Analyzing and Improving Application of Arbitration in Pakistan: A Comparative Approach

FINAL YEAR PROJECT UG 2016

BY

- M. TALHA SHAFIQUE - 175187 (G.L)
- RAYYAN AHMED SIDDIQI - 147390
- AMMAR MUHAMMAD - 178980
- KHURRAM NASEER - 183412

NUST Institute of Civil Engineering
School of Civil and Environmental Engineering
National University of Sciences and Technology,
Islamabad, Pakistan

(2020)

This is to certify that the

Final Year Project Titled

Analyzing and Improving Application of Arbitration in Pakistan : A Comparative Approach

submitted by

- M. TALHA SHAFIQUE - 175187 (G.L)
- RAYYAN AHMED SIDDIQI - 147390
- AMMAR MUHAMMAD - 178980
- KHURRAM NASEER – 183412

has been accepted towards the requirements
for the undergraduate degree

in

CIVIL ENGINEERING

_____

Advisor Name: Lec. M. Hasnain Ahmed

Designation (Lecturer)

NUST Institute of Civil Engineering

School of Civil and Environmental Engineering

National University of Sciences and Technology, Islamabad, Pakistan

ACKNOWLEDGMENT

We are grateful to Almighty Allah for giving us opportunity to complete this research document by granting us strength, courage and perseverance. Without the constant guidance and support from our Project advisor Lec. M Hasnain Ahmed and respected faculty of CEM department, this research would have been impossible to complete.

We would also like to thank Sir. Muhammad Ali, Senior Engineer (Contracts) NESPAK for inspiring us to work on this subject. Without his constant guidance and support none of this would have been possible. Secondly we benefited greatly from the experience of renowned arbitrator and contract specialist Sir. Liaqat Hayat. Without his guidance we could have never dealt with the more intricate matters of the subject. Lastly we would like to thank Sir Asad Baloch Assistant Director (Legal) NHA for providing us legal guidance and the much important case study.

ABSTRACT

Construction industry is responsible for generating huge revenues around the world. It has both private and public sectors incorporated in it. Due to its vastness conflicts occurrence in construction Industry are inevitable. Considering the place, time and work the professionals who are working in the Construction Industry try to resolve these disputes/conflicts with high efficiency and minimum cost incurred. Traditionally, Litigation was the go to methods for resolving the disputes but as world progresses various Alternate dispute resolution techniques have been introduced, among which arbitration is one.

Pakistan also uses Arbitration like the rest of the world. But the procedures and laws that are designed to carry out arbitration are old and ambiguous. This research aims at finding the problems of the arbitration act of Pakistan and compare it with the rest of world. And as a result come up with recommendations that can be incorporated in Pakistan's Arbitration Act. To achieve our objectives, we carry out a detailed literature review and compare various arbitration act of different countries and recommended a best arbitration procedure amongst those.

Then we got expert counsel on our recommendations on the basis of which we opted or rejected various points of our outcomes. Finally, the research was concluded with adding various recommendations that were based on steps required for improvement of Arbitration in the construction Industry of Pakistan.

TABLE OF CONTENTS

LIST OF TABLES:

LIST OF FIGURES:

CHAPTER-1

1. INTRODUCTION

1.1 Study Background

The construction industry has been considerably diversified as the expansion in knowledge, science and technology has advent due to compulsive building in the recent years. The complexity of projects in construction engineering has increased and the uniqueness of the time taking endeavors is noticeable. (Clough, Sears and Sears, 2005)

Most construction projects include 3 parties. Firstly, the owner (client), secondly constructors (contractors) and lastly designers (consultants). All work in a construction project is divided among these three parties. The owner decides what to construct and when to construct. For this the client hires consultants and contractors to carry out the work. This arrangement helps industry to economize the projects with regards to time, cost and quality as well. It is the inherent nature of such a project that it comes with its complexities in these three areas. Over runs in cost and time or a compromise in quality serves no one and due to the range of activities and personnel involved, having a contract at hand is of immense value.

An agreement between two entities or parties is termed as a contract. (Hinze.2010)

Under the section 2h of the Contract Act of 1872, a contract is an agreement or convent which is enforceable under law. While under the section 10 of aforementioned, it is stated that all the agreement made under the mentally and legally freewill of the parties is termed as contract. Once a contract, preferably written as it is easier to hold up in the courts of law, has been established, any deviation from it by all three parties involved on any of the metrics of time, cost and quality will result in a conflict of interest giving rise to disputes.

Disputes are inevitable in a construction project and this fact has been well established by experts and researchers around the world. (Cox and Thompson. 1997)

Disputes are inevitably a cause of concern and serve no one. Due to the considerable size and scale of infrastructure projects in the construction industry and the range of personnel working on them, unhandled disputes can prove disastrous not just for the

involved parties, but the industry and state at large. We must look at the methods to resolve disputes, therefore.

(Jannadia, Assaf, Bubshait, & Naji, 2000) terms dispute to be a reality of construction world and if no proper means are there to address these disputes they will grow with rising cost, time delays and chances of litigation in courts.

Litigation was(is) the conventional method of dispute resolution. Sue to the rising cost, time delays and litigation in courts new and less time-consuming techniques were formed to settle the disputed in the construction industry. (Fisk & Reynolds, 2010)

There is a move globally for quite some decades now to avoid litigation in construction disputes due to overburdened judiciaries with civil or criminal cases, the cost and time involved and due to the technical nature of such disputes. This gives birth to Alternative Dispute Resolution techniques.

These techniques ranges from simple negotiation, mediation to binding arbitrations. Experience shows that sooner dispute resolution than later in an un-confrontational method increases the chances to avoid litigation. (Jannadia, Assaf, Bubshait, & Naji, 2000)

We shall briefly look at these techniques and their linkages in this research. ADR moves away from litigation in steps. The first of these is arbitration. Several developed countries now rely on the more amicable settlement methods, but we believe Pakistan must first improve arbitration before it can do so too. Arbitration acts as a fire blanket for all other ADR techniques, without it one cannot rely on amicable settlements if there is no safety net in case a dispute spiral out of control.

The most alternative to litigation is traditional arbitration which gained popularity in the 1960s. Most of the contracts now include arbitration to be binding means of dispute resolution specially in private contracts. (Hinze, 2010)

The use of arbitration in Indian Sub-continent for dispute resolution is long and traditional because here a third party is used to settle the conflicts or dispute between other two parties involved. This form of arbitration can still be found in the forms of “Panchayats” and “Jirga” in Indo Pakistan region. (Khan, 2013)

The system of Panchayats was not abolished in the colonial rule rather it was encouraged and said if dishonesty or biasedness could not be proven then the final award could not be challenged. In 1859, the first act of arbitration was enacted which later after certain improvements and amendments formed the Arbitration Act of 1940 that continues to be the law of the land today.

On successful implementation of arbitration, the workload on the courts will be considerably reduce, also helping to increase the foreign investment in host country with many other advantages that include lower cost, decision finality, enforcement, privacy, flexibility and faster resolutions. In case of the developing countries, the academic literature regarding the implementation of Arbitration is scarce. We need to explore arbitration usefulness for economic development and social development or has some negative impacts as well. (Lessons from General and Varied Contexts, 2003 J. DISP. RESOL. 319, 341 2003)

Based on the above, this research aims to provide some literature on arbitration in Pakistan. The Arbitration Act of 1940 is a legal act to enforce arbitration rules and award declaration. This act is also used for conflicts or disputes resolution in the construction industry as well and this act is enforced by Pakistan Engineering Council (PEC), through standardized conditions of the contract.

The part played by arbitration in dispute resolution is critical. As the developed worlds are familiar to the advantages of the arbitration, many developing countries are just in initial stages to use arbitration in their dispute resolution techniques. (The Importance of the Rule of Law and Respect for Contractual Rights in Transition Countries, 17 EUR. BUS. L. REV. 327, 333, 2006).

Internationally arbitration has been revolutionized from its rudimentary roots to an organized affair with set and properly framed procedures to completely cover each and every aspect of the process as deemed necessary in lieu of justice. Different countries use different sets of rules to carry out arbitration including United Nations Commission on International Trade Law (UNICTRAL) act of arbitration, International Chamber of Commerce (ICC) rules of arbitration, American Association of Arbitrators (AAA) rules

of arbitration, International Center for Settlement of Investment Disputes (ICSID) rules of arbitration to offer flexibility and adaptability to parties and their specific circumstances.

1.2 Research Significance

There are 1.9 million cases pending in Pakistani courts, waiting for justice. In Pakistan, cases can sometimes take years to get solved if not longer, so the government has decided to set up a new system of model courts. (Al Jazeera's Kamal Hyder, 24 Apr 2019)

This statistic alone serves as the primary reason amplifying the significance of this research. 1.9 million is a big number that will involve cases of civil and criminal justice that are more critical in nature than disputes in construction industry (CI). Disputes in CI also typically take much longer due to their technical and complex nature.

Secondly, there is an inherent lack of sufficient literature on the subject. This research thus aims to build on the pioneering research of Mohsen Islam Khan titled 'Comparison Between Arbitration Proceedings Under Arbitration Act Of 1940 and International Rules Of Arbitration For Large Scale Construction Projects Of Pakistan' in order to first understand arbitration in Pakistan in terms of law and practice, with the help of case studies and then try to provide sources from foreign countries and international organizations that can prove to be beneficial in updating local arbitration laws. This will enable arbitration to fulfill its inherent purpose in the industry and the research will try to plug some of the gap in academia of the subject. It will also provide sufficient impetus and direction for future research.

This research then aims to establish differences among the arbitrational proceedings in different countries and compare them with those of Pakistan to improve and minimize the lackings in dispute resolution within the construction industry. We shall investigate the shortcomings of our arbitration practice and establish the basis for mitigating those shortcomings through changes in law and practice.

We also look at how Covid-19 has affected CI, particularly in term of disputes and how those are being resolved around the world. This will be the first thesis in this subject too.

The third and most important significance of this research is under the CPEC investment of $62 billion that is expected to rise in the coming years. As CI becomes ever more global, we must look to deliver infrastructure projects within planned constraints avoiding overruns of any sort. We also must see how Covid-19 may affect CPEC as China and Pakistan are among the top countries to be affected by the pandemic.

In the first six months of FY20, the fiscal deficit was at 2.3 percent of GDP which was 2.7 percent in the first half of FY19. The fiscal adjustment was achieved by increasing domestic revenue collections and by slowing the growth in non-interest recurrent expenditures. However, it s highly likely that the COVID-19 pandemic will put significant pressure on expenditures whereas revenue collections are expected to be negatively impacted. Pakistan's public debt which , by the end of FY19, was at 87.5 percent of GDP may rise as a result. (World Bank, 10 Apr 2020)

This is not just important for a relatively frail but promising economy like Pakistan's but also to ensure the best use of public money. Projects and litigation in Pakistan have seen delays of over decades taxing our dwindling resources heavily (Grand Hyatt, Islamabad has a case running 15 years now from the acceptance of bid). A well framed and structured mechanism to deliver speedy and efficient justice will be of paramount importance of this regard.

1.3 Problem Statement

Pakistan's arbitration law is archaic and completely ineffective. It leaves unbelievably large room for interpretation and discrepancies. With Pakistan's goals of a better economy, improved FDI and updated infrastructure it is critical to implement a modern arbitration law after comparison of the law in developed countries and tailoring it to our circumstances based on the data of local practices in arbitration. We will also have to be vigilant of how Covid-19 affects CI.

1.4 Research Objectives

Main objectives of the research can be defined as following:

1. To highlight and underscore the importance of usage of arbitration for timely resolution of disputes.
2. To analyze the different techniques accepted by developed countries to revolutionize arbitrational proceedings.
3. To highlight the shortcomings of the current arbitration act that is enforced in Pakistan.
4. To study international arbitration proceedings and use them to provide suggestions on developing the best arbitration procedure for Pakistan.
5. To provide a well-directed baseline and impetus for further in detail research on the issues of arbitration in Pakistan.
6. To try and learn how Covid-19 will affect CI and how can we mitigate its effects in Pakistan
7. We also look at any recent development on arbitration in Pakistan.
8. Use expert opinions of to ensure our recommendations align with ground realities.

1.5 Scope and limitations

The following points show the scope designed to conduct this research and also highlight the difficulties encountered during the compilation of this very research:

1. The primary objective or aim of this research is to highlight the differences in the techniques of arbitration used in Pakistan and developed nations and to use those findings to provide suggestions on how to improve the current arbitration proceedings in Pakistan.
2. The major comparison is among the use of Arbitration act of 1940 being used in Pakistan and the arbitration acts being used in the countries of Australia, Singapore and India, though we added a number of other countries for differing reasons.
3. The research being done on this topic is very limited in Pakistan which has slowed down the process of implementing better arbitration laws.
4. This research majorly relies on in depth and extensive literature review which was done to establish the differences among the Arbitration Proceedings of Pakistan and that of other developed countries.

5. We also take a look on the very relevant pandemic of Covid-19, that is currently unfolding around us at the time of compiling this thesis, and its affects on CI and disputes.
6. A very detailed analysis on the recent bills on arbitration was not possible due to their legal nature but we have still tried to produce their gist.
7. Due to time limitations and lockdown thorough and extensive interviews with professionals could not be completed as planned. They could also not have been conducted online because all our possible interviewees were overburdened with official and personal commitments in lieu of Covid-19. We still however managed to take some professional opinion where possible.

1.6 Summary

This chapter introduces the subject, developing a narrative form ground level. We look at why we are researching the subject and try to formulate the boundary of our research. We also constantly include references and statistics from renowned resources to establish the gravity of the matter.

CHAPTER-2

2. LITERATURE REVIEW

2.1 Introduction and Usability of Construction Contracts

In construction industry, the improvement can always be seen from the advent in the fields of science, technology and exponential expansion in knowledge which paved the way for modern construction techniques. In construction Industry the projects are unique, complex, expensive and time consuming. (Clough, Sears, & Sears, 2005)

The construction industry in Pakistan contributes 25.3% towards the GDP of country as shown in the IMF's 2011 report on GDP of countries all around the world. This figure shows the importance of the construction industry in Pakistan.

A contract can be termed as a legal commitment from one party to another. In order for a contract to be legal, it must fulfill certain criterion that includes intention of the parties, offer and acceptance between parties, consideration, legal capacity to contract, consent, legality and certainty.

For the successful completion of a construction project, contracts are used to set out condition that are mandatory to be fulfilled. The contract is placed to safeguard the interest of the parties involved in the contractual obligation and it also prevent gaining undue benefit by one party. Contracts explicitly state what is needed to be done and accomplished. On the unsuccessful completion of the contract, the contract conditions are used to determine the responsible party for the default or breach of the contract. So, it is important for the engineers to have a good grasp on engineering conditions. (Yates, 2011)

2.2 Standardization of Contracts and Bidding Documents

Due to high complexity of the construction projects in the present times, the importance for the standardization of contracts has become a necessity. By the experience gained in the past several years, the independent engineering organizations have developed standard forms for the contract agreement. This helps in creating a balance in the contracts and optimize the performance of the contracts. Greater clarity has been achieved by the use of standard contract conditions after the revision and modification

over time to show the certainty of the contract conditions. Furthermore, a greater uniformity for the evaluation and comparison of the works have been achieved when the work is done by the competitive bidding process. (Bunni & Loyd QC, 2001)

Pakistan Engineering Council (PEC) as a regulatory body in the country, for the procurement process and project work carried out the standardization of the contract documents in 1996 and prepared Standard form of Bidding Document for Civil/Construction Works. This document was prepared on the basis of FIDIC condition of contract 1987 to deliver an impartial and fair basis for contractual agreements. This document was approved and declared compulsory for all the engineering and technical organization to be used from federal to district level on 12th November,2007 (Pakistan Engineering Council,2007). We observe that will multiple new versions of FIDIC available, these too need to be updated.

2.3 Dispute Resolution in Construction Industry

In relation to construction contracts, disputes are inevitable no matter how much effort is done by owner, subcontractors or suppliers which increases the difficulty to draft a contract that can foresee all the contractual problems that can arise over time. (Yates, 2011)

It would be very unnecessary to delve further into this subject as it is already established that disputes are not just inevitable but frequently occur too. We shall now look at the techniques of resolution.

2.4 Dispute Resolution techniques

Broadly categorizing, there are two main processes

1. Formalized Dispute Resolution Process.
2. Alternate Dispute Resolution Process.

Wherein litigation and arbitration are termed as formalized dispute resolution techniques. (Cheung, 1999).

Yates identifies following techniques to be used for dispute resolution:

- Litigation.
- Arbitration.
- Contract Negotiation.
- Contract Mediation.
- Rent a judge.
- Mini trials.
- Dispute Review Boards.
- Court Annexed Arbitration.
- Summary jury Trials.
- Early Neutral Evaluations.
- Mediation/ Arbitration.

In the above-mentioned techniques, the last six techniques are also termed as Alternate Dispute Resolution Techniques (Yates, 2011).

Some experts also suggest that any technique rather than traditional litigation is considered as ADR technique as it is different than the conventional method for dispute resolution. It has been established that the net result of litigation is the loss of productivity, profit and quality as no one truly wins in litigation so therefore the company owners are more inclined towards the use of ADR for Dispute Resolution. (Clough, Sears, & Sears, 2005). The following figure clear depicts the usage of dispute resolution techniques being used in the construction industry.

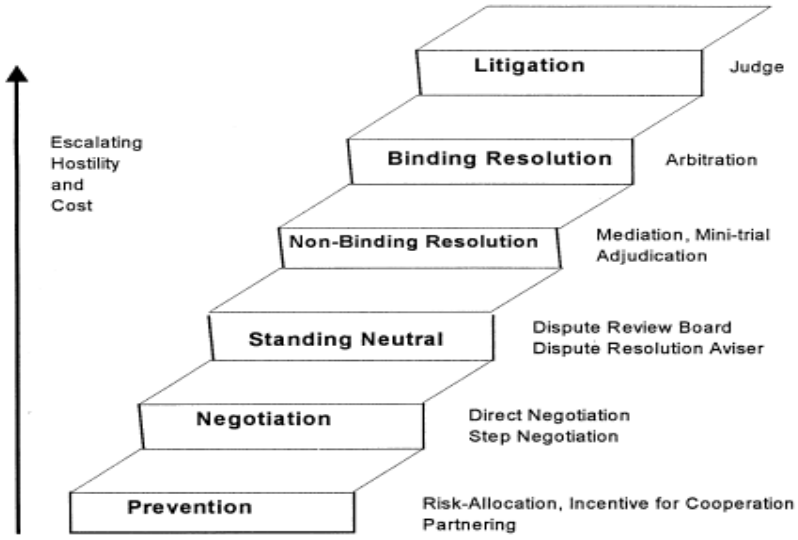


Figure 2.1. Step Chat for Dispute Resolution Techniques

The pros and cons of dispute resolution techniques evaluated against cost, time, right to appeal to decision and binding nature are shown in the table below.

Table 2.1. Dispute Resolution Techniques.

