Legal Framework Governing Foreign Arbitral Awards: From Hitachi Limited to Present

Introduction

The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("the **2011 Act**")—which implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention")—was enacted to "*liberalise procedures*" for recognition and enforcement of foreign arbitral awards in Pakistan.[1] Despite the enactment of this crucial legislation, the issue of "concurrent jurisdiction" of the courts of Pakistan over foreign arbitral proceedings and awards has remained open to debate. The genesis of this issue lies the Supreme Court of Pakistan's renowned judgment in ***Hitachi Limited v Rupali Polyester*** **1998 SCMR 1618** ("***Hitachi***").

In this article, we discuss the relevance of *Hitachi* in the legal scheme for recognition and enforcement of arbitral awards that emerged under the 2011 Act.

Hitachi

Hitachi arose from a contract between Hitachi Limited, a Japanese company, and Rupali Polyester, a Pakistani company. The contract between them was governed by the laws of Pakistan and provided for arbitration before the ICC International Court of Arbitration in London, United Kingdom.

When a dispute emerged between the parties, Rupali Polyester commenced arbitration proceedings in London. The arbitral tribunal issued an interim award, holding that Hitachi Limited's liability was limited under the contract.[2] The interim award was followed by a supplementary award. Rupali Polyester filed an application in Pakistan under Pakistan's Arbitration Act, 1940 ("the **1940 Act**") for removal of the arbitrators for misconduct and for a declaration that the arbitration agreement set out in the parties' contract had ceased to have effect. Hitachi Limited resisted these applications and objected to the jurisdiction of the courts of Pakistan over arbitration proceedings conducted in London under the ICC Rules.[3] This litigation ended up before the Supreme Court of Pakistan.

Before the Supreme Court, the parties conceded that the Arbitration (Protocol and Convention) Act, 1937 ("the **1937 Act**"), which implemented the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, did not apply to the arbitral awards.[4] Section 9(b) of the 1937 Act stated that it does not "*apply to any award made on an arbitration agreement governed by the law of Pakistan*."

The Supreme Court found that the arbitration agreement, being embedded in a contract governed by the laws of Pakistan, in the absence of any contrary express agreement between the parties, was also governed by the laws of Pakistan.[5] As the arbitration agreement was governed by the laws of Pakistan, the Supreme Court held that provision of the 1940 Act would be applicable and the courts of Pakistan had "concurrent jurisdiction" over the arbitral proceedings and the awards. The Supreme Court held:

- As laws of Pakistan governs the arbitration agreement, the courts in Pakistan have the jurisdiction over the issue of existence or validity of an arbitration agreement or an award and to determine the effect of either;[6] and, in this determination, the courts can go into the question of whether the arbitrators have misconducted themselves or the proceedings;[7] and

- As United Kingdom is the seat of arbitration, the courts in the United Kingdom have curial jurisdiction over the arbitral proceedings and the award (in relation to procedural matters).[8]

[1] *Louis Dreyfus Commodities Suisse S.A v Acro Textile Mills Ltd* PLD 2018 Lahore 597, Para 16
[2] *Hitachi*, Paras 1 and 2
[3] *Ibid.*
[4] *Ibid*, Para 16
[5] *Ibid*, Para 12
[6] *Hitachi*, Para 16
[7] *Hitachi*, Para 19
[8] *Hitachi*, Para 15

As such, the Supreme Court held that the courts of Pakistan and United Kingdom have "concurrent jurisdiction" over the arbitration proceedings and awards that arise out of an arbitration agreement governed by the laws of Pakistan and have the place of arbitration outside Pakistan.

The 2011 Act

The 2011 Act introduced a new legal framework for enforcing foreign arbitral awards in Pakistan based on (a) pro-enforcement policy,[9] (b) limited grounds for review of foreign arbitral awards,[10] and (c) allocation of the burden of proof on the award-debtor to establish grounds for refusing enforcement of an arbitral award (with the exception of grounds in Article V(2) of the New York Convention).

According to the 2011 Act, a "*foreign arbitral award*" is defined as an award issued in a Contracting State of the New York Convention.[11] This definition is consistent with Article I of the New York Convention, which states that the New York Convention applies to:

- Arbitral awards made in the territory or State other than the one where recognition and enforcement of such awards are sought (i.e., foreign arbitral awards); or

- Arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought (i.e., non-domestic arbitral awards).

The 2011 Act designated the place of issuance of the award—i.e., the seat—as the determining factor in deciding whether an arbitral award is one to be enforced under the legal regime of the New York Convention. At the same time, the 2011 Act allows the Contracting States to designate certain awards issued in their territory as non-domestic awards (to be enforced in terms of the New York Convention).

The 2011 Act confers *exclusive* jurisdiction on the High Courts,[12] which is one tier below the Supreme Court in hierarchy of courts, for proceedings related to the recognition and enforcement of foreign arbitral awards. By contrast, the jurisdiction under the 1940 Act rested with the Civil Court (which is the first instance court with plenary jurisdiction).

