect of any matter agreed to be referred to arbitration, the Arbitration Act entitles such other party to apply, at any time before filing a written statement or taking any other steps in such legal proceedings, to the judicial authority before which the proceedings are pending to stay the legal proceedings.

4. How long, on average, do court proceedings take to reach trial?

The court proceedings immediately start after the filing of the plaint. It takes around two to four years to reach the stage where evidence of the parties is recorded. The conclusion of the trial before the court of first instance usually takes from three to seven years.

5. What disclosure obligations apply? Are parties required to disclose unhelpful documents as well as those on which they rely?

The Code empowers the court to make necessary orders, either on its own motion or on the application of a party, in matters relating to delivery and answering of interrogatories, the admission of documents and facts, and the discovery,

inspection, production, impounding and return of documents and other material objects.

A party may, with the leave of the court, deliver written interrogatories in a prescribed form to be responded to by the other party. Such interrogatories should relate to factual matters involved in the suit. The party being interrogated may object to any interrogatory on the ground that it is scandalous, irrelevant or not delivered with a *bona fide* intention. The court will grant leave only if that is necessary for saving cost or for fairly disposing of the suit.

The Code requires interrogatories to be answered through a sworn affidavit. Where the party being interrogated omits to answer, or answers insufficiently, upon the request of the other party, the court may make an order requiring such party to answer either by sworn affidavit or by *viva voce* examination. A party may use the other party's answers to interrogatories in evidence at the trial.

A party may also apply to the court for an order directing the other party to grant access to documents which relate to any matter in question in the suit and which are in such party's possession or power. The court may make an order for the discovery of such documents if it is necessary for saving cost or for fairly disposing of the suit. The party against whom such order is made shall make a sworn affidavit specifying the documents in their possession or power and the documents which they object to producing along with reasons for objecting.

The Code entitles a party to request that the other party produce any documents referred to in the other party's pleadings or affidavits for inspection and for taking copies. A party not complying with such notice may not put the requested documents in evidence unless they satisfy the court that there was sufficient cause for not complying with the notice.

In case of the refusal of a party to produce the documents sought for inspection, the court may make an order for inspection of such documents if it is necessary for saving cost or for fairly disposing of the suit. A party may also apply to the court for an order for inspection of any documents not referred to in other party's pleadings or affidavits. The court may make an order for the inspection of such documents upon satisfaction that the applicant is entitled to inspect such documents and that such documents are in the possession of the other party.

Where a party fails to comply with the court's order for discovery or inspection of documents, the court may make an order for dismissal of the suit for want of prosecution if the defaulting party is a plaintiff in the suit. If the defaulting party is a defendant, the court may make an order striking out their defense and placing them in a position as if they had not defended the suit.

A party may, through a written notice, call upon the other party to admit any document mentioned in the notice. Similarly, a party may, through a written notice, call upon the other party to admit, for the purposes of the suit only, any specific facts mentioned in the notice. In case of refusal or neglect of the other party to admit such documents or facts after the receipt of notices, the cost of proving such documents or facts shall be paid by the party so refusing or neglecting, whatever the result of the suit may be, unless the court otherwise directs.

It is, however, to be noted that the above legal provisions have more of an academic than practical value as the courts very rarely enforce them.

6. Can witnesses be required to attend trial and face cross-examination?

The procedure for adducing evidence is provided in the Qanoon-e-Shahadat Order, 1984 (QSO). As per QSO, oral evidence in Pakistan has three stages:

- examination in chief;
- cross-examination; and
- re-examination of a witness.

The party calling the witness is the first to examine them, after which the opposing party may cross-examine them. After cross-examination, the original party has the right to re-examine the witness.

The court can compel attendance of a witness by issuing a summons and may take coercive actions such as issuing warrants of arrest, committing to prison or levying a fine against a delinquent witness.

7. What discretion do the courts have in making costs orders?

In the ICT, mainly under the Costs of Litigation Act, 2017, a court is bound to award court expenses and legal costs to a successful party.

In the rest of the country, the area of cost is governed by the Code. The provisions relating to costs refer to the burden imposed on the losing side in a litigation to compensate the winning side for its expenditure. The order of costs forms part of the judgment. The Code provides that, subject to such conditions and limitations as may be prescribed, the award of costs shall be at the discretion of the court, and the court shall have full power to determine by whom or out of which property and to what extent such costs are to be paid, and to give all necessary directions in that regard.