Settlement Cost	Time	Appeal	Binding Nature
Negotiation: 1. Very minimal 2. Cost of Compromised settlement.	1. Depends on the attitude and objectives of the negotiator. 2. Is usually very fast.	1. If no agreement is made can be passed to litigation or arbitration. 2.Waived in case agreement is made.	1. Can lead to an agreement. 2. Usually take it or leave it.
Mediation: 1. Cost paid to the mediator for his or her services.	1. Is alike negotiation. 2. Usually very fast. 3. There can be some limitation imposed by mediator.	1. Same as above	1. Same as above. 2. Moral pressure to make an agreement.
Mediation-Arbitration: 1. Cost paid to mediator for his or her services.	1. Procedure used dictates speed. 2. If formalities are waived, resolution is very fast.	1. Same as above	Can be settled in advance to be binding.
Arbitration: 1. Arbitrators compensation. 2.Filing fee.	1. Faster than litigation. 2. Preparation can take time.	1. No review of merits in the court.	1. may be binding or non-binding depending on the

3. Attorney's fee if any.	3. Availability of arbitrators can cause a problem.	Arbitrators does not need to explain the award in court.	conditions of the contract.
Litigation: 1. Very expensive in terms of time, cost and fees of attorney.	1. Can take up to years for completion. 2. Preparation itself, take a lot of time.	Right to appeal.	Binding

(Reproduced from the 9th Edition of "Construction Project Administration" By Edward R. Fisk PE and Wayne D. Raynolds, Refer Page no. 349.)

2.5 Arbitration in Construction

Some experts suggest that according to the condition of the contract's arbitration can be non-binding. (Yates, 2011)

We find that this proves to be troublesome and opens the floodgates to litigation. All other methods of dispute resolution are already non-binding. Arbitration should thus be a binding method to ensure litigation is avoided until absolutely necessary.

According to a popular opinion, arbitration is termed as an alternate dispute resolution technique, which if not present left litigation to be the only method for dispute resolution if the parties involved in a dispute do not mutually opt for any other method. (Hinze, 2010)

Arbitration can be defined as following.

> "Arbitration is defined as voluntary submission of dispute to one or more unbiased persons (known as arbitrators) for the resolution and final binding determination of award" (Fisk and Reynolds, 2010)

> "Arbitration is basically a process of in which a neutral and impartial third party or several persons are hired by parties to judge the evidence and listen to the arguments of the parties involved to provide a binding or non-binding final award." (Yates, 2011)

"Arbitration means referral of the dispute to one or more than one impartial and unbiased persons or parties for final and binding determination of award" (Cloughs, Sears and sears, 2005)

"Arbitration is one of the ADR techniques that is most similar to litigation. In which rather than presenting the case to judge or jury, choices of arbitrators are made by both parties for one or more panel of neutral arbitrators. Many exact same procedures that are used in litigation are also used in arbitration like discovery and preliminary motions. However, in arbitration arbitrators have the authority to direct those processes. The decision of arbitration is considered to be binding unless specified to be non-binding." (Tucker, 2005)

All of the above definitions explain arbitration but according to United Nations there is no official definition of arbitration and they provide elaboration for the characteristic of arbitration as follows:

1. Arbitration is a method used to resolve disputes. .
2. Arbitration is consensual.
3. Arbitration is a private procedure not public.
4. Arbitration leads to the resolution and final and binding determination of rights and duties of the parties involved.

The above-mentioned characteristics are the essence of arbitration. (Comparison Between Arbitration Proceedings Under the Arbitration Act of 1940 and International Rules of Arbitration for Large Scale Construction Projects of Pakistan).

2.6 Procedure of Arbitration

Procedure of arbitration varies deeply from country to country and that will be discussed but a generalized procedure of arbitration is explained below.

(Extracted from: (1) yates Engineering and construction laws and contracts, (2) Hinze, J. 2010 Construction contracts, (3) Clough, Sears and sears, Construction contracting.)

- **Intent of Arbitration:** Arbitration only begins when the parties under contract have tried all the other dispute resolution methods in contracts and show their intent to solve the dispute through arbitration. The intent usually includes nature

and description of dispute, costs, solution for conflict and a request to commence arbitration. This step is very important as because it gives a clear picture to both parties about the dispute and the finances that will be involved during arbitration.

- **Selection of Arbitrator:** After the intent to enter into arbitration, a sole arbitrator or an arbitral tribunal is selected through mutual consent of both parties in the contract. Selection of arbitrator is generally done under the rules of an institution. For small disputes, by the mutual consent of both parties a sole arbitrator is selected while in larger disputes both parties select their own arbitrators, those who then select a third arbitrator who acts as the head of the arbitral tribunal also known as referee. Arbitrators selected by parties should be neutral, experienced, unbiased and professionals having a sound knowledge of arbitration. More on this is discussed later.

- **Arbitration Proceedings:** After the selection of arbitrator, he/she will call a pre-referral meeting to have a clearer understanding of the dispute and also give the date for the formal hearing that comes next. Both parties are free to show evidence and express their views and arguments in support of their claim. They can also hire an attorney if it is necessary. The arbitration procedure is not formal as lawsuits and is more flexible in which parties can hire attorney if necessary and date and time can be altered by consulting parties and all of it can be discussed in a relaxed manner.

- **Arbitral Award:** After all the hearings and formal proceedings, arbitrator announces the award that states his decision and provide delineated justification. Usually the decision of arbitrator is binding and can only be challenged if:
    - Award is procured through fraud.
    - If arbitrator did not listen to some important piece of evidence.
    - Any misconduct on behalf of arbitrator.
    - Arbitrators do not give time to a party to gather evidence.

2.7 Arbitration act of 1940

In Pakistan, Arbitration Act of 1940 is being used to settle disputes under arbitration. The arbitration act of 1940 can be described in the following parts (Arbitration act of 1940):

2.7.1 Introduction

The title of the law is Arbitration Act of 1940 which has been enforced in the whole of Pakistan. “Arbitration agreement” is a written agreement to solve present or future disputes with arbitration. “Award” is basically an arbitration award. “Court” is a civil court which have this authority to decide the question regarding the subject matter of reference. “Legal representative” is that person who represents the matters of a person. “Reference” means in reference to arbitration.

2.7.2 Arbitration without intervention of court

The parties under arbitration can agree that the arbitrator or arbitrators can be appointed by a person designated in the agreement by name or as the holder of a particular office. Unless a contrary intention is shown in agreement, the authority of appointed arbitrator is not revocable except with thee leave of court. Arbitration agreement will not be discharged in case of death of any party involved and will still be enforceable against the legal representative of the deceased party.

In case of insolvency provision and clauses are provided which states that the court having authority in insolvency proceedings for an order directing that the question in matter shall be referred to arbitration in accordance to agreement. Court will have the power to appoint an arbitrator or umpire in case if the parties after differences have arisen do not appoint an arbitrator or if an arbitrator himself/herself neglects or refuses to act or is incapable of acting. Also, if the parties or arbitrators are required to appoint an umpire and they do not do so or they don't make the appointment within 15 clear days after the services of said notice, the authority is then transferred to court to appoint an arbitrator for them. We discuss the merits of court involvement later on.

The parties have this authority of appointing a new arbitrator if the appointed arbitrator denies to act or is incapable of acting. Three arbitrators will be appointed if it is provided in the agreement. One arbitrator will be selected by each party those who then will select third arbitrator or umpire. The court also has the authority to remove any arbitrator who misconducts himself and will not be entitled to any remuneration for the services he provides. We shall later discuss that this penalty is insufficient

The arbitrator will have the power to administer oath to the parties and appearing of witnesses and make the final award of the case. After the award is made, the arbitrator will sign the copy of award and notify the parties and on getting his fees, he will submit the copy of award with relevant documents in the court. The court has the power to modify the award in case there is some error or clerical mistake. The extents and merit of these corrections are discussed later in detail.

The court has the power to remit the award in case some matters have been left undetermined or not able to be executed. In this case, court will ask arbitrator to submit the new decision within specified time upon failure of which the award will become null and void. In case the court does not find any cause to remit the award or no application has been submitted will give its judgement according to the award. The court can also pass interim orders for speedy execution of award. In case if the award has become void, the court will issue an order that arbitration agreement will have no effect with respect to difference referred. There are serious issues with regard to lack of legislation here that we shall discuss, especially as to why we still need an interim injunction to speed up the process.

2.7.3 Arbitration with intervention of the court when no suit is pending

If any difference arises in the agreement and the parties have entered in an arbitration agreement, those parties can apply to a court having jurisdiction to the specified agreement, that the agreement can be filed in the court of justice. The application to be submitted is written to which the parties interested will be termed as plaintiffs and the other parties will be termed as defendants.

After the application has been made the court will give order to both the parties to present cause that agreement should not be filed. If they failed to do so the

court shall make an order to the appointed arbitrator or in case if no arbitrator has been appointed, appoint an arbitrator. And the arbitration proceedings will be governed by the other laws of the act. How assigning an arbitrator early on can be vital shall be discussed.

2.7.4 Arbitration in Suits

In any suit if the parties involved think that any difference among them is to be referred to arbitration, they can submit an application in court prior to agreement. As agreed, the arbitrator will be selected by both parties. The court shall order the arbitrator to refer the difference and time to make an award. If some parties included in agreement does not agree to arbitration the suit will go on for them and for parties having some difference to the matter can opt for arbitration. How arbitration needs to be compulsory for construction contracts shall be discussed, this provision however will still stand effective in civil matters.

2.7.5 Generals

In case the arbitrator does not state sufficient details for the award and there are questions regarding law which are arising out of award the court will remit award and give time to submit proper details on failure of which the award will become void. The arbitrator also has the power to make an interim award if no other intentions arises. The court can enlarge time in case it thinks that the time to submit award has expired or it needs more time. Arbitrator cannot do so without the consent of all parties.

The court can set an interest on the principal amount that it seems fit from the time the arbitration has commenced. The award can set aside apart from the reason that the arbitrator has misconducted himself or if the award was procured improperly. An award can be submitted any court of justice having jurisdiction over the matter. Arbitration agreement must be consented by all the applicants. If someone does not want to do it, he may submit an application in the court.

The judicial body may make an order staying the legal proceedings in the arbitration agreement if a party is ready and willing to do all the proceedings of

the arbitration. No reference nor award will be deemed in valid after the commencement of legal proceedings. The court has the power to make the order that a specific provision making an award may not apply to a particular difference.

All the provisions of Limitation Act of 1908 will be applied to the arbitrators. The arbitration will be considered necessary to commenced when one of the party serves on the other part in the arbitration agreement. Court can increase time to appoint arbitration or commence arbitration in case any party in arbitration agreement if the fixed time has expired. In case , if an award is set aside by court or an arbitration agreement is said to have no effect, the total time spent in proceedings to will be excluded for the start of legal proceedings. The courts involvement of implementing the award itself will be discussed too.

2.7.6 Appeals

The court shall be authorized by law to hear appeals on the following orders:

1. Superseding an agreement
2. Modifying or correcting an award
3. An award stated in terms of special orders
4. Filing or refusal of filing an arbitration agreement
5. Staying or refusal to stay legal proceedings in case of an arbitration agreement
6. Setting aside or refusal to set aside an award

Merits of these appeals shall be discussed.

2.7.7 Miscellaneous

A house court will have no jurisdiction over arbitration. The provisions of the Code of Civil Procedures 1908 will be applicable to all the proceedings of the court. Any notice in the act will be served through court, party or arbitrator according to the act. And if no provisions are provided will be delivered to the person on whom it is served. The court will issue processes to serve the parties and witnesses as similar to the one served during the suits.

The High court has authority to make rules consistent with in this act. All the provisions in the agreement are binding on the government. The provisions will be applied to all the arbitration except in case the act is inconsistent, or some changes have been made there under. The provisions of this act will not be applied to any pending issues at the commencement of arbitration.

2.8 PEC rules for Arbitration

(Rules of Conciliation and Arbitration: PEC, March,2009)

2.8.1 Introductory Rules

If two parties have a written agreement that all disputes will be solved by referring to arbitration under PEC Arbitration Rules, all the arbitration would be governed by these rules. Any notice is assumed to have been received by the party if it is delivered physically to any of his/her related places. Time period starts the day following the day when that notice is received by the party. In case of any official holiday or a non-business day, the period is then extended to next business day.

"CLAIMANT" requests to PEC to arbitrate which then gives "RESPONDENT" a notice of arbitration. Request for Arbitration include a demand, names as well as addresses of the parties, reference to the arbitration clause and contract, remedy sought, number of arbitrators. Rs.10,000 is processing fee that is charged on request to commence arbitration. The parties may be represented by persons they choose. Names and addresses of such chosen persons must be forwarded in writing to the PEC and the other party; it must be clarified that the appointment that is made is for representation or assistance puropses.

2.8.2 Composition of The Arbitral Tribunal

Either parties decide before (1 or 3) or PEC does it. If sole arbitrator to be appointe, it shall be done by the PEC on a request by either party. For construction and engineering services arbitrator shall be Professional Engineer. One arbitrator should be appointed by both parties in case of 3 arbitrators. These two would select the 3rd arbitrator who would preside. If parties do not appoint PEC does. Their documents are required by PEC.

Arbitrator can be challenged by any party, either who appointed him or the other one. Challenging party must notify all concerned groups about it. If other party agrees arbitrator is replaced. If it does not agree then no withdrawal occurs, and PEC decides the new arbitrator. If arbitrator dies, resigns or fails to deliver new is appointed. Hearings are repeated.

2.8.3 Arbitral Proceedings

Arbitral tribunal may conduct the unbiased arbitration. All documents are sent to all concerned parties or groups. Either party decides the place or tribunal does this. Award is made there. Language would be English unless decided otherwise. The claimant party shall write their statement of claim to PEC unless it was present in notice of arbitration and send a copy to all other groups. It includes names and addresses of the parties, facts, and remedy.

Respondent must write his defense statement to claimant and to each of arbitrators. Respondent and Claimant have the rights to make amendments to his claim or defense but within 15 days of proceedings. Even on matters which are outside the approach of tribunal, the tribunal must have the power to access them. If any of the parties have reservations regarding tribunal authority, then that plea shall be raised.

90 days is the limit of time period assigned for communication of all written statements which is fixed by tribunal, but this limit cay be extended if extension is justified. The arbitral tribunal may demand a summary of al the documents and evidence from the party to support its claim or defense, time period is decided by tribunal.

A notice must be sent to parties in advance to inform them about time, date, venue of oral hearing. All arrangements must be made by tribunal for translating statements and recording the hearing. Hearings shall be held in front of cameras to keep a record and for transparency unless the parties agree otherwise.

Written evidences of witnesses are accepted also. They just require sign of witnesses over their statement. If either of the party makes a request to tribunal, the arbitral tribunal may take any interim measures regarding the subject-matter of the dispute, including measures for the conservation of the goods or material that is forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

One or more than one expert is appointed by the tribunal to write a report to them on specific issues. A copy of it is sent to all. Parties can raise questions on it. They can defend blames in hearing. If during proceedings claimant fails to justify his claim tribunal issues orders of continuation of proceedings. If either of parties fails to show up on hearing, even after getting notice of it, without justifiable reason then the tribunal continues the arbitration.

Parties are asked if they want to provide more proofs, evidences, witnesses or any submission. If none then closure of hearing is declared. Reopening of hearings may be done before the award.

2.8.4 The Award

Notification of hearing completion should be sent to parties. Reasons should be mentioned too. 30 days is the time limit for arbitral tribunal to render the award after the hearing completion and submitting same to PEC. Award is made by majority; in case of no majority it is made by presiding one.

Tribunal shall also make some interim, interlocutory, or partial awards alongside final award. The final award shall be in written form and both parties are bound to follow it. Date and venue of award is mentioned on the award and it is signed too by the all arbitrators. In case any of them is absent a reason is mentioned there. Award should be filed with court within time span as mentioned in law.

In case of dispute, law designated by the parties shall be applied by the tribunal. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. If parties having conflict agree on a settlement before the award is made by tribunal, then proceedings are terminated or agreement is announced as award.

If the proceedings are impossible to carry forward or are unnecessary before the award is made, then they may inform parties about their aim to terminate the proceedings. Interpretation of award from tribunal may be demanded by either of parties. If within fifteen days after the receipt of the award, either party finds some error in award, it

should request tribunal for the correction by notifying other party too or the tribunal may do such corrections on its own too within 15 days after sending award to parties.

A party may request an additional award from tribunal as to claims presented in the arbitral proceedings but omitted from award within fifteen days after the receipt of the award. The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only: The fees of the arbitral tribunal, expenses of arbitrators, Cost of expert advice, expense of witnesses, the costs for legal representation and assistance of the successful, administrative expenses of the PEC.

The costs of arbitration shall in principle be borne by the unsuccessful party. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Rules 35 to 37. The PEC on acceptance of a request for arbitration shall request each party to deposit an equal amount as an advance for the costs. During the course of the arbitral proceedings the PEC may request supplementary deposits from the parties.

If the required deposits are not paid in full within thirty days after the receipt of the request, the PEC shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the PEC may order the suspension or termination of the arbitral proceedings. After the award has been made, the PEC shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

We discuss the problems with PEC rules as a whole and identify all areas that necessitate explanations to avoid the possibility of multiple meanings being inferred.

2.9: Arbitration in Australia:

(Arbitrational Procedures and practices in Australia by Leon Chung, Elizabeth Poulos, and Elizabeth Macknay.)

In Australia, a lot of amendments in the International Arbitration Act IAA are made, which now governs the arbitration acts in Australia, and which was based on UNICTRAL Model Law of 2006. Which has resulted in more affective arbitral proceedings which are also consistent with International Laws. In 2015, ACICA (Australian Centre for International Commercial Arbitration) celebrated its 30th

Anniversary. The ACICA rules were recently updated in 2011. Also, the IAMA (Institute of Arbitrator and Mediator) renamed as LEADR and Resolution Institute updated its rule in 2014 which includes rules for Fast Track Arbitration as well. ADC (Australian Dispute Centre) has been amalgamated from The Australian International Dispute Centre and Australian Commercial Dispute Centre to deliver dispute resolution services more efficiently both internationally and nationally.

2.9.1 Advantages of Australian Arbitration:

There are some significant advantages for solving disputes through new arbitration acts. Some of them are as follows:

- A more unbiased and neutral system.
- More privacy is ensured.
- More readily enforceable.
- A legislative framework which is more consistent to International norms and recently amended UNICTRAL Laws of 2006.

2.9.2 Validity Requirements for Arbitration:

Option 1 of Article 7 of the UNICTRAL Model Law requires that the parties agreement should be recorded. An Arbitration Agreement can either be in contract document in shape of a clause or can exist as a separate agreement (section 16 IAA; Article 7(1), Model Law). An arbitration agreement is a reference to any document containing arbitration clause in a contract (Section3 (5), IAA). A right on only one party to select to resolve a dispute by arbitration are enforceable in Australia by unilateral clauses.

The arbitration agreement will be treated as a separate from main contract unless the parties who are in agreement show any intention to the contrary. If any involved party breaches an arbitration agreement which is solve able by arbitration, Australian courts will enforce arbitration on the matter by ordering a stay on court proceedings (Section 7(2), IAA).

Australian courts will order a restraint on proceedings started overseas if there has been a breach in arbitration agreement. The third party can be joined in the arbitration if third

party has engaged in a fraud is a company that is related to the company bounded by arbitration agreement.

2.9.3 Selection of Arbitrators

The arbitrators must be neutral, impartial and independent. Parties are allowed to select any number of arbitrator but failure to do so will result in selection of three arbitrators. The procedure to appoint arbitrator has been provided in Article 11 of MODEL LAW. Parties are free to decide a method to select arbitrators but failure to do so will result in the procedure described by MODEL LAW:

In any arbitration having three arbitrators, each involved party will select one arbitrator and then the selected arbitrators will select 3rd arbitrator. If a party is not able to appoint an arbitrator within 30 days of call by other party or the two arbitrators fails to appoint final arbitrator within 30 days of their appointment, the appointment will be made by relevant arbitral institute on request from a party. From 2011, ACICA has been the sole default appointing authority under the amended International Arbitration Act of 1974 to perform the arbitrator appointment (Regulation 4, International Arbitration Regulation, 2011).