Section 10 of the 2011 Act repealed the 1937 Act. The ambiguity created by the Section 9(b) of the 1937 Act, therefore, has no place in the 2011 Act.

Despite streamlining the recognition and enforcement of foreign arbitral awards in Pakistan, the enactment of 2011 Act did not resolve the controversy about the application of 1940 Act to the arbitration awards issued outside Pakistan. The 2011 Act did not amend the 1940 Act, nor did it expressly address the principle laid down in *Hitachi*.

Subsequent Judgments

Following the enactment of the 2011 Act, the issue of "concurrent jurisdiction" of the courts of Pakistan arose in ***Taisei Corporation v A. M. Construction Company (Pvt) Ltd.*** PLD 2012 Lahore 455 ("***Taisei I***"). In *Taisei I*, the parties' contract was governed by the laws of Pakistan; the arbitration agreement provided for arbitration under the ICC Rules and in Singapore.

The Lahore High Court, relying on *Hitachi*, ruled in *Taisei I* that the arbitral award is not a foreign award as the governing law of the contract between the parties was that of Pakistan.[13] The Court held that the arbitral award in question had to be dealt with under the 1940 Act because it was a domestic award.[14] Further, as the 2011 Act does not specifically repeal the 1940 Act, the remedies provided under the 1940 Act remained available.[15]

[9] The New York Convention, Article III
[10] *Ibid*, Article V
[11] The New York Convention, 2011, Section 2(e)
[12] Section 2 (d) of the 2011 Act provides that the "Court" means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the official Gazette; Section 3 of the 2011 Act provides that, 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
[13] *Taisei I*, Para 29
[14] *Ibid*, Para 28
[15] *Ibid*.

Following *Hitachi*, the Lahore High Court in *Taisei I* held that, where the governing law of the arbitration agreement is that of Pakistan, the award arising from this agreement would be domestic one to be dealt with in accordance with the 1940 Act.

In separate proceedings between the same parties (and arising from the same arbitral award), the Sindh High Court differed from the Lahore High Court. In ***Taisei Corporation v A. M. Construction Company (Pvt) Ltd*** 2018 MLD 2058 ("***Taisei II***"), the Sindh High Court held that arbitral awards issued outside Pakistan were foreign arbitral awards and fell under the ambit of the New York Convention. The Court's determination turned on the simple fact of whether the award was one made (or issued) in a Contracting State. The Sindh High Court held that the High Courts have exclusive jurisdiction in proceedings for recognition and enforcement of foreign awards, as defined in the 2011 Act.[16]

The appeals from *Taisei I* and *Taisei II* are presently pending before the Supreme Court of Pakistan.

In the meanwhile, in ***Orient Power Company (Private) Limited v Sui Southern Gas Pipelines Limited*** PLD 2019 Lahore 607 ("***Orient Power***"), the Lahore High Court addressed the issue of concurrent jurisdiction of the High Court and the Civil Court in relation to the enforcement of foreign arbitral awards. The Court ruled that, under Section 2(d) read with Section 3 of the 2011 Act, the High Court has exclusive jurisdiction for the recognition and enforcement of a foreign arbitral award.[17] The Court noted that *Taisei I* relied on *Hitachi,* which interpreted the provisions of the 1937 Act. Following the repeal of the 1937 Act by the 2011 Act, the Court noted that an award made in a Contracting State is a foreign award, notwithstanding the governing law of the contract.[18] The Court further stated that "*it is totally impractical*" to allow the parties to approach the High Court and the Civil Court simultaneously for the enforcement of foreign arbitral awards.[19]

More recently, in ***A.M. Construction Company (Private) Limited v Taisei Corporation*** 2022 LHC 3489 ("***Taisei III***"), the Lahore High Court endorsed the principle laid down in *Orient Power*. The Lahore High Court held that, regardless of the governing law of the arbitration agreement, the High Courts have exclusive jurisdiction in relation to the recognition and enforcement of foreign arbitral awards, a foreign arbitral award being one issued in a Contracting State.[20] The Court confirmed that the judgement of *Taisei I* stands overruled by *Orient Power* judgment.[21]

Conclusion

In light of the recent decisions in *Taisei II, Orient Power and Taisei III,* the findings in *Hitachi* and *Taisei I* no longer remain relevant. *Hitachi* is also not a relevant precedent to the extent that it relied on the distinction between domestic and foreign awards in the 1937 Act. Despite the pendency of appeals from *Taisei I* and *Taisei II*, the approach that now appears to be consistently followed by the courts in Pakistan is that the High Courts have exclusive jurisdiction in relation to the recognition and enforcement of foreign arbitral awards which have been issued in a Contracting State.

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[16] *Taisei II*, Pg. 2065
[17] *Orient Power*, Para 10
[18] *Ibid*, Para 11
[19] *Ibid*, Para 11
[20] *Taisei III*, Paras 22 and 23
[21] *Ibid*, Para 29