Furthermore, the court has the power to award either actual costs, as provided under section 35 of the Code, or compensatory costs under section 35-A of the Code. Actual costs are awarded by the court to secure the expenses borne by the successful litigant in assertion of their rights before the court. Courts generally take the position that these costs are not awarded as a penalty or punishment against the unsuccessful party and that these cannot be the source of profit for the successful party.

Section 35-A of the Code deals with the award of compensatory costs in cases of vexatious litigation instituted with ulterior motives. In actual practice, courts rarely award costs in Pakistan. Sometimes the courts do impose compensatory costs in case of vexatious litigation.

8. What are the main types of interim remedies available?

A court may grant a temporary injunction in the proceedings pending before it if the court is satisfied that:

- the applicant has a *prima facie* good case;
- the balance of convenience lies in favour of the grant of injunction; and
- the applicant would suffer irreparable loss if the injunction is refused.

Courts in Pakistan have the authority to grant non-monetary relief:

- by taking possession of certain property and delivering it to a claimant;
- by ordering a party to do the very act which it is under an obligation to do e.g., grant a decree for specific performance of contracts or for mandatory injunction;

- by preventing a party from doing that which it is under an obligation not to do e.g., grant a decree for preventive relief by way of injunction, temporary or perpetual;
- by determining and declaring the rights of parties otherwise than by an award of compensation; or
- by appointing a receiver.

9. What approach do the local courts adopt with respect to arbitration? What arbitration law applies and is it based on the UNCITRAL Model Law?

In the Punjab, the KPK, the Baluchistan and the ICT, specific legislation is in place which encourages the resolution of civil and commercial disputes through ADR. The legislation for the Punjab, the Balochistan and the KPK remains ambiguous on the issue as to whether the consent of the parties is required before the court may refer a dispute between them to ADR. However, the legislation for the ICT is quite clear and requires the consent of the parties before a dispute is referred to ADR.

As discussed in Question 3 above, in terms of law applicable to arbitration, there is a dual system in Pakistan. Domestic arbitration is governed by the Arbitration Act, while international arbitration is governed by two separate enactments, discussed below.

Pakistan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Pakistan signed the New York Convention on 30 December 1958, and ratified it on 14 July 2005. On 15 July 2011, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the NYC Act) was enacted by the parliament of Pakistan in order to permanently implement the New York Convention in Pakistan.

The NYC Act applies to arbitration agreements made at any time, and to foreign arbitral awards made on or after 14 July 2005. It obliges a local court seized of a matter covered under an international arbitration agreement to stay the judicial proceedings pending before it upon an application by a party to such an agreement and to direct the parties to refer the matter to arbitration.

Pakistan is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the Washington Convention). Pakistan signed the Washington Convention on 06 July 1965, and ratified it on 15 September 1966. On 28 April 2011, permanent legislation to implement the Washington Convention in Pakistan – the Arbitration (International Investment Disputes) Act 2011 (the AIID Act) – was enacted by the parliament of Pakistan.

The AIID Act empowers the federal government to lay down the procedure for the registration of arbitral awards issued pursuant to the Washington Convention by making rules. The federal government is also empowered under the law to prescribe, by rules, the matters to be proved at the time of the filing of application for registration of such arbitral awards and the manner of proof of these matters. So far, no rules have been issued by the federal government in this regard.

Certain foreign arbitral awards issued pursuant to an arbitration agreement covered by the Protocol on Arbitration Clauses 1923 and to which the Convention on the Execution of Foreign Arbitral Awards 1927 apply may be enforced in Pakistan in accordance with the provisions of the Arbitration (Protocol and Convention) Act, 1937.

None of the enactments in Pakistan are based on the UNCITRAL Model Law.

10. Can arbitrators grant interim relief?

Under the Arbitration Act, an arbitrator can only issue interim awards. Section 41 of the Arbitration Act grants certain specific powers to a Civil Court in relation to arbitration proceedings. These powers include matters such as preservation, interim custody, sale of any goods that are the subject matter of the reference, interim injunction, appointment of a receiver, etc.

An important issue is whether or not a local court may be approached for the grant of an interim injunction in aid of arbitration proceedings being conducted outside of Pakistan.

There appears to be no provision in the AIID Act that may empower a local court to issue an interim injunction in aid of arbitration proceedings before an ICSID tribunal. Furthermore, the AIID Act does not contain an express provision obligating the local courts to implement an interim decision of an ICSID tribunal issued under Article 47 of the Washington Convention regarding provisional measures to preserve the respective rights of the parties.