2.9.4 Removal of Arbitrator

The procedure for challenging arbitrators has been appointed in the Article 13 of the MODEL LAW. Parties have this free will to decide a method to challenge an arbitrator failure to do so will result in the default procedure as described in the MODEL LAW. Any party who feel this need to challenge arbitrator must send a statement with reason of their challenge to arbitration tribunal within 15 days after becoming aware of the fact that arbitrator is not unbiased and impartial or lack qualifications over which parties agreed upon.

The arbitral tribunal will give the final decision on the challenge unless the other involved party agrees to the challenge or the allotted arbitrator withdraws from his or her office. If the challenge is not successfully resolved the challenging party within 30 days of the notice receiving of the decision rejecting the challenge, may request that the court decides on the challenge.

2.9.5: Commencement of Arbitration:

Article 21 of the MODEL LAW provides that, unless otherwise agreed upon, the arbitration proceedings start on the date on which a request to the dispute be referred to arbitration proceedings is received by respondent. It is necessary commencement of the arbitration that a notice is delivered for arbitration proceedings. The notice is served on the opposing parties of the agreement.

The claimant party nominates arbitrator or arbitral tribunal in notice of arbitration end to the opposing parties. A good practice for Notice is to include name and addresses of the parties, nature of dispute and relief sought. The claimant should also indicate his preference for the location of arbitration location if it is not specified.

2.9.6 Applicable rules and arbitrators' power

The procedure rules are often determined by parties if not so the arbitrators or arbitral tribunal decides them after consultation with the parties. The incorporation of institutional rules or ad hoc rules in arbitration agreement is not necessary but they can save time by providing a framework for conducting arbitration. An alternative is to set the complete arbitration proceedings in the agreement.

Article 19 of Model Law allows parties to select rules for the proceedings but failure to do arbitral tribunal will subject to provisions of Model Law and conduct arbitration proceedings as they see fit. The powers conferred in the arbitral tribunal for the proceedings of arbitration includes the power to determine admissibility, relevance, material and weight of any evidence.

The power of tribunal is subjected to Article 18 of Model Law that states that each party will be treated equally and will be given full opportunity to present their case. Article 24(1) provides that if parties have agreed that no meeting will be held, the tribunal will hold hearings at an appropriate stage of the proceedings of the arbitration. Article 24(3) of Model Law provides that all the evidence and documents submitted by one party to arbitral tribunal will be communicated with the other party as well.

The tribunal does not have the power to force a party to disclose any document, but party can apply to the court for subpoena. Under the section 23 of International Arbitration Act (IAA) as additional provisions to the one in Model Law, parties can

apply to court for a subpoena to a person to attend for examination before tribunal or produce the documents specified in subpoena. But such application can only be done with the permission of arbitral tribunal (Section 23(2), IAA).

A party can apply to court for orders under section 23 A of IAA if a party fails or refuses to do as told by tribunal in which case the court can order the person to attend the court for examination or provide the required documents to the court. (Section 23 (A), IAA). Under Article 27 of Model Law, the arbitral tribunal or a party involved in arbitration proceedings can request assistance from the court in taking evidence. The court will execute the request according to its rules on taking evidence.

2.9.7 Evidence and Confidentiality

By Article 19(1) of Model Law, Parties are free to determine any procedure they see fit on failure of which the arbitral tribunal will have the power to conduct arbitral proceedings which include the relevance of evidence as well. Article 24(3) also states that all the documents, statements and relevant documents supplied to the arbitral tribunal to by one party to be share with the other parties in arbitration.

If the parties included in arbitral proceedings agrees to include section 23C to 23G of International Arbitration Act in arbitral proceedings on an opt-in basis, then there are addition provisions which specify the parties not to disclose and confidential documents and information saved for some specific cases. Section 23 E sets out the condition in which the tribunal for arbitration may allow for the disclosure of the confidential documents.

In 2010, some specific amendments to IAA to specify provisions regarding confidentiality in commercial arbitral proceedings being conducted in Australia. The parties or arbitral tribunal cannot disclose confidential information unless the provisions of Section 23C, IAA are met. The confidentiality clauses in the IAA are applicable to the arbitral tribunal and parties as well. The confidential information includes any claims, documents or statements submitted to arbitral tribunal, evidence, notes made by tribunal, award and rulings of the arbitral tribunal.

2.9.8 Courts and Arbitration

Courts will only intervene in arbitral proceedings, if asked by parties or the tribunal. Article 5 of Model law states that where expressly provided in Model Law, there is no scope for court to intervene in the arbitral proceedings. Section 39 of IAA specifies matter to which a court must take in regard when intervening in an arbitral proceeding under the relevant sections of Model Law and IAA.

Australian courts are considered to be in favor of arbitral proceedings. If a court is considering to intervene in an arbitral proceeding, section 39 of IAA requires court to have regard for the objectives of IAA to facilitate international trade and commerce by enforcement of arbitral award and the fact that arbitration is meant for timely and impartial resolution of dispute by certainty and finality of award.

2.9.9 Appeals

Under Article 34 of Model Law, an application can be brought in the court that is the place of arbitration to set aside the arbitral award under section 18(3) of IAA. Under Article 34 of Model Law, an award can be set aside only if it meant specific provision as provided under the article.

2.9.10 Costs

The permissible fee structure for the arbitral proceeding vary among different jurisdictions in Australia. Section 27 of IAA states that the fees and expenses of the arbitrator will be at the discretion of the arbitral tribunal heading the proceedings. The general norm in Australia is that cost will follow the event and the winning parties will at least recover some portion of the cost they had paid.

2.10 Arbitration in Singapore

(Recent Developments in Singapore on International, Commercial Arbitration by Warren B Chik.)

In 2002 Singapore updated its Arbitration Act and International Arbitration Act.Early work was carried out nearly a decade back whilst the Singapore International Arbitration Centre (SIAC) was fostered in July 1991 with the aid of the authorities followed by the validation of the International Arbitration Act in 1994, which included

the UNCITRAL Model Law on Commercial Arbitration. This goes to show how long and tedious of a process establishing such institutes can be and the resulting success amplifies the need to do so.

These advancements were completed to promote Singapore as a hub of arbitration for the decision of worldwide disputes by means of neighborhood and overseas events involved in international, and largely commercial, transactions. The SIAC was installed as Singapore's reply to popular arbitral corporations. Its goal was to implement arbitration as an achievable alternative to litigation and to captivate remote places "arbitrants" to Singapore by establishing an international base of qualified and well experienced arbitrators.

As arbitration developed in Singapore, they were able to identify and mitigate issues because of the large number of cases and versatile data sets at their disposal. It is in the nature of arbitration that the parties' willingness on the whole determines the regulation applicable to the agreement and to the complaints. Arbitrations are not held in a vacuum and a site is chosen; Singapore started becoming that site. Arbitrating parties could stick to the Singaporean law model or more importantly, in rare cases expressly choose the law of another place.

Regulation was vastly improved by using the court docket's developing pool of decisions. This enabled setting precedents and kept clarifying the law.

For the first time, on 6 June 2003, the courts of Singapore had the possibility to take stance on the issue of confidentiality among the parties intending to an arbitration and the panel of arbitrators. Particularly crucial became the question of whether or not, and if so to what extent, documents and facts utilized in arbitration are confidential and ought to not be divulged in subsequent lawsuits or to the public.

It is the nature of arbitration to be held in person and this very fact appeals most to its users. The right to confidentiality inside the conduct of arbitral proceedings is generally provided for in institutional arbitration policies. Unlike most court docket litigation, the rule of thumb is that the overall public is commonly no longer allowed to attend arbitral hearings and have no right of get admission to the written information of the court cases. Common regulation jurisdictions have also upheld this rule as an implicit knowledge in an agreement to arbitrate.

On the alternative hand, confidentiality in arbitration has given rise to inconsistent and disparate treatment among jurisdictions. For instance, underneath English regulation, there is a preferred rule of confidentiality with regards to documents and records generated or produced inside the direction of arbitral complaints. The cases have upheld an amazing degree of protection in opposition to disclosure concern to the exceptions which have slowly been carved out through subsequent case regulation. On the opposite hand, in Australia and the US, there is no standard responsibility of confidentiality in any respect.

2.11 Arbitration in Georgia

(Rescuing Arbitration in the developing world: The extraordinary case of Georgia, Steven Auster miller.)

2.11.1 Demographic History

Arbitration has a long history, re-emerging in 20th century. In a developed country it is ubiquitous and emerging in developing countries too. Georgia is a post-communist, post-war country that has undertaken extensive structural reforms and is now on the doorstep of European Union membership. Georgia is small country located between Europe, Asia and Middle East. It has nearly 5,000,000 people. King Bagrat III made it modern but then Mongols destroyed it. In Russian Revolution, Soviet troops occupied the state and later it produced Joseph Stalin and Eduard Shevardnadze. Later Georgia got independence and many transfers of power occurred inside state, instability prevailed, and several wars were fought too. Georgia is currently operated as semi-autonomous state, controlled by Russia. Georgia made progress; Rose Revolution was one of main cause. The country grew and by 2013 ranked 8th in World Bank's Doing Business rankings. With all this improvement in trade and investment sector it needed improved dispute resolution structures. General public had low level of trust in courts. Arbitration is a useful remedy to all this.

2.11.2 Arbitration History

Arbitration is an old concept in Georgia and implemented there for centuries. Soviet Union introduced two arbitration initiatives when they occupied Georgia. One was

"Arbitrazh Courts" to deal with domestic economic activity. However, it was believed that judges were biased in this system. Second was "Foreign Trade Arbitration Commission" for international disputes. Even in this concept there were doubts about system's impartiality.

- **Private Arbitration:** Arbitrazh Courts were abolished and "Law on Private Arbitration" was introduced. Commercial entities were authorized to provide dispute resolution services. Tribunal had to render award within 30 days or else resign leaving parties to start over. It has many shortcomings, so its implementation was disastrous.
- **Criminal Arbitration:** In Georgia's criminal arbitration system, an extensive network of neighborhood under world members engaged in dispute resolution. These Thieves-in-Law (TIL) and their subordinates were respected members of Georgian society and were called upon to help resolve neighborhood, family, and business disputes.

2.11.3 Georgia's New Arbitration Law

It is known as "Law of Georgia on Arbitration" (LOA), came into effect in 2010. It follows UNCITRAL Model Law on International Commercial Arbitration. It provided courts a constructive role in arbitration.

- **Sub-Sections:**
- **Scope:** Not every matter could be arbitrated. Especially property disputes and disputes of private character.
- **Form of Arbitration Agreement:** Agreement must be in writing and signed.
- **Composition & Jurisdiction of Arbitral Tribunal:** Appointment of arbitrator, rules and process are important factors. Challenge procedures are essential too.
- **Jurisdiction:** The LOA envisions full acceptance of the competence-competence doctrine found in the Model Law. The competence-competence doctrine holds that an arbitral tribunal has the authority to determine whether it has jurisdiction over the dispute.
- **Interim Measures:** LOA provides interim measures in line with Model Law.
- **Arbitral Proceedings:** LOA provides equal treatment of parties and opportunity to present one's case, provides party autonomy in determining rules

of procedure, place of arbitration, right of representation, choice of language, choice to determine form of procedure.

- **The Award:** LOA follows Model Law in providing for parties, freedom to choose. Substantive rules re followed. Award must be in writing and signed by all. Also, LOA provides a possibility of negotiated settlement.
- **Recourse against Awards, Recognition and Enforcement of Awards:** Approach to recourse against awards and recognition and enforcement of awards is preserved in LOA.

2.11.4 Statutory Recommendations

1. **Better Clarity on Scope:** LOA states that it applies to property disputes of a private character.
2. **Consider Ex Aequo Et Bono and Amiable Compositeur:** The LOA omits the Model Law's section allowing for the parties to decide a case on the principles of ex aequo et bono (according to the right and good), or as amiable compositeur. Both concepts provide for decisions based upon general principles of equity and justice.
3. **Alter the Requirement to Consider Industry Practices in Awards**: LOA requires tribunal to take into account usages and practices of trade.
4. **Promote the Remission Process:** The process is necessary to promote rule of law, respect for tribunals, improved awards, and to preserve arbitration autonomy.
5. **Streamline Enforcement for Foreign Awards:** it is not easy but through amendment it could make clear that this is exclusive and cannot be expanded.
6. **Clarify public policy:** An effort should be made to clear this.

2.11.5 Results of the Arbitration Act

Despite problems Georgians continued to stick with arbitration, which is positive sign. Recommendations should be look into. Lot improvement have been done in this law still this work should remain in progress. Some shortcomings should be addressed to make it more authentic. Other countries can learn from Georgia's struggle in Arbitration System.

2.12 Arbitration History of India

Arbitration proceedings in India are conducted under the Arbitration and Conciliation Act 1996 (the Act). The main arbitration bodies in India are the Indian council of arbitration, the international Centre for alternative dispute resolution, the Bombay chamber of commerce, and the Indian merchants' chamber. Each organization has its own set of arbitration rules.

Much like in Pakistan, Indian arbitration has grown from the panchayat to British inspired Arbitration Act 1940. In an effort to update the law, Arbitration and Conciliation Act 1996 was formulated, this time inspired by UNCITRAL Model Law. This meant that the 1940 Acts constant need of the court's involvement had now been overwritten. The court however still has full power to removal or alterations in the award or the arbitral tribunal itself on account of assessed misconduct. Obvious misconduct includes bias and partiality but not limited to. The conduct of arbitral proceedings is left open to the tribunal and parties to decide. Further research should formulate guidelines of the following:

- Rules of Procedure
- Place of Arbitration
- Language
- Statement of claims and defenses
- Hearings and written proceedings

It is also realized that despite the intent of formulation of a set of guidelines, it is in nature the very inherent flexibility of these proceedings that make differentiate them from court hearings.

Advantages experienced in India

Courts of almost every developing country face massive backlog. Arbitration removes this burden, faster hearings and less paperwork handled by people with more relevant knowledge means you reach a decision more efficiently. Flexibility and privacy alone are two traits that players in the industry hold dear due the ever-changing nature of projects and subsequent disputes.

Moving on from the 1996 Act

Due to revisions deemed necessary, several attempts were made in India to amend the act, only the third in 2016 was successful. This on its own proves the slow-moving legislation and the very need to indigenously handle construction disputes by arbitral proceedings.

Actual Updates

After the well-known BALCO judgment in India a complete bar was put on Indian courts to exercise any sort of jurisdiction over foreign seated arbitrations. This avoided numerous practical difficulties in dealing with the law of two different nations simultaneously in lieu of a single case.

Under the 1996 Act, a judge could refer a dispute for arbitration if applied for by either party. The referral mechanism was cumbersome and impeded issuance of such references. In the 2015 Act, the process was eased to the point of application for arbitration being possible even if the judge believed differently or the original arbitration agreement between the parties was held hostage by either of them.

It was usual for parties to sleep over the commencement of arbitration proceedings once an interim injunction had been obtained. A thorough guideline and time bracket was established to ensure that both parties, after issuance of an interim injunction had positive intent to start arbitration proceedings within reasonable time to ensure issuance of award within stipulated time.

Appointment of arbitrators is the sole choice of parties involved, with mutual consensus. In case of a deadlock however, either party could refer to the courts where the ‘Chief Justice’ would excise judicial powers for the necessary appointments. The Amendment Act changes the authority from the Chief Justice to the courts and uses administrative powers instead of judicial to allow the courts to pass on appointment of arbitrators to non-judicial put professional parties. Even more importantly the high court was allowed to determine a mechanism for arbitrator fees, unique to this part of the world. Two extremely important schedules were added, one enlisting the grounds for justifying the doubts in independence or impartiality of the arbitrators and the other entailing relationships between the parties an arbitrator that would make them ineligible for appointment.

The Amendment Act enforces the passing of an award within 12 months, extendible by 6 months on mutual consent between parties after which extensions and penalties go into the domain of the courts. Clauses for fast track arbitration were added to pass award within 6 months, especially useful for smaller claims.

The 'costs follow the event' followed internationally was added to ensure expenses other than legal fees were now the regime.

If an arbitral award contradicted public policy, moral or justice or even Indian law, it was referred to the courts in an attempt to reopen the case. The Amendment Act restricts this to be challenged only on the account of patent illegality, only in domestic arbitration and without entering into a merits review or evidence.

Room for improvement

In this round there is no mention of emergency arbitrators, as there is in 2013 Hong Kong International Arbitration Centre (HKIAC) Rules, London Court of International Arbitration, International Chamber of Commerce and the Singapore International Arbitration Centre. For interim injunctions, the doors of courts still have to be knocked, defeating the purpose of arbitration itself. It is not seen as a good practice.

Secondly, the arbitrability of disputes involving fraud has remained ambiguous and differing on a case to case basis in Indian records. This is a subject necessitating much more thorough and in-depth research.

Lastly, the merits of stipulating the time period remain uncertain. How will possibly most awards be judicially passed within this time, satisfying both parties and who and how will ensure these time constraints.

2.13 Arbitration in Developing Countries

(Arbitration and Developing Countries by Joseph T. McLaughin)

Investor invests in market to get a return with minimum risk. Entrepreneur assures him that the risks would be acceptable. Both of them want efficient resolution if dispute arises which is provided by Arbitration.

2.13.1 Growth in International Arbitration

Expansion of commercial relations between nations has proved the necessity of Arbitration. It has become preferred solution recently. For trade to run smoothly, disputes must be resolved promptly. National courts increase risk, time, and price to solve international conflicts. Also, it is in convenient for foreign parties. So, Arbitration is more flexible than legislation.

2.13.2 Views of Developing Countries

Developing countries have realized that there is a change in nature of foreign investment lately. After their independence they focused on developing and marketing their natural resources to the world. Though due to lack of experience they do depend on external sources of investment, they are also desired investment markets, but risks are involved too. Agreements are done between investors and these countries and in case dispute arises arbitration is a go to mechanism for them because going to national courts will not suit the investor especially due to risk of biasedness. Still not all disputes are solved through arbitration. To ensure the effectiveness of arbitration they must anticipate the practical and legal consequences of the inclusion of an arbitration clause by taking into account the views of the developing country should select, where appropriate, the recognized arbitration rules most suited to the agreement, and draft specific language governing arbitration under the agreement.

2.13.3 Special Problems in Negotiating Arbitration Clauses with Parties in Developing Countries

Choice of forum: Developing countries do not wish to resolve conflicts through western-oriented arbitration body and investors do not wish that local courts of that country resolve the conflict. So, in this case they opt for third party from some other country but if government of developing country is involved, this third-party solution is against their interest and they desire to resolve it with in borders.

- **Choice of law:** Choice of governing law is also a problem, some use rules of International Chamber of Commerce some insist to apply their own rules because they believe International laws are biased in favor of west.

- **Arbitral issues:** At some instances, countries did refuse their commitment to use law defined by tribunal and preferred national procedures. However, several cases demonstrated that the argument is not readily accepted internationally.

2.13.4 Major Systems of Arbitration

A party can choose from a wide variety of arbitration systems. They differ in cost, fees, method, procedure, rules, and content of award. Some well-known systems are:

1. The Rules of the International Centre for the Settlement of Investment Disputes ("ICSID" or "Centre").

2. The Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") (1975).

3. Commercial Arbitration Rules of the American Arbitration Association ("AAA") (1977).

4. United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL") (1976)

5. Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") (1976).

- **ICSID Arbitration:** It is an intergovernmental agency, limited to disputes where one party is state. It includes western nations and developing countries of Africa, Asia, Middle East and Caribbean. Latin America not a part of it. It is used to facilitate investments in developing countries. It is assured that no interference would occur in proceedings. The appointed tribunal is empowered to determine its fees and expenses within the limits set by the Administrative Council. The Centre provides arbitration rules which may be amended to suit the particular needs of the parties. There must be an uneven number of arbitrators. A majority of the arbitrators must be from countries other than those of the parties. The tribunal's arbitral award is not subject to any appeal and this rule cannot be changed by agreement.

- **The ICC Court of Arbitration:** Provides a specialized mechanism. Fees and the administrative charges are based not on the amount of work performed. Procedure and rules are somewhat vague. If parties fail to agree on arbitrators, then it is done by National Committee. The drafting and execution of the terms of reference are required by the ICC Rules.
- **The American Arbitration Association:** AAA rules puts some limits to administration expense. Also, their charges are lower comparatively. Rules are specific. Arbitrators are decided by mutual consent of parties. No terms of reference present in AAA.
- **Arbitration Under the UNCITRAL Rules:** UNCITRAL Rules are comprehensive. Costs and fees are reasonable, additional costs re included with in the arbitral award. Procedure Rules are similar to AAA Rules. It allows parties to choose arbitrators. No terms of reference provided by rules.
- **Rules of the Arbitration Institute of the Stockholm Chamber of Commerce:** Final costs are somewhat predictable. No fee schedule is here. SCC Rules are like rules of ICC. Parties have no choice to select from arbitrators. No provision in rules exist for terms of reference.

2.13.5: Drafting the Arbitration Clause:

To draft an effective arbitration clause, counsel should be familiar with developing country and rules of international arbitration systems. Definition of disputes that are arbitrable, method of selection of arbitrators and laws and rules of arbitration must be considered. Parties can either select arbitrators themselves or can rely on rules of some arbitration center. Chairman of tribunal plays a critical role. Parties could also identify the governing law.

CHAPTER-3

1. METHODOLOGY

Due to the lack of sufficient literature on the subject of arbitration in Pakistan, this research is primarily aimed to form as an impetus for iterating arbitration's importance and as a baseline for future research.

We start our process by understanding the Arbitration Act of 1940, PEC rules and New York Convention 1958. We then move to select countries for comparison on basis of maximum diversity and possible learnings from their histories of arbitration. We cover Australia, India, Palestine, Georgia and Singapore in this regard. We also look at arbitration in developing countries in general.

From these understandings we try to formulate a sample specific procedure of arbitration after comparing the procedures of the above countries.

Despite here say that case studies on arbitration will be difficult to find in Pakistan, in our experience we found an immense willingness of the industry to provide data and constant support in understanding the legal language there in. We thus cover two case studies, one due to the relatively small nature of the project but the dispute carrying over a decade. The second was chosen on the basis of an immense number of claims, a good number of which proved false. The nature of snowballing of claims was well demonstrated in it.

With all this understanding and exposure to the subject, with the help of experts, we produce discussions and suggestions on many different areas of all of the above. We look at what to pick form which country to implement locally, suggest a wholistic model of arbitration in Pakistan and delve into clause specific errors in the Arbitration Act of 1940. Various ground measures like degree of privacy, enforceability and neutrality were taken into account.

We also look at the effect of Covid-19 on contracts and disputes. We were also unable to conduct detailed interviews on our findings with experts because of Covid-19.

CHAPTER-4

4. DISCUSSION AND RESULTS

4.1 Developing a Procedure of arbitration by comparison

The following is an attempt to produce a sample procedure for arbitration in Pakistan.

4.1.1 Arbitration Procedure of Pakistan:

7. Notice of Arbitration.
8. Representation of Assistance.
9. Number and selection of Arbitrators. (within 30days of receipt of notice)
10. PEC selection. (If parties do not select then PEC will give a list for 15 days)
11. Challenge the arbitrator. (Within 15 days of selection)
12. Replacement of arbitrator. (According to above conditions)
13. Repetition of Hearings. (In case of replacement of arbitrator all hearings to be repeated)
14. Place of arbitration. (If parties fail to be determined by Arbitration tribunal)
15. Language. (If parties fail to be determined by Arbitration tribunal)
16. Statement of Claim. (Time to be decided by Arbitral tribunal)
17. Statement of Defense. (Time to be decided by Arbitral tribunal)
18. Amendment to statements. (within 15 days of submission of defense statement)
19. Pleas as to the Jurisdiction of the Arbitral Tribunal.
20. Further written statements. (Time and need to be decided by tribunal)
21. Periods of time. (Not exceed 90 days but can be extended if needed by tribunal)
22. Evidence and hearing. (Decided by tribunal, oral hearings will be notified at least 15 days before)
23. Interim measures of protection. (Decided and enforced by tribunal)
24. Experts. (If needed will be decided by tribunal)
25. Default. (If parties failed to answer in allotted time)
26. Closure of hearings. (When there is no more evidence to be submitted)
27. Waiver of rules. (By parties after closure of hearing)
28. Decision. (30 days after closure)
29. Communicate (within 15 days)
30. Total time. (Within six months from notice to award submission)

31. Forms and effects of awards. (To be submitted to concerned authorities)
32. Interpretation of award. (Within15 days of receipt of award)
33. Correction of awards. (Within 15 days of receipt of award)
34. Additional award and finality. (Within 15 days of receipt of award)
35. Deposit of cost. (Within 30 days as advance as per PEC instructions)

4.1.2 Arbitration in Australia:

1. Validity: (Arbitration agreements must be in writing reflecting option I of Article 7 of the UNCITRAL Model Law (section 16, International Arbitration Act 1974 (Cth) (IAA)))
2. Notice of Arbitration. (To be sent by claimant and should include the name of arbitrators.)
3. Representation of Assistance.
4. Number and selection of Arbitrators. (Article 10 of MODEL Law)
5. Arbitral Institute selection. (Article 11 of MODEL Law)
6. Challenge the arbitrator. (Article 13 of MODEL Law, within 15 days of getting evidence)
7. Replacement of arbitrator. (If have no evidence retract their application within 30 days)
8. Place of arbitration. (Claimant should indicate his preferred place in the notice.)
9. Applicable rules. (Article 19 of Model Law)
10. Evidence and hearing. (Decided by tribunal, Article 23,24 (1 & 3))
11. Confidentiality. (Section 23 IAA)
12. Interim measures of protection. (Article 17 of Model law)
13. Ex parte. (Article 17 B of Model Law, Section 18 B of IAA)
14. Security. (Section 23 of IAA)
15. Rights to Appeal. (Article 34 (2) of Model Law)
16. Closure of hearings. (When there is no more evidence to be submitted)
17. Award. (Article 34 of Model Law)
18. Respond (within 14 days)
19. Cost. (Section 27 of IAA)

4.1.3 Arbitration in Singapore:

The procedure of mediation varies in different cases, however coming up next is a rundown of the typical strides in arbitration proceedings in Singapore:

1) **Starting the Arbitration** – A party wanting to begin arbitration will document a notification of arbitration and give out this notification on the other side.
2) **Selecting Arbitrator(s)** – Arbitrators can be designated straightforwardly by the parties, by existing council individuals (for instance, where each side names one arbitrator and those picked referees delegate a third arbitrator) or by an outside party (for instance, by a court or an institute picked by the parties).
3) **Introductory Congregation** – A structure and timeline is decided for arbitration in a meeting of parties with the appointed arbitrators.
4) **Claim Statement –** The Plaintiff will embark an outline of the issues in dispute and the cure looked for.
5) **The Response Statement** – The Defendant shall concede or contradict the claims. The Defendant may likewise present a Counterclaim.
6) **Disclosure/revelation and Inspection** – The sides shall trade applicable papers and afterward examine each other's records.
7) **Evidence** – The parties will provide genuine and master composed proof.
8) **Hearing** – The place and time would be decided mutually by the parties and the tribunal. The parties will ordinarily be approached in the first place with opening entries. The consultation at that point continues to prove in-boss and interrogation of witnesses (real and additionally master). At last, parties might be welcome to make closing remarks orally towards the end of the meeting or potentially recorded as a hard copy after the finish of the meeting.
9) **Award** – The arbitral council will compose its choice as an honor which the effective party would then be able to authorize against the losing party.

4.1.4 Arbitration Procedure of Georgia:

Based on the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 (the Model Law)

5. Arbitration Agreement.
6. Composition of Arbitral Tribunal.
7. Number of Arbitrators consists of one or several arbitrators defined by parties.
8. Appointment of Arbitrators: each party shall appoint one arbitrator, and the two arbitrators appointed in accordance with this rule, shall appoint the presiding arbitrator within 30 days. There could be sole arbitrator too.
9. Challenging an Arbitrator: Selection of an arbitrator could be challenged.
10. Termination of Authority of an Arbitrator:

11. Appointment of Substitute Arbitrator:
12. Determination of Rules of procedure: Determined by parties
13. Place of Arbitration: Either parties or tribunal decide
14. Commencement of Arbitration Proceedings:
15. Notification of Arbitration:
16. Representation in Arbitration Proceedings: Party has a right to be represented by a lawyer.
17. Language in Arbitration Proceedings: Decided by parties or tribunal
18. Statements of Claim & Statements of Defense: Submitted within selected duration.
19. Wavier of right to object.
20. Form of Arbitration Proceedings: If not decided by parties, oral hearing is held by tribunal.
21. Absence of party on hearing: Hearing continues
22. Evidence and court assistance in obtaining evidence:
23. Decision making by panel:
24. Settlement: Occurs during proceedings and proceedings is terminated.
25. Arbitration Award:
26. Correction or Addition to award:
27. Setting aside an arbitration award: Done by court if award is challenged by some party.
28. Recognition and enforcement of award:

4.1.5 Best Arbitral Procedure after Comparison:

1. **Validity:** (Arbitration agreements must be in writing.) (Australian: Article 7 of the UNCITRAL Model Law (section 16, International Arbitration Act 1974 (Cth) (IAA)))
2. **Notice of Arbitration:** A party wishing to commence arbitration (the "**Claimant** ") will file a notice of arbitration and serve this notice on the other party (the "**Respondent**" and should include the name of arbitrators.) (Australian: Article 21 of Model Law)
3. **Appointment of Arbitrator(s)** – Arbitrators can be appointed directly by the parties, by existing tribunal members (for example, where each party appoints one arbitrator and those chosen arbitrators appoint a third arbitrator themselves)

or by an external party (for example, by a court or institution chosen by the parties). (Singapore:)

4. **Challenge the arbitrator**: (Article 13 of MODEL Law Within 15 days of getting evidence) (Australian: Article 13 of MODEL Law)
5. **Replacement of arbitrator**: (If have no evidence retract their application within 30 days) (Australian: Article 13 of MODEL Law)
6. **Place of arbitration**: (Claimant should indicate his preferred place in the notice.) (Australian: Article 21 of MODEL Law)
7. **Preliminary Meeting** – The parties and arbitral tribunal will meet to discuss and agree an appropriate process and timetable. (Singapore:)
8. **Statement of Claim** – The Claimant will set out a summary of the matters in dispute and the remedy sought. (Singapore: Section 6(1) of Arbitration Act))
9. **Statement of Response** – The Respondent will admit or deny the claims. The Respondent may also introduce a Counterclaim. (Singapore: Section 6(1) of Arbitration Act)
10. **Further written statements**: (Time and need to be decided by tribunal) (PEC: Rule 22)
11. **Evidence** – The parties will exchange factual and expert written evidence. (Singapore:)
12. **Hearing** – The hearing will take place at a time and location agreed between the parties and the arbitral tribunal. The parties will usually be asked to begin with opening submissions. The hearing then proceeds to evidence-in-chief and cross examination of witnesses (factual and/or expert). Finally, parties may be invited to make closing submissions orally at the end of the hearing and/or in writing after the conclusion of the hearing. (Singapore: Order 3 Rule 4)
13. **Periods of time**: (Not exceed 90 days)
14. **Interim measures of protection:** (Decided and enforced by tribunal) (Australian: Article 17 of Model Law)
15. **Default**: (If parties failed to answer in allotted time) (PEC: Rule 28)
16. **Closure of hearings:** (When there is no more evidence to be submitted) (Australian)
17. **Award**. () (Australian: Article 34 of Model Law)
18. **Respond** (within 14 days) (Australian: Article 34(2) of Model Law)

19. **Correction of awards**: (Within 15 days of receipt of award) (PEC: Rule 36)
20. **Additional award and finality:** (Within 15 days of receipt of award) (PEC: Rule 37)

4.2 Arbitration Case of Pakistan

4.2.1 Case

4.2.1.1 Introduction

Two contracts signed between M/S Husnain Pvt ltd and M/S Talha pvt ltd.

9. Contract agreement for provision of HDPE pipe and fittings for water supply system in M/s HUSSNAIN Group (Pvt.) Ltd. Housing Scheme, Zone-V, Islamabad with no exact quantum mentioned.
10. Contract agreement for laying and installation of PE pipe and fittings and other related accessories, again with no quantum mentioned.

4.2.1.2 Features of the Contract:

8. Rate of supply of material and labor rate for execution of work agreed.
9. Total contract price not decided, and client will provide schedule of material supply and execution of work according to site requirements.
10. Contract period is not defined and contractor (M/S Talha Pvt Ltd) agreed to work according to schedule provided by client (M/S Husnain Pvt Ltd).
11. Arbitration clause present in contract 1 but by Government order will be applied to second contract as dates of both contracts are same.
12. Contractor was to provide HDPE pipes according to specifications and client reserves the right to accept or reject them depending on the test and quality of pipes. No consultant was included, and approval of work was informal.
13. Work appeared to be completed on time without any delays or claims.
14. All pipelines were tested, and reports are attached in claimants claim and in response. Work completed on January 31,2009.
15. Contractor was only to install the pipes. Backfilling was client's duty. There was no flaw at time of completion. And up till June,2011 only a small issue of outstanding payment was there.

16. According to client in mid of 2011, leakage was seen when pipes were connected to main supply of overhead tank which was rectified by client without informing contractor in advance.
17. Contractor representative visited site on 18th June 2011 after being informed by client and were shown the rectification work.
18. Client wrote formally to contractor about the warranty clause of contract. Invoking para 6. (Agreement relating to 05 years WARRANTY by the manufacturer inclusive of manufacturer fault, if any. Dated: August 1, 2011)
19. Contractor replied confirming about their visit and asked about intimation of any further leaking in future for checking and rectification. (Dated: August 15, 2011)
20. Contractor visited society site on 23rd August 2011 and was presented with defective pieces of pipes which has cracks which caused leakage. Contractor took the pieces and promised to determine the problem and share results of his findings.
21. After which contractor did not share his findings which he was obligated to share with client.
22. Ultimately client invoked arbitration clause and ask Col. Muhammad Hanif Awan to preside as arbitrator. The contractor did not participate in arbitral proceeding and accept Mr. Hanif as arbitrator.
23. Mr. M Hanif Awan submitted the first Arbitration award in April 2012 and submit it in the court for further proceedings.
24. Court ordered that ex-parte order is not suitable and is to set aside. Court assigned undersigned as sole arbitrator through PEC in January 2018.
25. The court appointed arbitrator's assessment is to be based on review of defective work and assessing the damages. No contemporary record between parties to contract was present hence original loss figures were considered instead.

4.2.1.3 Issues and Analysis pertaining to disputes:

7. Major issue to determine the cause of leakage and fix the responsibility of rectification cost to be considered.
8. According to client the cause of leakage is the poor quality of pipes which were not conforming to the informally agreed upon specifications.

1. Client has substantiated their claims by testing the pipes in a laboratory in Lahore not approved by government, which says the pipes were not up to standards due to impurities in them.
2. Contractor does not agree and says that leakage is due to the movement caused after the installation and testing of pipes which is not their responsibility.
3. The court in its order to sole arbitrator has pointed that the dispute between the parties is about specification of pipes and fittings.
4. Leakage has occurred in other diameter pipes which suggest that quality of pipes was a problem in general.
5. The client was to test the quality of pipes before the procurement of pipes but only leakage test was conducted after laying of pipes. The Client tested the pipes in government approved lab after 3 years of completion which suggest that there were impurities in the pipe. This is not a general way of working but the contactor must bear the responsibility of providing sub-standard pipes.
6. The defect liability is period is not defined which is usually 6 months to 1 year. It would have ended in January 2010. If any repair work were to be done, the cost would have been borne by client and work would be done by contractor.
7. In this case, the defect is tested and becomes apparent after end of DLP, so client would also be responsible for timely action of repair of work.
8. In case the contractor did the repairing work, the charged cost would have been Rs.5000 per repair which would be more than what client spent. According to client, this was done as the contractor did not respond timely and did not share the results of the defective materials after taking them for testing.
9. As the pipes do not meet the quality, contractor would be responsible under the 5-year warranty agreement.
10. There has been no note able leakage in other parts of the society after completion of remedial works except at some defective points in 2011.
11. There is no substantial evidence from client about the defective parts, repair work and remedial measures as work was done without any witnesses and no

photographs of work are present which is a contradiction to the claim of client.

4.2.1.4 Issues Framed after meetings:

Whether the pipes supplied by contractor were up to standards? The date of completion for project is not clear which is needed to assess the DLP. Review of claims of both parties to see the financial impact and actual loss of incurred in contract agreement.

4.2.1.5 Arbitration Award:

Actual loss is considered in the agreement as the parties do not have enough evidence for their claims and counter claims due to lapse of 11 year and improper management. So, the arbitrator has decided to divide the cost equally between two parties. As client has some remainder amount to contractor the total loss will be divided by 2 and minus reminder cost will be paid by contractor to client within 15 days of the award. The indirect costs and any hidden costs are to be borne by parties themselves. There was no effort by both parties to resolve the issue on the basis of amicable settlement.

4.2.1.6 Summary of Arbitration case:

A contract has been signed between contractor (M/S Talha) and client (M/S Husnain). Contractor is to provide HDPE pipes to the Housing Scheme 5 of client. Laying of pipes and their installation is also to be done by contractor. The end date of project is not sure as the schedule of work is to be decided by client depending on availability of site. The work was done in an informal manner and only leakage test was conducted. The client was to do the quality test for pipe materials before procurement which he did not do. Almost all the payments were cleared apart from a small retention amount. The date of completion was 31st January 2009. The backfilling was done by client and not the contractor. After 2 and a half years, when the pipes were connected with the overhead tank, leakage was observed. On which, the client repaired the leakage and contacted contractor and told him about the leakage. Contractor sent a team to confirm the leakage and was given pieces of pipes for testing. When contractor did not contact back after a lot of letters, client decided to go into arbitration as decided in the contract.

Contractor did not respond back to the arbitrator calls as well after which arbitrator submit the award in court in April 2012 which court did not seen suitable.

Court assigned an arbitrator in 2018. Following facts were seen, client did not do the pretesting of material and only conducted the tests after 3 year of leakage from a government approved laboratory. The tests did show that the pipes provided by contractor were not according to the specification. Client's perspective was that the leakage in pipes is due to poor quality of pipes, but contractor is of the view that the leakage is due to the damage done during backfilling by client. Apart from a few points no leakage was observed anywhere else and after repairing the leakage also stopped from that part also. Also, client had not enough evidence to support his claim.