The NYC Act is completely silent on the issue of interim relief by a local court in support of arbitration proceedings pending abroad. The Lahore High Court has decided in one case that there is no provision in the NYC Act that grants a local court the power to grant interim relief to a petitioner pending the decision of the international arbitral tribunal. Under the NYC Act, a High Court has the power to stay any legal proceedings instituted by a party in violation of an international arbitration agreement.

11. On what grounds can an arbitration award be appealed?

In the context of domestic arbitration, a court may modify or correct an award where the award is beyond the scope of the arbitration agreement, or if it is imperfect in form or contains an obvious error, or where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Under the Arbitration Act, a court can set aside an award if the arbitrator has misconducted himself or the proceedings, or if the award was made after the court had suspended arbitration, or if the arbitration proceedings had become invalid or the award was improperly procured or is otherwise invalid.

The Arbitration Act allows appeals against the following orders passed by the court:¹

- suspending an arbitration;
- on an award stated in the form of a special case;

¹ Section 39, Arbitration Act, 1940.

- modifying and correcting an award;
- filing or refusing to file an arbitration agreement; and
- setting aside or refusing to set aside an award.

There is no right of appeal in case of the enforcement in Pakistan of international awards under the NYC Act and the AIID Act. The NYC Act provides limited grounds under Article V of the New York Convention for the refusal of the enforcement of an international arbitral award.

12. What international conventions and agreements on enforcement of judgments or arbitral awards is Pakistan a party to?

For the enforcement of international arbitral awards in Pakistan see Question 9, above.

Pakistan has not ratified any major international convention for the enforcement of foreign judgments.

13. What types of judgments in commercial matters are enforceable and what types are excluded?

Enforceable judgments

Decrees that can be enforced include decrees under which a sum of money is payable but not in respect of taxes or any other charge of a like nature or in respect of a fine or penalty. A decree based on an arbitration award is also not enforceable in Pakistan.

With reference to superior courts of the UK, the decree includes judgments given and decrees made in any court in appeals against such decrees or judgments but does not include an arbitration award even if such award is enforceable as a decree or judgment.

Excluded judgments

Section 13 of the Code states that a foreign judgment is conclusive as to any matter adjudicated upon between the parties. However, a foreign judgment cannot be enforced in Pakistan where:

- it has not been obtained by a court of competent jurisdiction;
- it has not been given on the merits of the case;
- it appears on the face of the record to be founded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable;
- it has been obtained by fraud;
- it sustains a claim founded on a breach of any law in force in Pakistan; or
- it has been obtained through proceedings which were conducted against the principles of natural justice.

14. What is the process for registration of foreign judgments and arbitral awards?

Foreign judgments

In the ICT, the Sindh, the Balochistan and the KPK, section 44-A of the Code calls

for the enforcement in Pakistan of judgments of the superior courts of the United Kingdom and other reciprocating territories. Reciprocating territories are those states that the federal government declares in the official gazette as reciprocating territories for the purpose of section 44-A.

The superior courts of the United Kingdom mean the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland and the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Section 44-A was amended in the Punjab province in 2018, wherein all references to the superior courts of the United Kingdom were omitted. However, the Punjab province still enforces the judgments issued by the courts of the reciprocating territories.

If a foreign decree is from a non-reciprocating territory or was passed by a court other than a superior court of the UK or otherwise does not fall within the ambit of Section 44-A of the Code, its enforcement lies through filing a separate suit on the basis of the foreign judgment, treating it as a cause of action.

Procedure for the enforcement of foreign judgments

A foreign decree can be enforced through the filing of a certified copy of the decree in a District Court of Pakistan along with a certificate from the superior court of the reciprocating territory stating whether the decree has been satisfied or adjusted to any extent. The District Court in Pakistan will enforce the foreign decree as if it has been passed by such District Court. There is a presumption of regularity attached to a certified copy of a foreign decree that such decree was passed by a court of competent jurisdiction unless the contrary appears on the record. The onus of dislodging such presumption is on the person challenging it.