After seeing all the evidence, award decided is that both client and contractor will cover half of the claim amount. The client had to release some retention money to contractor at the end of project. After subtracting that amount contractor is to pay remainder amount to client within 15 days of announcement of award.

4.2.2 2nd Case Study:

Arbitration between Geurrino Pivato SPA Pakistan (Claimant) Vs NHA (Respondent).

4.2.2.1 Award:

The claimant entered into arbitration agreement with respondent for rehabilitation, widening and improvement of existing roads on N-55 on December 27, 2006. According to claimant the work was for 200 KM road. After the claimant did the most of work the respondent refused to award contract of remaining 130 KM which was failure of commitment under the contract. Also, the failure of respondent to make timely payments, the claimant asks for the compensation of damages and asks for following claims:

Claim No:1:

1. On 23rd April 2008, the claimant filed a claim for extension of time which includes an amount for losses borne by plaintiff during period of time for which extension of time was required.

2. On 29th Sep 2007, the claimant asked for extension of time regarding occurrence of a phenomenon on 18th August that continued to occur. Both parties decided to ascertain the cost claim regarding grant of extension of time to be 112 days.
3. Mobilization advance was due on 30th March 2007 but was undertaken on 19th June 2007 causing a delay of 81 days affecting the cash flows and obstruction of work.
4. Claimant notified about the work problems due to delay of payment on 21st May 2007.
5. The PM of claimant was mobilized on field on 1st February 2007. Due to security issues PM was directed to return which was communicated to respondent on 10th and 13th February via letters.

After the above-mentioned things were told to the Engineer, he approved an EOT of 112 days instead of 176 days as claimed by claimant. On 31st July, claimant asked for damages sustained by it due to above mentioned reasons. The respondent told that the delays was due to changes in geometric design on 13th August. On 30th August, the claimant made an interim claim asking for the damages taken by it till 12-07-2007.

The resident Engineer rejected the interim claim but accepted the interest due to late payments. The claimant intimated the respondent that delay of payment and security caused delay in commencement of work and asked for EOT and cost associated with the time period when PM was absent due to security reasons. The respondent also failed to release the payment after engineer approved it causing the suspension of work. Shortage of diesel in December also caused delay in completion of work. Assassination OF Benazir, General Election of 2008, Failure to give Authority to acquire and ownership of site as a whole and approval of designs were also reason for the delay. The claimant maintains that the commencement date was 11th February,2007 and completion date was 9th February 2009. After the EOT of 112 days the new completion date was June 1st, 2009 and the cost were revised from RS. 1,126,444,128 to 1,295,512,130. The engineer approved the basic rates for escalation on 19th March 2008, but claimant did not receive the payment of escalation. According to claimant, the accumulated payment with 8% interest till 2013 was RS. 21,490,161 which was outstanding towards respondent. Claimant referred to the meeting with Chairman of

NHA who approved the claim of PKR 53.5 Million regarding EOT, but the said amount remains outstanding according to Claimant.

Claim No. 2: Extension of Time of 207 days with an associated cost of PKR, 361,719,591. The claimant made a claim for above mentioned cost regarding EOT of 207 days which was granted by the Engineer instead of 273 days as asked by claimant. The delayed payment from respondent resulted in suspension of work due to financial constraints. The claimant also communicated that torrential rains and security hazards has resulted in stoppage of work. Contractor invoked force majeure under the circumstances by informing resident engineer that due to Bomb Blast, culvert in Pezu Hills had been destroyed and employees had been restricted. The claimant maintains that due to these reasons the completion date was extended till 25th December 2009. According to claimant, after meeting with Chairman NHA, EOT was accepted but the cost regarding it was unpaid and delayed payment accumulated cost regarding this till June 30, 2013 @ 8% interest per annum resulted in RS. 97,594,919.

Claim No. 3: Charges incurred against cutting of trees at project site:

The claimant filed a claim for cutting of trees as they were causing disturbance in the work and made all payments to forest department with additional 20% resulting in expenses of, RS. 4,679,356 but only RS. 119,354 was paid so an amount of RS. 456,0000 remains with outstanding cost.

Claim No.4: Work done but not paid:

Claimant claimed PKR. 286,268,707 on April 30, 2011 on account of work done but not paid due to employment of a wrong method for measuring by consultants.

Claim No. 5: Interest accumulated on delayed payment till October 4, 2010.

The claimant claimed for the interest on all the payments due and claims submitted and not paid to PKR. 14,521,825.

Claim No. 6: Construction and maintenance of diversions:

The claimant filed a claim on April 30, 2011 for the maintenance and construction of diversions. According to claimant on directions of Project Director and Resident

engineer diversion was created which costed RS, 144,000,000 and delayed payment of this resulted in an interest of RS. 23,229,370.

Claim No. 7: Costs Incurred for effectuating suitable security agreements:

The claimant claimed for RS. 4,262,519 on 30th April 2011 for the work done on directions of project director and resident engineer which includes accommodation of FC squad, provision of wireless communication, raising height of boundary walls and construction of security piquet.

Claim No.8: EOT for a period of 260 days:

Claimant claimed for an EOT of 260 days with amount of RS. 305,160,480. On June 6, 2009, when commanding officer of DI khan suspended all activities and it was communicated to The Engineer on 6th June who asked to suspend all activities. The project activities were suspended, and expatriates were shifted to Islamabad for safety purposes. The claimant asked for extension of 241 days on March 27th, 2010 for which the engineer recommended only 182 days on April 13th, 2010. According to claimant due to delayed payments cash flows were obstructed. On December 20th, 2010, a statement of completion with the breakdown cost of claims were provided to respondent. Also delayed payments incurred a cost of PKR. 49,226,984.

Claim No. 9: EOT for a period of 54 days:

The claimant filed a cost claim against grant of EOT of 54 days in performance of the contract for PKR. 46,017,441. The claimant notified project director on 25th August 2010, regarding the flood condition that affected the site. EOT was required due to rains which were paying havoc from July to September. Claimant had sustained heavy losses due to damage of machinery and breaking of agriculture dam in the vicinity. This was communicated to Engineer on 5th August 2010. For this the claim was asked. Delayed payments resulted in interest on RS. 7,423,307.

Claim No. 10: Pertaining losses due to repudiation of rehabilitation, Improvement and widening of existing roads:

According to claimant FFSA was executed between the respondent and claimant in which the claimant proposed to withdraw its claims prior to 2004 on September 2004. This was done in consideration of respondent to award claimant a contract for a road of

200KM. Contract for 70.27 KM was signed on December 27th, 2006. An EOT of 112 days was given. According to claimant the conduct of respondent was not up to mark by withholding payments. For which the claimant terminated the contract.

Claim No. 11: For Losses amounting to RS. 1,900,422,371 on account of repudiation of the FFSA by the defendant:

The claimant claimed for the amount on account for repudiation of FFSA which occurred due to failure of award of remaining 130 KM of road section which was entire consideration of claimant for entering into FFSA.

Claim No. 12: Loss of commercial profit on account of sale of catalyzed mixture pavements:

The claimant was under the contract from manufacturers and was initially to buy material for up to 500 KM of road works under previous contracts of 200 KM road. The manufacturers were to give profit to claimant however due to failure of contract of 200 KM claimant claimed for lucrative profits of RS, 699,014,360 furthermore delayed payment resulted in an interest of PKR. 58,219,278.

Claim No. 13: Unpaid amount of the interim payment certificate no. 22 and escalation payment certificate no. 17:

Claimant asks for unpaid amount under IPC No.17 and draft submitted to respondent on April 20, 2012 stands at a total of PKR. 170,644,298. Furthermore, the delayed amounts resulted in an interest of PKR. 14,212,566.

Total Claim:

The claimant asked for claim of PKR. 5,637,652,768 along with costs for entire period of delay till realization of the amount of claimed.

Respondent Side:

Respondent resisted by saying that notice for intention of claim was not issued. Claimant did not send notice according to contract terms. Claimant did not provide

reasons for EOT. It also left the site without completing the work. Also, claimant had received overpayments on several accounts.

Issue:

On behalf of parties following issues were framed.

1. Are claims legal?
2. Is claim maintainable?
3. Claims were filed in time.
4. Fixed rate or BOQ rate contract?
5. Claimant competed its work.
6. Claimant liable to excess amount.
7. Respondent entitled to amount due to damaged works.
8. Respondent entitled to loss of benefit.
9. Whether payments were held due to contractor?
10. Any amount foregone by respondent?
11. Respondent suspended any works.
12. Any payments withheld by respondent?

Witnesses:

The first witness on behalf of claimant was PM for the project, who referred to the letters and FFSA settlement. He denied claims for the time duration for submitting claims were on time. He agreed that the final work in DLP was not completed. He said that the works in punch list were not completed because they were not paid for.

The next witness was formed General Manger of the company. He told that EOT asked were not granted and delay was due to delay in mobilization advance. He also rejected about any overpayments that were given by respondent. He admitted about Lump Sum offered by The Engineer and that DAB has decided against his firm.

The last witness was acting PM of the company. He told about the EOTs asked and were given only three times. He denied any overpayments received from NHA. He also stated that delay was due to climatic conditions and other reasons aforementioned.

In response, respondent examined three witnesses, first witness was independent engineer who was given the task to provide consultancy on regarding contract terms. According to him, claims were not filed in said time. Claimant left the site without completing the works. He also said that contract was fixed price which was updated. Claimant was paid based on quantity wise which was against the contract. But amount paid was recoverable. DAB also decided in favor of respondent. Claimant did not complete his work and no claims were asked in front of DAB. Most claims were just EOT based and no cost was asked. And, improper work by claimant caused severe damage to roads. He said claim 1-5 were misinterpretation of the contract and respondent is liable to work over payed by respondent as the contract was fixed rate contract.

The next witness project director also supported the first witness. The claimant work was sub-standard, and it failed to rectify the mistakes. As the work was sub-standard it disentitled them for further work. The torrential rains were not force majeure it was disability of claimant. The bomb blast did not affect the site. Most of the claims are not true as work was not done up to standard and according to contact condition and the claimant was to pay RS. 1,022,574,135 to respondent for not rectifying the works. He also denied the claims by the claimant regarding the Late handling of Site.

The next witness was quantity surveyor for project. He also supported the narrative that claimant failed to fulfill its obligation. According to him it was obligation of claimant to design and execute the works which it did not complete. The claimant was responsible for all the work under the fixed price. The site had transverse and longitudinal cracks due to substandard work and were affecting subbase and embankment. And these were not rectified by claimant. Most claims were not submitted on time and without details. Most claims are not valid under contract. Claimant is liable to pay respondent for the damages for its inability to work properly. He denied the claim for acceptance of BOQ rate as contract price. As overpayments were not returned and rectifying work was not done, NHA has made a counter claim.

NHA challenged the determination of the Engineer before DAB, which framed following issues:

1. Engineer determination?
2. Engineer authority to change contract.
3. Whether the fixed rate contract be changed without changing the contract.
4. Work executed upon employer requirement, a variation.

After examination DAB give following award on hearing:

DAB has decided that the payments should be make according to the work done, which is according to the design given by contractor and approved by NHA. Fixed rate or quantity base is not important in this case. Also, according to FIDIC Engineer cannot change the contract and the contract needs to be interpreted correctly. The fixed rate contract was there to make payments till final design was approved, which was delayed and was responsibility of both parties but NHA has been making payments according to the actual work done. So, contract conditions should not change. As the work done was paid according to executed work, the requirements are not variation as no official procedure was followed for it.

Relief given for extra work:

DAB holds that NHA should pay extra amount for changing camber to cross fall and additional length works which were approved by the Engineer.

The contractor was not happy with DAB decision dated 5th January,2012 and challenged it on 25th January 2012. The main point of contractor's argument was DAB exceeds it jurisdiction in proceedings. Learned counsel have submitted lengthy arguments and following issues are determined:

1. Learned counsel failed to explain how the tribunal debarred from adjudicating claims. Islamabad High court referred matter to arbitration after hearing both parties as was stipulated in the contract.

2. In this case pre mentioned conditions for arbitration cause were fulfilled. As, one party was not satisfied with DAB decision it can resort to arbitration under contract.
3. From the records it is deducted that claims were on time.
4. Claimant does not agree that it was a fixed price contract but the letters pertaining to the contract proves that both parties settled for a unit price/ KM. But the additional work must be paid to claimant.
5. As from witnesses it is decided that claimant did not completed its work and left beforehand without any intimation to employer.
6. According to respondent claimant was overpaid but according to records and claimant it was not overpaid, and the amount approved by NHA was also not given to claimant.
7. According to claimant, he repaired the damages but due to usage of road for double carriage way cause more damage which was not in the scope of work. According to respondent, claimant left before DLP and did not answer to letters to repair the damages on road and asked for damages cost. But respondent has failed to show that the amount asked by him was incurred as damages losses.
8. Respondent has claimed that due to damages and late completion of work, economic benefits were not gotten from road. But according to claimant, after substantial work road segments were open. And, respondent is not able to show these losses.
9. According to claimant, delays were due to respondent's delay in payments whilst respondent is of the view that he overpaid the contractor which is not possible because of all the checks and balances. According to respondent, claimant left the site before DLP, so he is not entitled to any claims.
10. The respondent has denied having foregone any amount as claimed by claimant. And claimant has failed to provide proof for his claim.
11. According to claimant the work was suspended due to respondent delayed payments and security reason and that respondent was aware of all the delays.

It is admitted that claimant left the site which he could not have done under contract. Also, claimant has failed to show any losses incurred due to delayed payments. From past cases it is proven that only those damages will be paid whose exact amount can be shown. Claimant has failed to show that the road was to be used for single carriage way purposes and respondent claim for cutting trees was in built in fixed amount is also proven. The DAB has provided that contractor has to be paid for extra works.

According to respondent, the such payments have been given to claimant and that overpayment were made to claimant. But records do not show who approved them or what action was taken against them. Both parties have made imaginary claims with no reasonableness and evidence to cogent claims. Therefore, claims and counterclaims are rejected, and award is made accordingly. The parties are left to bear their own costs.

Summary

When disputes arose in this case, the claims were referred to the presiding DAB. The issued award was rejected by the contractor and the dispute was referred to arbitration. The claims stated than by both parties were grossly overstated, there were discrepancies in the witnesses' stories and the documentation available. All this led to an award where arbitrator left both parties to bear their own costs. This case clearly goes to show the unhealthy practices prevalent in the industry and the problems in enforcement of DAB/ arbitrator awards.

4.3 Discussing Palestine

Construction is one of Palestine's major industries. Empirical evidence proves that as the industry has grown disputes have been on the rise. Arbitration is the fundamental dispute resolution technique in the region. Despite an Engineering Arbitration Centre's presence, disputants are dissatisfied with the cost, time and mechanism of arbitral tribunals.

Palestine is thus a good choice for comparative analysis to Pakistan because they are a step ahead of us and we shall look at the why.

Palestine too has an old history of arbitration, stemming from Islam itself. What we take from this is the remarkable and much useful guide is an arbitrator's qualities. His status in the community, his reputation, being from a strong tribe, and his wisdom and reasoning skills were the qualities.

It is also noted that the issue of enforcement of award was taken care of by disputants putting up property as security and the social status of the arbitrator meant it was very unlikely for the losing party to challenge his award. In modern times in Pakistan courts are highly involved in enforcement of arbitral awards rendering the very purpose of arbitration strained.

More recently, in 2015 Palestine's joining of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards was a major step forward promoting international arbitration and ensuring international organizations that a modern mechanism complying with international best practice to recognize and enforce arbitral awards was in place in Palestine. It is observed that similar strategy would greatly benefit Pakistan and force our construction industry to begin marching with the changing times. Pakistan can become a great center of international arbitration in the region if we are fully compliant with international standards. Despite being a part of the convention, its application has not fully materialized in law or practice yet. The benefits of this will not just be of improving our image and status globally but because of the standard of these proceedings, local arbitration will increase in efficiency and effectiveness. Hence, forward steps in international arbitration are critical for the local constitution industry. It is also noted that multiple projects under CPEC and other bilateral treaties mean that foreign companies are involved in local development projects a lot too. Updated arbitration laws would give us the possibility of locally awarding such disputes. With improving foreign direct investment (FDI) in Pakistan, especially under the current government, implementation of UNICITRAL laws locally becomes important to ensure we can seat international arbitration locally.

Palestine has a myriad of Alternative Dispute Resolution Institutions; Pakistan unfortunately does not have a single one. These institutes offer services not just in construction, but engineering and technology too. This brings more stakeholders to the

table and such a mechanism in Pakistan would mean more industries could push forward and benefit from the regularized arbitral proceedings.

Association of Engineers, Engineering Arbitration Centers, Palestinian Contractors Union and Palestinian International Arbitration Chamber offer training, examination and certification schemes in arbitration besides primary arbitral services. Further research in the establishment of such institutions in Pakistan will be of paramount importance to ensure proper regularization and that the primary aim of their establishment is met. There is reasonable evidence to fear that existence of such institutes can very easily become a burden on the system with inefficient performance and mismanagement. It is important that too many do not unnecessarily spring up and the people who run and certify their credentials at such institutes go through formal rigorous testing. An arbitrator it at the very center of arbitration and loss of quality here will mean a feeble and inefficient system.

It is also noted that the issue of overburdened judicial systems is not local to Pakistan. The cost of educating lawyers and judges, even leaving aside the issue of ensuring ethics, is quite high. Cases of construction disputes in courts mean an engineer only quantifies the problem while the judge rules on it creating for a very complicated process, often yielding incorrect results because if its inherent nature. The technical incompetency and backlog mean verdicts typically take up to three years with several levels of appeals. A similar situation is present on Pakistan, with some cases taking well over a decade and still inconclusive. One such case of the Grand Hyatt in Islamabad was the very reason we took up this research.

A comparison from the medical industry shall explain this point well. The American system now produces less doctors and more health workers and nurses. This is because most medical emergencies can be adequately solved by the training they receive. They are always supervised by doctors that can be referred to in case of any complications. This ensures the cost of medical education goes down, overspecialization is reduced, and doctors get some time to develop medicine itself through research.
This model in our industry would mean construction and other technological industries are handled by arbitration centers on the dispute front. The judicial system, with its reduced burden shall be able to focus forwarding its cause on prevailing much more

critical issues. It also notes that as stated earlier that UNICITRAL model laws are of paramount importance, equally important is to ensure that this system remains procedurally very separate from the judiciary. This intermingling in Palestine was cause of concern for international parties and even their reason to refuse Palestine to be the seat in international arbitration. We have tried to compile the best arbitration procedure after a comparative analysis.

This is also like the establishment of Shariah courts separating those issues from the main judiciary. Again, immense care must be taken as we establish arbitration centers to ensure that all stakeholders are fully onboard from the very beginning in policy formation, to aid the efficiency of the actual system on ground. This will help establish widespread acceptance of these centers and avoid some of the problems faced by Shariah courts in establishing their writ.

As we push forward for the establishment of an arbitration center, a proper mechanism must be developed for arbitration fees. Palestine fixes arbitration fees according to a sliding scale model determined by the value of a dispute. This may also enable us to mitigate the practice of claim exaggeration.

There are basically two systems that exist to determine arbitration fees, based on time spent and amounts in dispute. The time-based system has the advantage of billing on actual work done by the arbitrator but does not provide incentive for them to be efficient. However, the may self-correct because of market competition among arbitrators and in order to receive future appointments. The dispute-based system ensures greater transparency and predictability in costs of arbitration. This would also mean arbitrators would be more efficient but would provide not inventive to disputant to not prolong the case. Since we can see both systems seem insufficient, tribunals must exercise their powers to control arbitration costs. The goal is to ensure disputants are realistic in their claims and the process is efficient for all.

The second part of overseeing cost comes toward the finish of arbitration: the allotment of arbitration fees. Arbitrators should practice their power to make an honor dispensing the expenses of the arbitration, considering the time went through managing undeserving claims or cross-claims, terribly overstated claims, unacceptable lead by a

side throughout the arbitration, etc. This may prompt a procedure that is reasonable for all, both the disputants and the arbitrators.
Further research must develop a mechanism to eradicate the prevalent practice of exaggeration of claimed amounts seen in Palestine and Pakistan. This immensely clogs arbitration proceedings. A penalty system could be highly effective in this matter.

The primary sorts of development debates in Palestine are identified with demands for affirmation or dissolution of arbitral honors, dire solicitations to stop the granting of a development contract, critical solicitations to stop development works because of land proprietorship question or to ensure ancient rarities and archeological resources, protection and money related cases for extra costs, misfortune, or potentially cost claims. Further research in these areas and their issues and whether in Pakistan we face similar or more of issue will be very beneficial.

Another dilemma that arises is of the seat of arbitration in multi country contracts as briefly touched upon when discussing the importance of involvement and improvement in international arbitration. International organizations have moved forward and are keener to participate in amicable settlement procedures such as negotiation, mediation, or conciliation. This is by no means a negative, but the world has moved on after effectively using arbitration to settle disputes, this means that global industries are now active in amicably settling disputes. In our state, where even a sense of basic justice often fails to be reproduced it is important that we master arbitration before any amicable settlement method is even possible to be widely accepted in the industry. The matter simply boils down to a matter of economics. The world prefers to settle amicably because it knows arbitration acts as a dam like structure that they can always rely on if issues are mutually resolved. Without a proper arbitration practice in plays we cannot move forward. This means Pakistan will have to update its laws on the matter to ensure we came rightfully be the seat of arbitration in multi country contracts.

4.4 What changes with Covid-19

A good part of this research was conducted in quarantine due to the global pandemic Covid-19. Ratan K Singh FCI Arb, FMI Arb, FAIADR FPD, an Indian arbitrator

recently argued a petition under section 9 of Arbitration and Council Act through video conferencing. It is high time such provisions are added to contract clauses.
This would enable a noticeable reduction in cost and time of proceedings.

In the FIDIC Covid-19 Guidance Memo long haul trade heed, social obligation, long haul strength of supply chains and of social orders everywhere is urged to be dealt with. Following international standards for arbitral law is further reinforced here, where just in a memorandum scenario by scenario problem that are like to occur in construction industry due to the pandemic are highlighted and remedies stated.

We shall now look at some scenarios of how this pandemic has affected construction and claims.

Let us say the government is allowing work to continue but public is self-isolating in fear of the pandemic. FIDIC accommodates a privilege to an Extension of the Time for Completion (EOT) in the event of unanticipated deficiencies in the accessibility of staff or commodities (or Employer-Supplied Materials, assuming any) brought about by pestilence or administrative activities. (RB2017) In ’99 versions however this is a contractor’s risk. It is also pertinent to mention that no financial remedy can apply in either version unless provision has been made, specifically in the contract.

In case delays are caused by government regulations or lockdown instead, the same EOT provision will apply as long as specific conditions mentioned in clauses are satisfied.

If the contractor faces increased costs due to new regulation surrounding the pandemic, there is provision to treat such as a claim event or variation order. Making arrangements for social distancing, providing face masks and sanitizers, arranging alternate transportation and adjusting work hours can all be treated as adjustment to the execution of the Works or to the modified or latest relevant level.

Another consideration is in the event of complete lockdown, can Covid-19 be treated as a Force Majeure or Exceptional Event:

- is past a side's jurisdiction.
- the side was not capable sensibly of giving against prior to going into the agreement.
- having emerged, such side was unable to keep away or defeat; and
- is not considerably referable from the opponent Party.

We see that this pandemic could possibly fit the bill in these two categories owing to the government-imposed lockdown. An EOT through this route is highly possible. However, any financial compensation cannot come through this categorization, that would only be possible by taking the route of changes in law. This is also due to the fact that Covid-19 despite being a Force Majeure, will only delay work and not damage the Works.

It is worthy to note that in most cases, work on site will become difficult and tedious but not impossible. The contractor could try and use above provisions unnecessarily since he/she would not be able to back them up. Secondly if a contractor decides to prematurely close site to prevent spread of virus, entitlement to an EOT would even prove near impossible as there would be no law regarding closure or SOPs of work yet.

The last scenario is if contractor is executing work despite all odds, but client's personnel are working remotely and unable to visit site leading to delays. An EOT would apply in this case even without proving Force Majeure.

It is clear than that in almost all general scenarios pertaining to the pandemic an EOT would probably apply but either the Contractor can initiate the right to monetary reimbursement will have to be checked elsewhere under the Contract or law.

Despite this having nothing to do directly with arbitration, it is a point to prove case of how going global in solutions to local problems gives organization a much larger data base to formulate modern law. It is only then that holistic, objective and pragmatic views become the root of the right solutions.

A more specific example of the above is when we look to adopt and implement more time restricted clauses in our arbitration acts, FIDIC and delay analysis based on it has

extensive global literature available enabling is to foresee implementation bottlenecks from regions that have already been through the change.

4.5 FIDIC in Arbitration

Despite this not being a part of the scope of this research, it is pertinent to mention that the version of FIDIC applicable to contracts in Pakistan is archaic. The industry continues to stick to it on the basis of sufficient case data available for understanding of specific clauses. Newer versions remove the controversial 'the Engineer' and introduce DAB. With DAB the process of arbitration becomes a continuous one where the arbitrator/s is continually aware of project progress and issues avoiding claim snowballing later on. Also, newer versions of the FIDIC look at contracts more holistically and not just in CI. We are not delving into further detail of the version of FIDIC that should be applied but renowned practitioners highly recommend at least the '99 version of these books to be adopted as it includes the aforementioned two changes that will be of immense benefit to contract management and dispute resolution.

4.6 Project Management Institute in Arbitration

Almost all literature that looks to improve on arbitral proceedings emphasizes on saving time and cost. However, in practice we often see how this undervalues quality of the award, fails to identify the comparator, fails to take change and project management into account. Involving project management in arbitration is basically a case against using 'standard practices' and internationally accepted procedures to the degree of not being effective anymore to disputants. It gives more project management authority to the arbitrator enabling them to customize the process within the guidelines laid down by law for an efficient award. A comprehensive guide on what project management techniques can be used in arbitration, has been published in McGill Journal of Dispute Resolution.

The second aspect of project management necessary for improvement in arbitration proceedings is at grass root level. No matter how well developed an arbitration framework is, if parties to a dispute cannot substantially back their claims with evidence such as site records etc., the practice is of little use. As a result, it is important to improve

and make norm of proper practices in site management so that parties are prepared for dispute resolution down the line. The best form of this will be in necessitating project and site managers to clear Project Management Institute certifications at necessary intervals and ensure these practices are realized on ground.

4.7 ADR outside Construction

As per World Justice Project's latest Rule of Law Index, Pakistan is almost at the bottom among the countries having the least tendency to safeguard the basic rights. Consequently, challenges in judicial system impede economic development and drive inequality. Unfortunately, we spend less than 1% of our budget federally and provincially on our legal system. If we are to move forward, especially with ADR this will have to increase. Unfortunately, the Alternative Dispute Resolution is not a part of the constitution of Pakistan. The trade and cashflow activities can be used to highlight the fact that ADR is practiced at some level at least.

In September 2016, due to backlog of cases due and fruitlessness of lower courts lawyers in more than 30 districts of Punjab walked-out in strike, paving way for an ADR bill to be passed. In March 2017, the first Alternative Dispute Resolution center was opened in Lahore by the Chief Justice of Lahore High Court, Syed Mansoor Ali and it was judicially backed and unsurprisingly it proved successful with a rate of 67%. We hope to repeat a similar undertaking for ADR center especially for construction industry. The fact should not go unmentioned that as of January 2018, 39 Alternative Dispute Resolution centers in 36 districts of Punjab are operating overlooking minor offences and contract issues with a success rate of 87% out of 8,372 cases. Further research into how these centers were established and legality of enforcing their awards will give us good insight into the process of implementing an ADR center specifically for CI.

It was admitted in Islamabad Deceleration after conclusion of 8th Judicial Conference that ADR is subsequently very effective. The same deceleration read ' directly transplanting a foreign model may not be advisable. Indigenization is the key to cater for Pakistani conditions.'

This discussion concluded that the time-barred foreign frameworks could be implemented and altered focusing mediation instead of arbitration. However, as proven in the conclusion of the study on Palestine we will eventually have to have a proper arbitration procedure in place before amicable settlement procedures become widely acceptable. This is the very nature of a dispute; it does not always remain amicable.

We are already a part of MIGA, ICSID, UNICITRAL and the New York Convention of 1958 but these memberships have not proven too fruitful. Further research about International treaties and conventions, their applicability and effectiveness can prove to be critical in laying down a road map for Pakistan's future.

Civil Procedure Law of segment 89-A provides the plaintiff as well as the defendant with a chance to solve their claims by mediation. It is additionally high time that capacity to allude issues to mediation or arbitration is moved to judges. This along with enforcing arbitration clauses are upheld in contracts will ensure disputants cannot refer matter to the overburdened judiciary just to prolong proceedings. In this way, exceptional accentuation must be put on human collaboration and human asset improvement in Pakistan as expounded in Palestine study.

4.8 A detailed analysis of Arbitration Act of 1940

On top of the Arbitration Act of 1940, Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 governs the subject of arbitration in Pakistan. The arbitration act is unbelievably and unreasonably old and unreliable in the 21st century. We must align it with modern fast paced international jurisdictions.

The act specifies two types of arbitrations, presence and in the absence of the involvement of the judiciary. The law intervenes if one party is willing to arbitrate, enabling them to ensure compliance of pre-decided arbitration by the reluctant side. The Foreign or overseas Awards Act on the other end is simply a formal consent to the New York Convention 1958 giving the information that overseas verdicts and awards from or in between the natives of agreeing states are to be implemented in the absence of any reservations over the viability of the same other than on basis clearly given in the agreement.

Sec 2(2) of Arbitration act of 1940 specifies that in every class of arbitration, there must be a written agreement, but it does not necessitate the naming of an arbitrator. It is suggested that for projects especially involving public money or of large and complex nature, naming arbitrators in the initial contract itself could prove very beneficial. The arbitrator would be continually aware of the project progress and intentions of potential disputants would be clear too. Ideally this should apply to all contracts.

The idea behind such a suggestion is to eliminate the practice of not appointing arbitrators or appointing a designated authority to appoint arbitrators. A conflict with a designated authority could cause unnecessary hurdles too, down the line. The contract should not be allowed to stay silent on mode of appointing arbitrators because the Act eventually gives the power to court to make appointments under section (8-10). This is exactly what we desire to avoid, court involvement at the very onset of arbitration, a structure designed to avoid necessitating court intervention.

Instead of the provision under section 20 to seek court intervention to compel a reference to pre-agreed arbitration, law should make arbitral proceedings firstly a compulsory inclusion in initial contracts and secondly compel parties to complete arbitral proceedings before appearing in court. Since civil procedural law provides claimant access to court as a civil right, making arbitration proceedings compulsory would at the very least mean the arbitral award is reviewed in court instead of going over all proceedings, saving time and cost.

About waiving rights under arbitration clauses, parties can tacitly agree to submit disputes to a regular court despite presence of arbitration clauses. There should be no provision for this until an arbitrator has issued an award. If a party still files a court case, it is likely considered a breach and the right to arbitrate is waived. Unfortunately, this waiver is revocable till defendant responds in court. Subsequently there must be a penalty to refer a case to court despite arbitral clauses, otherwise claimants will always find a loophole or special case to which the arbitration does not specifically apply.

The process suggested is simple. All disputes directly or indirectly related to the contract must undergo arbitration if amicable settlement does not reach a conclusion. Civil courts can only review arbitral awards for procedural or ethical errors, period. Filing a court case before arbitral award should be an offence warranting corresponding penalty under civil law for unnecessarily wasting an overburdened judiciary's resources.

Dealing with the above suggestion in specific policy matter, we find in segment 34 of the Arbitration Act of 1940 of Pakistan which comprises of Article 8 of the UNCITRAL Model Law and Article 2 of the New York Convention 1954, that this clause operates to create on obligation on courts to cite issues to arbitration that where court proceedings are initiated by a claimant in breach of contract unless the contract is nonvalid, nonbinding and not capable of being carried out. Segment 9(4) of the Arbitration Act of 1996 furthers this imposing obligatory stay on happenings until court is contented of the contract being void. We can already see the importance laid to agreements internationally and intent to bring to affect an agreement to arbitrate. Our Arbitration Act 1940 however only mandates stay on court proceedings if the defendant wishes to refer to arbitration, in complete disregard of the original agreement.

It is also noted that when plaintiff files a case in court in taking no notice of arbitration agreement and eventually waives power to arbitrate, the defendant has to respond substantially in court (filing a defense for example) to lose their right to arbitrate under section 34. This provision must be annulled because it keeps undermining the very nature of a contract rendering it useless upon will of either party.

If we investigate the legality of the waiver above, plaintiff only loses right to arbitrate on that particular dispute. Once the defendant files a drafted affirmation, renouncing his/her right, the plaintiff subsequently receives authorization to club issue to the original claim that may or may not be closely related. The defendant than tries to refer these additional issues to arbitration and apply for an adjourn of progress on them

specifically. The court however holds that these further matters were concerning to the issues highlighted in the primary happenings. Again, the same solution of making arbitration binding closes such loopholes.

Constitution concentrates little on the idea of renunciation and either it would ever be reversible, rather it utilizes customary agreement law to distinguish disavowal of agreements to arbitrate. In the event, that the renouncement is acknowledged, the two sides will no longer need to arbitrate. However, this is still not irrevocable as both parties can again agree to arbitrate. Precedent from a Lahore High Court case shows how this matters quote:

'The Lahore High Court came across a case by a Claimant for remaining on its own suit, and the respondent's request, for arbitration. The contract among the sides had a provision presenting all questions to arbitration. At the point when a disagreement emerged, the petitioner looked for a between time directive convincing consistence with the contract. The requisition was made in a part claim form, as opposed to for between time measures on the side of arbitration. The requisition was rejected. A few months after the happenings, the claimant served a notification of arbitration. The respondent reacted by presenting its safeguard and cross-claim in the court procedures and testing in correlation to the Claimant's entitlement to seek after arbitration. The Claimant pertained to remain its case and the respondent's cross-claim. The court allowed a stay of the cross-claim, and a stay of the suit. Despite the fact that it was "profoundly doubtful" that the matter of the part claim added up to a default of the arbitration accordance, the respondent did not do something which would add up to an acknowledgment of that default, in order to finish the arbitration accordance. Be that as it may, had the claimant's matter of the claim form been acknowledged by the respondent, this would have added up to an acknowledgment of the claimant's abrogationary default, and the claimant would along these lines had lost the option to depend on arbitration. The court held, considering attestations made by the respondent in correlation preceding the beginning of court procedures, that there was no agreement between the gatherings which added up to a disavowal of the consent to arbitrate. Ultimately, the claimant's ensuing initiation of procedures added up to an

acknowledgment of this repudiatory default along these lines ending the consent to arbitrate. 'End quote

If we look at arbitral procedure under the Arbitration Act 1940, it is immensely deficient in nature. Section 30 does allow an unjust award to be set aside but various stages seem to be overlooked. As a matter of fact, arbitration is carried out based on the charges whereon matters might be structured accompanied by legal documents, spoken information, and disputations. We have a result of this developed the best possible procedure after several comparisons, discussed earlier.

With regard to the award itself, the Act does stipulate it to be announced within four months from start of hearing but it simultaneously permits contract to specify any timeline and under section 28 and First Schedule the court may intervene to extend timeline. This unnecessary involvement of court must be avoided, and a fixed timeline followed by law to modified in special circumstances only at the discretion of the arbitrator. The act does not also require an arbitrator to reason the award. Without reasons a court may never annul an award based on flawed legality. To avoid this the Act should be made to make reasoned awards compulsory. This would help weed out illegalities only as the reasonableness of the reasons cannot be argues on court anyway under law.

A courts judgement is also necessary to enforce an award, this can be avoided by practice of certified arbitrators under an established institute. Section 15,16,17 and 30 outlines how the court may accept, reject or modify the award. All these provisions are purely meant to correct awards that are illegal, procedurally incorrect, impossible to apply or unjust. Most of these interventions can be avoided by making arbitration an institutionalized standard practice.

The only matter still necessary to refer to court is misconduct of the arbitrator. The Act does not provide an exhaustive definition of the word as it would be impossible to do

so due to the infinite number of possibilities. An arbitrator could be unjust based on relations with the parties or lack of expertise and ethics (procedural errors). Penalizing the arbitrator on such instances and treating proven malice as criminal act, just as Civil law would do for a judge, will help streamline the process and ensure it remains impartial. A common head of misconduct is private inquiries by the arbitrator that will be eliminated if law has provision for strict penalties on such on such practices.

There is reasonable confusion and irregularity if an issue of law is referred to an arbitrator. As we are looking to promote a more universal and international practices-based method of arbitration, further research must outline the jurisdiction of an arbitrator with matters specifically of law. If the award does not reason itself, it is impossible for the court to judge on its legality. An arbitrator anyways must follow procedural justice and not what he feels is right. In short, section 30 needs elaboration.

In short, problems the with Act are as per the following: the sides are generally allowed to embrace techniques of their will with small inaccuracy, with no national arbitral foundations, there are no arbitral standards, aside from some defined by courts inside the structure of the Act, no break power in the mediator, an excessive number of justification for legal intercession at all stages (pre-arbitral, during intervention and post grant), subsequently it crushes the entire entity of rapid and economic argument adjudication. We need to thus move forward to new legislation based on well-established international models.

Pakistan has long been a signatory of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and more recently under the Foreign Awards Act 2011 this has been made into law. The effect is unprecedented as court intervention on foreign awards is now a minimum. In this respect, a compelling note on the subject has been recorded under a judgement by Mr. Justice Ajmal Mian (the “Note”), which states that:

“I might notice that during considering a request below section 34 of the Arbitration Act in connection to an international arbitration section such as the one at question, the

attitude of Court ought to be lively and it must consider the fact that until in that place you have certain necessary causes, like an arbitration clause must be carried out as normally the other side to such an arbitration clause is a overseas side. Alongside the turn of events and development of universal exchange and trade and because of upgrading of services/transportation structures on the globe, the agreements having these arbitration provisions are normal these days. The deal which obeys from the holiness which the Court appends to agreements should be applied with more force to a contract having a international arbitration provision. This must not be ignored that any violation of a condition of such a contract to which an international organization or individual is a side, will discolor the picture of Pakistan in the amenity of countries. The basis that can be a thought of a party at the hour of going for a contract as a judicious man of business cannot outfit reason for refusal to remain the suit under segment 34 of the Act. So the ground like, that it is hard to convey the proof or various observers to an outside nation for arbitration procedures or that it would be excessively costly or that the topic of the contract is in Pakistan or that the default of the contract has occurred in Pakistan in my opinion cannot be a solid basis for objection to remain a suit recorded in Pakistan in break of an international arbitration provision including in the contract of the category alluded to previously. So as to deny an international side to have arbitration in an outside nation in the way accommodated in the contract, the Court must arrive at the resolution that the implementation of such an arbitration provision would be unacceptable or would add up to driving the petitioner to respect an alternate contract, which was not in the viewing of both the plaintiff and the defender and which could not have been in their consideration as a judicious man of business." (emphasis added)

In another judgment by reference to the note, it was maintained that:

“…a party having entered into an agreement after having full knowledge of its consequences cannot be allowed to defeat the arbitration clause.”