Domestic arbitral awards

Once the arbitrator has made the final award, they inform the parties and file the award in the court whereupon the court issues notices to the parties of the filing of the award. The court has the power to remit the award to the arbitrator for reconsideration where the award has certain infirmities. Where the court does not remit the award or sets it aside, after the time for making an application to set aside the award has expired, it shall proceed to announce the judgment according to the award which is followed by a decree of the court. The decree passed by the court may be executed by a party in whose favor it is passed by filing an execution application before a Civil Court of competent jurisdiction in the manner laid down in the Code.

Foreign arbitral awards

The New York Convention arbitral awards

Section 6 of the NYC Act obliges a local High Court, upon an application by a party in whose favour a foreign arbitral award is issued, to recognise and enforce the foreign arbitral award in the same manner as a judgment or an order of a court in Pakistan. A foreign arbitral award that is enforceable under the NYC Act is treated as binding for all purposes on persons between whom it was made. The court is entitled to refuse recognition and enforcement of a foreign arbitral award

only on certain grounds stated in section 7 of the NYC Act which are the same as those laid down in Article 5 of the New York Convention. After a foreign arbitral award is recognised by the court, it may be executed in the manner laid down in the Code.

ICSID arbitral awards

Section 3 of the AIID Act entitles a person seeking recognition or enforcement of an arbitral award issued by the International Centre for Settlement of Investment Disputes (ICSID) to have the arbitral award registered in a local High Court subject to proof of any matters that may be prescribed and to other provisions of the AIID Act.

An arbitral award registered under section 3 of the AIID Act is treated, with regard to the pecuniary obligations it imposes, as a judgment of a local High Court and is to be executed by the High Court in the manner laid down for execution of its judgments. However, enforcement of an award against the government may be refused by the court on the same grounds on which a court judgment may not be enforceable against the government.

The AIID Act bars local courts from applying the provisions of the Arbitration Act to proceedings initiated pursuant to the Washington Convention.

15. Once the judgment or award is registered, what are the available methods of execution?

Execution of the foreign judgments is explained in Question 14 above.

Under section 6 of the NYC Act, the court before whom the enforcement of foreign arbitral award proceedings are pending shall recognize and enforce the award in the same manner as a judgment or an order of a court in Pakistan. Order 21 of the Code deals with the execution of decrees and orders. Under Order 21, Rule 10 of the Code, a decree-holder has to apply to the court for execution, however, for the courts functioning in the Punjab province, under Order 21, Rule 10 of the Code, the court automatically converts the enforcement application into execution proceedings without the need for the applicant to file any additional pleadings once the enforcement is allowed by the court.

Pursuant to Rule 11(1), in case of a money decree, the decree-holder can apply orally at the time of passing of the decree for the execution of the decree by the arrest of the judgment-debtor, prior to the preparation of a warrant, if they are within the precincts of the court. Furthermore, under Rule 30, every money decree may be executed by the detention in prison of the judgment-debtor or by the attachment and sale of their property or by both. In practice, the punishments of arrest and detention are hardly ever awarded.

Under Rules 12 and 13, a decree-holder can apply for the attachment of moveable and immovable property of the judgment-debtor. Under Rule 64, the court executing the decree, may order sale of the property attached or any portion of it and the proceeds to be paid to the party entitled under the decree.

In case the judgment-debtor has any objection on the execution of a money decree, they may object to it under Rule 23-A(a) but on the condition that they either deposit the decretal amount in the court or furnish security for its payment.

Rule 41 states that in case of money decree, the decree-holder may apply to the court for an oral examination of the judgment-debtor regarding their debts and whether the judgment-debtor has any property or means of satisfying the decree. The court may make an order for the attendance and examination of the judgment-debtor and for the production of any books or documents.

16. What interim measures are available pending enforcement?

See Questions 8 and 10 above.

AUTHOR BIOGRAPHY

Mansoor Hassan Khan

Mansoor Hassan Khan is a partner in the law firm of Khan & Associates which has offices in Islamabad and Lahore. His practice focuses on commercial law and dispute resolution. He has advised international corporations on some of the largest transactions in Pakistan's history including the USD 2.6 billion acquisition of an equity stake by an international telecom company in a Pakistani telecom company and a USD 3.2 billion mining project in Pakistan and its subsequent international dispute resolution.

Mansoor Khan has obtained law degrees from Punjab University, University of London and Harvard Law School. He worked as a banking and finance associate for the New York office of a premier U.S. law firm before returning to Pakistan. Mansoor Khan has numerous citations as one of the leading lawyers in Pakistan from Chambers International and Asia as well as Legal 500.