In a different discernment by backing to the record, it was kept up that:

"… a side having gone into a contract afterwards having full information on its outcomes cannot be permitted to crush the arbitration statement."

In addition, while watching the chief set down in the record, a view was kept up in another judgment, which is

"… contentions in regards to open strategy and cost of the arbitration occurring in London as a location for remain of suit are not, at this point reasonable considering the perceptions of the Supreme Court of Pakistan in the Hitachi case… There is no uncertainty some cost is engaged with litigation yet that is genuine anyplace on the planet. In the current suit, the offended party has recorded a suit for more than USD 1 m, and it is sensible to hope to cause a few costs in case of a contest. Moreover, there is no limitation forced by the State Bank of Pakistan on settlement of outside trade for any legal reason whenever and with the accessibility of current gadgets, for example, video chatting offices, proof might be recorded effectively anyplace in the World under the oversight of the arbitral body." Accordingly, the suit was remained for this situation.

The above extracts act as noteworthy sources of ethics on the subject.

However, despite the progress, the Act under section 53,54 leaves reasonable room for enforcement of ICSID awards. It is impossible to go into the details of this Act too in this research, but it is a highly sensitive issue, especially regarding to Article 4,5 which entails to issues involving the government of Pakistan itself.

In summary the extract narrated here is sufficient: "Essentially, consequently, the Act doesn't accommodate an infallible implementation of ICSID grants in Pakistan. Implementation of grants is dependent upon the analysis of the High Court and, if the grant has been given in opposition of the administration, it can be implemented only in the case that if it were implemented in the similar conditions. In reality, the High Court will have the ability to join and vend resources, if such resources are not identified with guard and national security. High Court choices can be claimed. But, in implementation affairs, the floors of plead are quite constrained."

The Arbitration Bill of 2009 that is built on Indian Arbitration Act 1996. Our research on the problems faced in India under this Act since its implementation means it would be very unwise to implement it here. We must look at the data from India and modify our Act to ensure we do not have to repeat the process in the region when sufficient basis is already available.

With regards to the 2009 Bill: "The Bill is planned to override and erect on the the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2007 which enforced the protocol of United Nation on the acknowledgement and implementation of International Arbitration Accords 1958 (New York Convention) in the law of Pakistan. This is an integral section of law-making which includes the operation of arbitration, reconciliation and alternative dispute resolution inside or out of doors of Pakistan, counting re-publicizing a local rule enforcing the multinational protocol on the Settlement of Investment Disputes between Countries and Federations of Other Countries (the Washington Convention). The act also suggests in developing an Arbitration and Conciliation Centre in Pakistan."

Multinational trading arbitrations being carried out in Pakistan also fall in the jurisdiction of the Bill. The bill gives various authorizing guidelines regarding these arbitrations and offers managerial authority on these arbitrations to the courts of Pakistan greatly conforming to the UNCITRAL Model law. These guidelines and authority incorporate, amidst additional matters, providing the sides the autonomy to acquire provisional course if actions throughout the process of arbitration; the Chief Justice of Supreme Court of Pakistan possessing authority to designate arbitrators; authorizing capabilities of the courts of Pakistan on the selection and question of the arbitrators; providing the arbitral panel the autonomy to act on their own command; regulations controlling the arbitral proceedings; judicature aid in collecting proof; sovereignty of the arbitrators to determine a case ex aequo et bono or as amiable compositor provided the approval of the sides; and to pertain the essential law of any state decided by both the parties.

As the Bill simply follows Indian Law, we will import all associated problems too. It is beyond understanding why local courts are being left to singly assess Indian models quoted ahead of them when constructive research on the subject can easily automate the process by including necessary edits into our law itself. There is precedence in India of how the missing 'only ' caused issues

“Aforementioned is the segment that will concern when the location of arbitration is India”

"In Bhatia International v Bulk Trading S.A. and Another[27]and, more recently, Venture Global Engineering v Satyam Computer Services[28], the Supreme Court of India has clarified the language of Segment 2(2) of the Act of India to mean that Part I of the Indian Act ought to be put in for all arbitrations either carried out inside or outdoors of India."

Similarly, the lax use of the precarious and unpredictable term 'public policy' in our law is compounded in problem with its explanation in section 34(2).

4.9 An important discussion on India

Literature review on India was purposefully done from research papers that were commentary oriented in nature. India has the most similar demographic to Pakistan and provides us with the best view of roadblocks ahead when implementing and practicing updated arbitration laws in Pakistan.

Consequently, discussing India in this chapter would be repetitive.

4.10 Analyzing Australia

Australia has a number of well-established institutes with regards to arbitration including an international commercial center for arbitration, an institute to train arbitrators and mediators as well as a regular dispute center. They also have a primary focus on fast track arbitration that is of much use to Pakistan. We selected Australia because of their institutionalized approach to the subject.

The power given to Australian courts to give a stay on tribunal happenings if a side breaches an arbitration contract for issues solvable by arbitration is commendable. Even if such proceedings are started overseas, Australian courts still order a restraint, ensuring there is no escape if you break an arbitration agreement. However, further detail on what issues are not solvable by arbitration, at least guidelines since an

exhaustive list would be difficult to produce, will be beneficial for Pakistan in streamlining the process.

With regards to appointing an arbitrator, Australian law lets parties find a way to do so, failure of which makes Model Law applicable. To avoid giving birth to new issues, Pakistan should straight away make the Model Law procedure applicable. Secondly, if this appointment of arbitrators is to remain lax, it should be done in the initial agreement before staring any work. It is also notable that Australia keeps a single organization responsible for naming the arbitrator if the parties cannot agree on this issue, ensuring any conflict is avoided.

In the advent of removal of arbitrator, Australia adapts appropriate procedure. The only addition should be introduction of appropriate penalties on proven malice on part of arbitrator that should be handed out by an arbitration institute instead of a court. If the institute fails to do so, courts will have to intervene and there should be very serious consequences in such a case as the entire system would fail on account of malice of the institute at large.

On commencement of arbitration, location should be pre specified in contract especially in contracts involving firms from multiple countries to avoid dispute on this. Updated standard forms of notice to arbitrate should be prepared under PEC to standardize the process.

Australian law does not necessitate institutional or ad hoc rules to govern arbitral procedure, however clearly appreciates the impact of doing so which is why a framework in this regard is necessary to be adopted for Pakistan. We have also tried to provide the best procedure in this regard.

Australia has a very thorough mechanism to ensure privacy concerns of all parties are met. There are even additional clauses that can be opted for to ensure no confidential documentation is released, especially useful in public sector projects. Pakistan should integrate these privacy clauses into law.

Model Law is apt with regards to giving specific circumstances for the involvement of a court in arbitration proceedings. Australian law encourages courts to have regard for assistance in international business by ensuring enforcement of arbitration and arbitral awards in true spirit.

With regards to cost of arbitration, Australia is very lax to the point of no unified fee structure. This should never be implemented in Pakistan as it will only give rise to unbridled costs, defeating the purpose. It also puts the onus of deciding costs on the arbitral tribunal. We shall look to Palestine in this regard.

4.11 On Singapore:

Arbitration in Singapore is of help to us in establishing the basic pillars on the subject. These are government policy and legislation, executive and institutional support, judiciary and developments in case law. Even without one of these arbitrations cannot be effectively implemented. Secondly Singapore's approach of becoming a hub of international arbitration has provided great impetus in developing and formulating legislation on the subject. Pakistan can adopt a similar model in the South East Asian Region at least. The last knowledge gained from Singapore is on the subject of award confidentiality, where they take a much stricter approach than internationally practiced, bringing in more user confidence.

4.12 Discussing Georgia

The reason for discussing the history and disturbed state of Georgia is to prove to a point in case, despite such circumstance's arbitration has been implemented successfully in the region. They even have a history of solving criminal disputes with arbitration. Learnings from the region include exclusion of private property disputes from arbitration, applying principles of general justice and equity instead of looking at the right and good on a case to case basis, requiring arbitrators to not blindly follow Model Law, instead take into account practices of the trade, direct enforcement of foreign awards, promoting maximum remission of awards and clarifying public policy.

4.13 1st case study

From the first case study we observe that an unbelievable delay of 11 years occurs in arbitration proceedings. This is completely unacceptable as it defeats arbitration's inherent purpose. Even then neither party had sufficient evidence to back their over exaggerated claims. Vague terms like 'loss of business' were being used. Even after 11

years due payments were not made in full and had to be adjusted in the award. This case study opened up a two phased solution, one on new arbitration laws that ensure no case exceeds strict timelines by introducing penalties and that site practices and record management is a much more core issue to be solved by implementing, in fact requiring site managers to clear PMI certifications and ensure project management principles on ground. It is clear that even what is right of a party cannot be delivered if there are no records to show and just one man's word against another.

4.14 2nd case study

The second case was picked to learn how an arbitrator can develop a specific framework to assess such a complicated case with snowballed claims. We see in the way the 12 issues were framed. We also realized that the matter of jurisdiction of an arbitrator or DAB must be determined appropriately by law instead of being left open to interpretation. There is a clear lack of communication between parties because of not being aware of standard procedures and their importance. The decision of DAB was rejected by contractor which led to arbitration. Lastly was the issue of delayed payments, since there is no penalty on such and the contractor was also unable to prove any losses due to the same, the effort ended in a dead end. A system around delayed payments must be established too similar to what we propose for the project management part of the problem.

4.15 Recent Developments on Arbitration in Pakistan

The Alternate Dispute Resolution Bill, 2017 was passed in National Assembly and introduced in Senate on 16th February 2017. It amends a list of clauses with more concise wordings, removes any discrepancies in meaning deduction from the clauses. The details of the changes in clauses are reproduced in the Senate report.

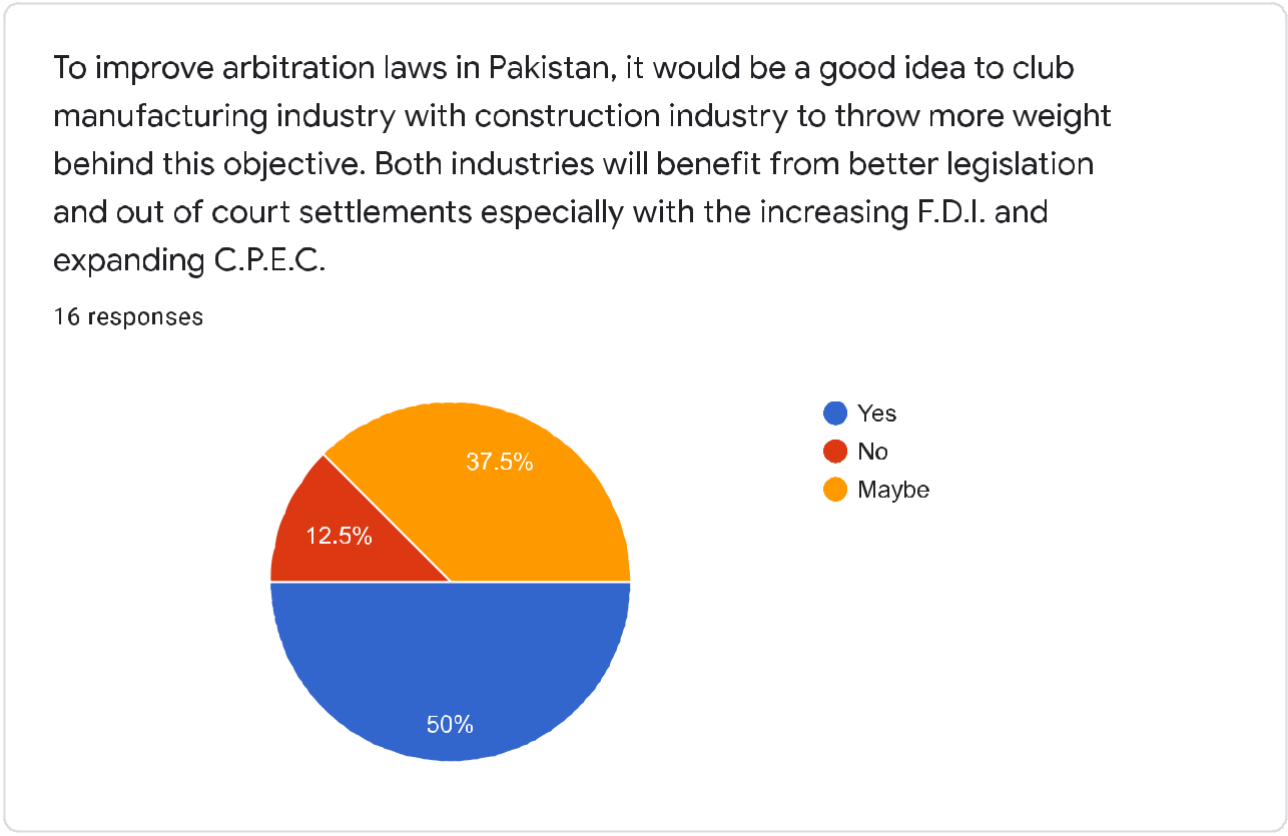
While this bill is a tread towards the accurate direction, it produces very minute changes, mostly relevant to civil disputes. However, it clearly displays the ruling bodies familiarity with the subject and its benefits. It is thus recommended that expert counsel formulates frameworks and laws in accordance with relevant examination and pushes the suggestions to be passed as an update to the archaic 1940 Act.

4.16 Confirming Recommendations from Expert Counsel

The following questions were framed with yes, no, maybe or other as options. They were sent to leading arbitrators, claim and contract specialists and professionals very much familiar with dispute resolution in Pakistan.

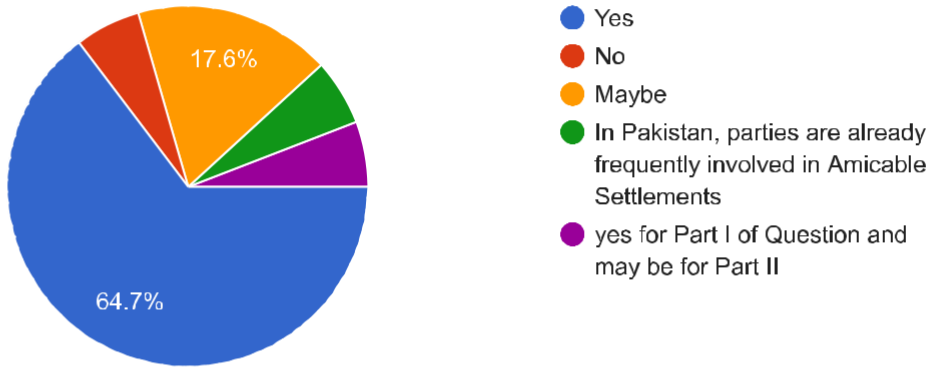
4.16.1 Questions and Responses

Figure 4.1 – Figure 2.23: Responses of Online Questionaries'



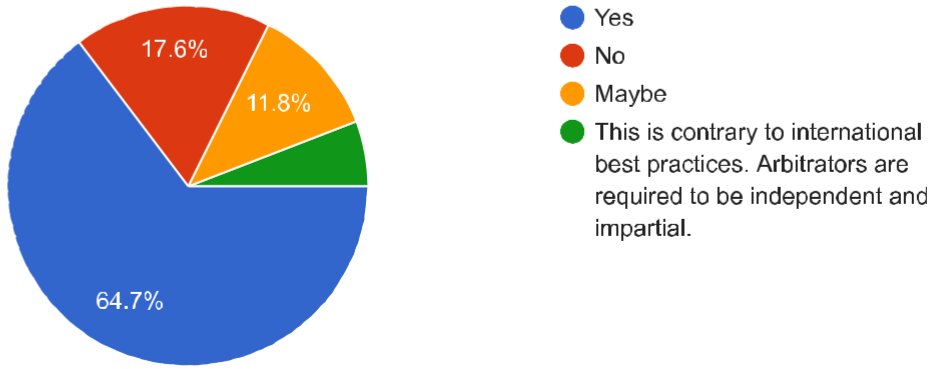
Despite the fact that amicable settlement methods are now preferred internationally, without a proper and well established arbitration act we can not expect our industry to jump from litigation to mediation etc. directly. Amicable settlements work because parties are confident that in case situations spiral down, we can always go to arbitration.

17 responses



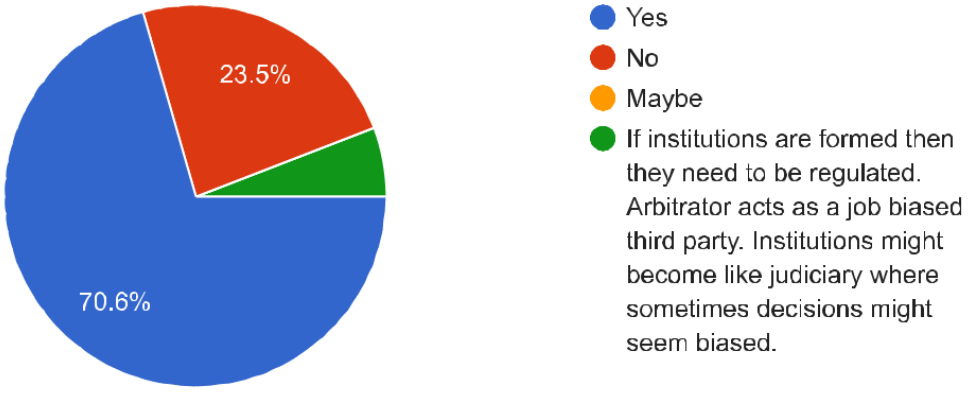
Selection of arbitrators is usually left to when disputes occur. Do you think requiring naming arbitrators at the onset of contract itself would be beneficial and show seriousness regarding dispute resolution of both parties?

17 responses



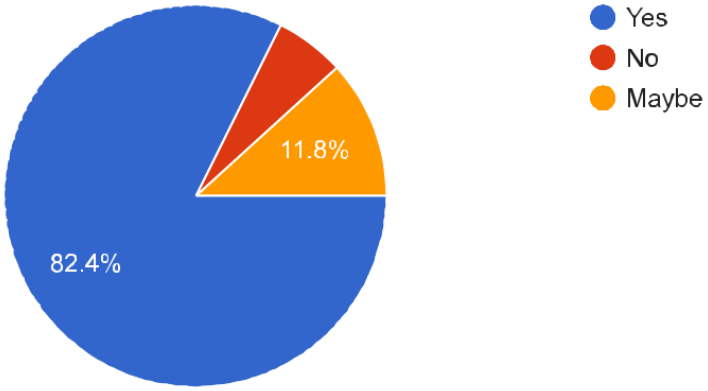
Do you think an institutionalized approach to arbitration will be helpful instead of leaving decisions to a case to case basis?

17 responses



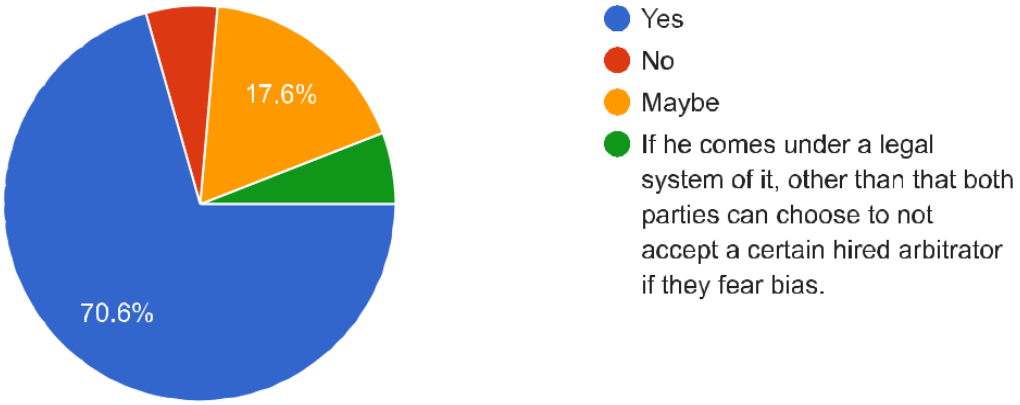
Do you think Pakistan needs an institute to train and certify arbitrators?

17 responses



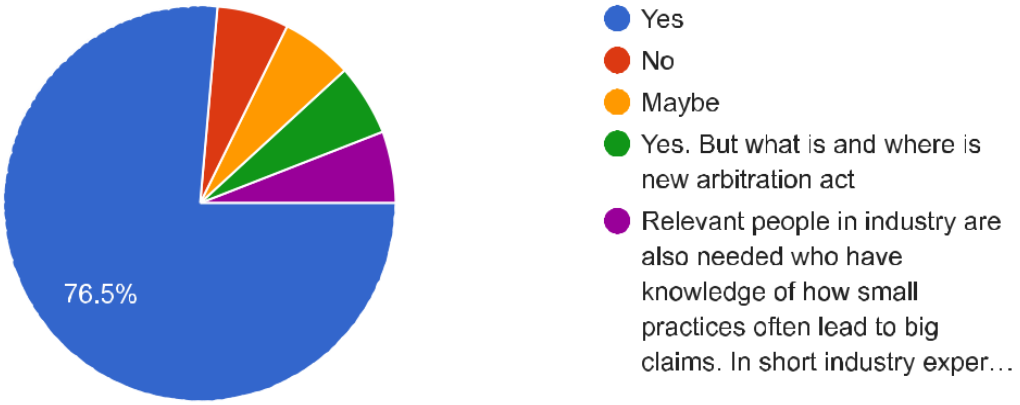
If an arbitrator has been proved of malice, should he be treated the same way Civil law would treat a judge?

17 responses



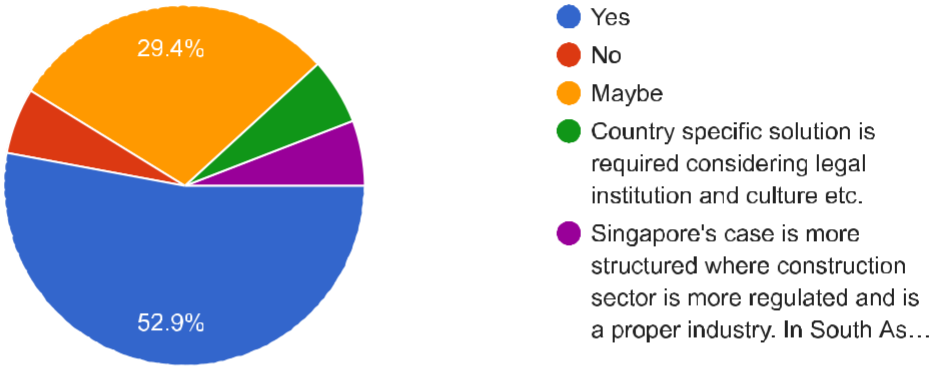
We believe government policy and legislation, executive and institutional support, judiciary and developments in case law are the pillars to implement a new arbitration act. Do you agree?

17 responses



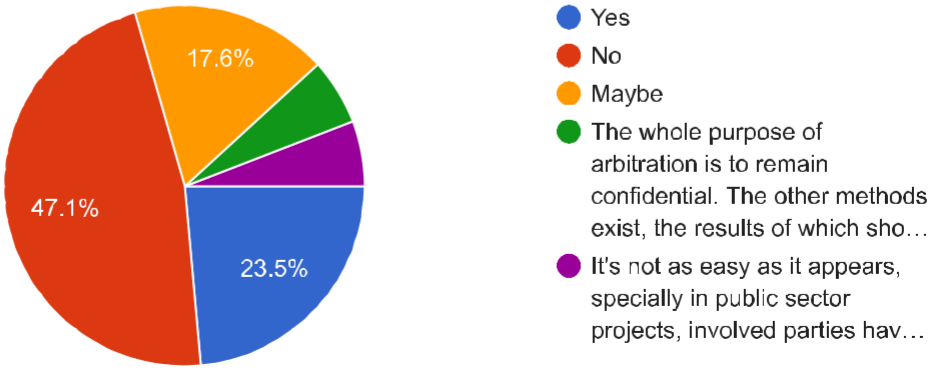
Singapore benefited greatly from their model of becoming an international hub for arbitration. It helped them bring in finances and loads of data sets to develop arbitration. Do you think we can apply this model in Pakistan, especially for countries like Afghanistan and Sri Lanka etc. for example.

17 responses



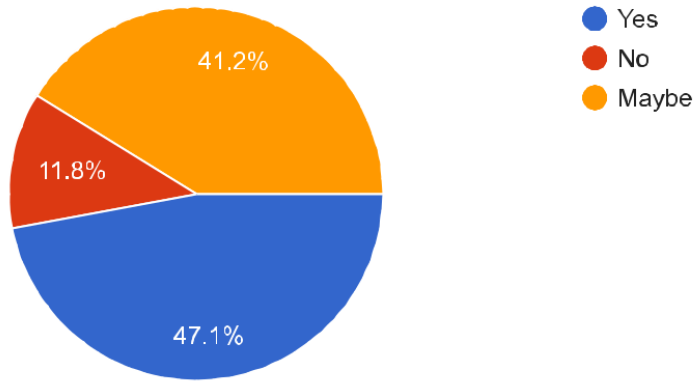
With regards to award confidentiality, the world is divided. Do you think arbitration proceedings, awards and relevant data should be completely confidential?

17 responses



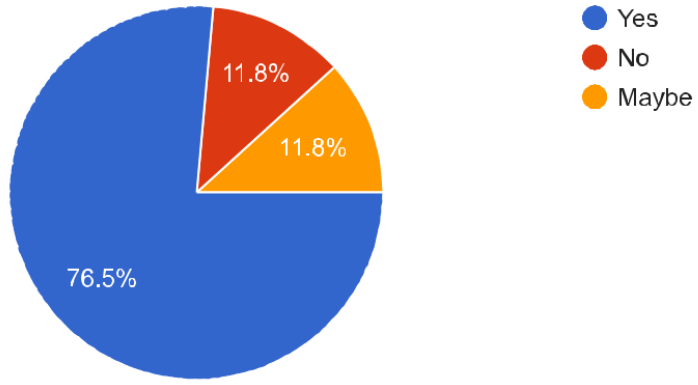
Can we possibly ensure Pakistan is the choice of forum in arbitral awards with China under C.P.E.C. to give us an edge?

17 responses



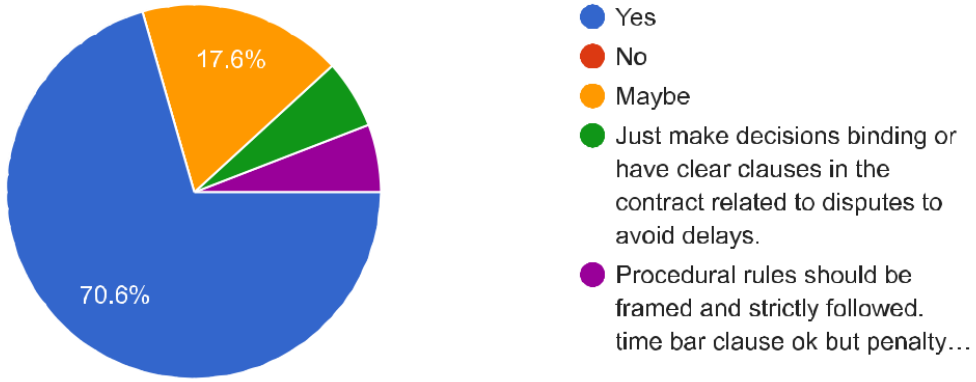
Arbitration procedure is very open ended in Pakistan and has to be developed on a case to case basis. Do you a think a detailed framework in this regard, that is part of law, will be helpful?

17 responses



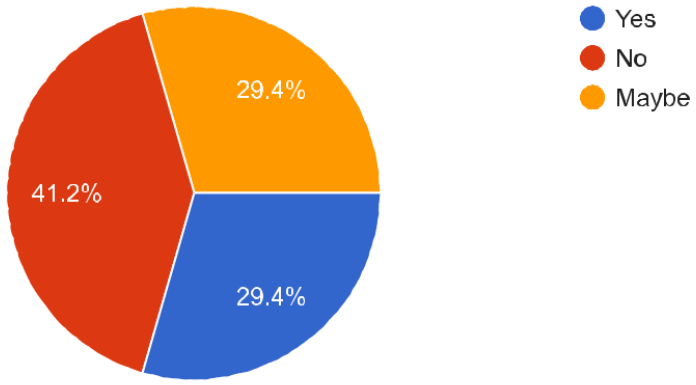
Our study shows cases delayed over a decade in arbitration. Do you think arbitration should be strictly time barred with penalties imposed on parties that cause delay including arbitrator?

17 responses



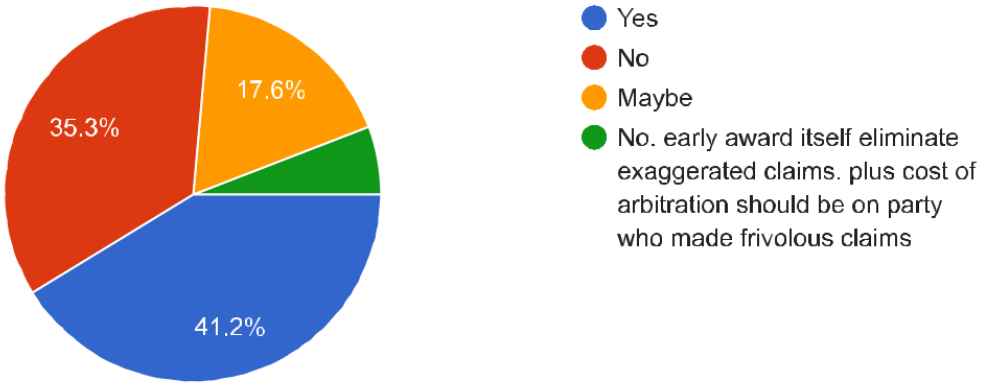
Do most arbitral awards end up in 50/50 fault due to lack of evidence and the fact that both parties cannot sufficiently justify claims?

17 responses



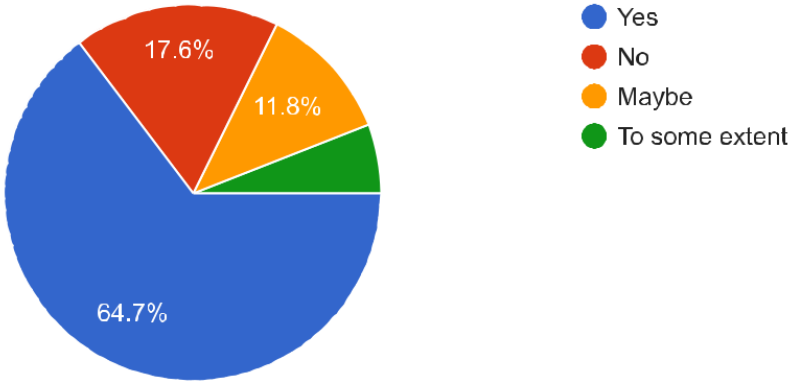
Do you think a strict penalty on largely overstating claims can be a solution to this problem?

17 responses



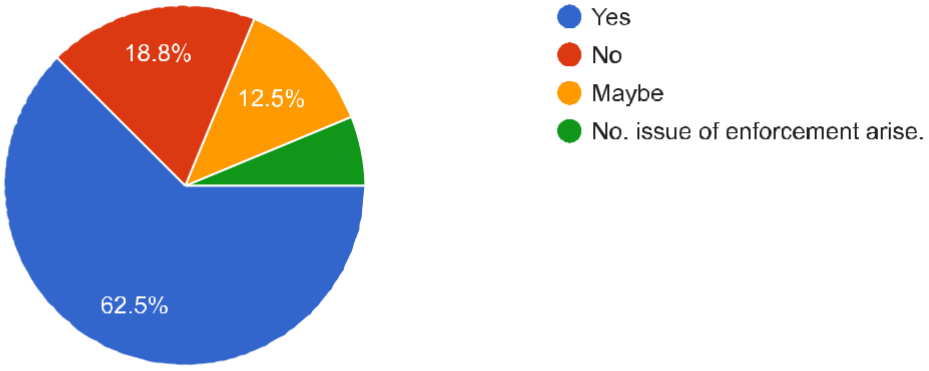
A lot of the issues in arbitration boil down to a lack of record keeping at site and overall mismanagement. Do you think necessitating clearing of P.M.I. certifications for project managers etc. can prove beneficial to improve these practices?

17 responses



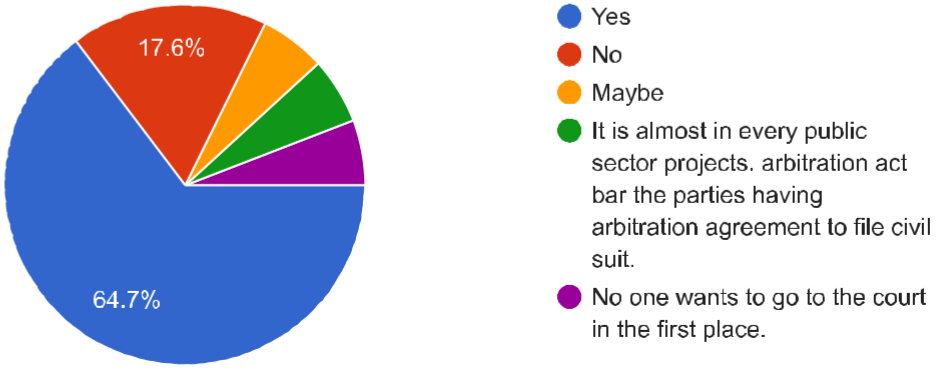
A court must be currently involved in applying an arbitration award. Do you think these should be automatically applied and not needed to be registered with court, just with an institute of arbitration?

16 responses



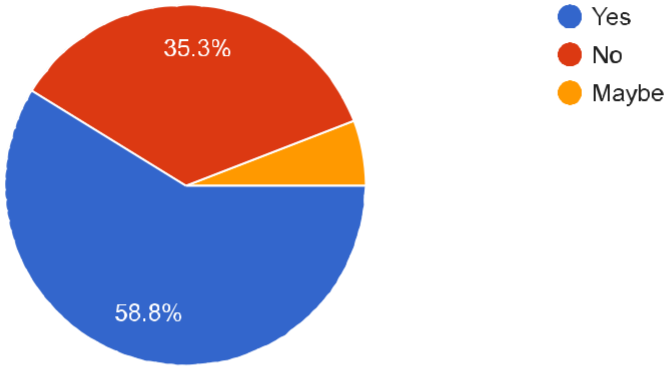
Should arbitration be a binding and compulsory clause, especially in public sector projects? This would mean a court would only look at the arbitration award and proceedings, no party would be able to file a court case if they have agreed to arbitrate, which would inevitably be binding.

17 responses



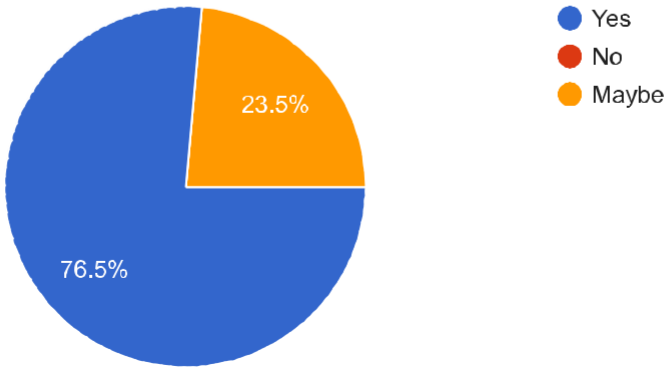
Do you think spoken arbitral awards and evidence be omitted completely as it is anyways very difficult to prove in the face of law?

17 responses



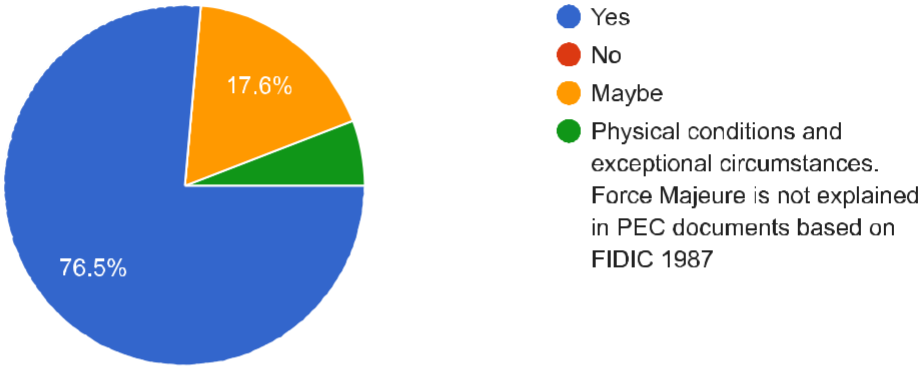
Arbitrators should exercise their authority to make an award allocating the costs of the arbitration, taking into account the time spent dealing with unmeritorious claims or counterclaims, grossly exaggerated claims, unsatisfactory conduct by a party in the course of the arbitration, and so on instead of a time based or claim amount based system.

17 responses



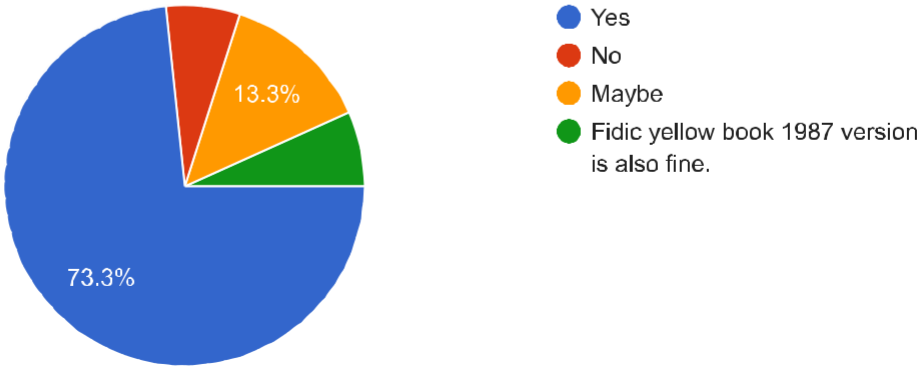
Covid-19 should be treated as a Force Majeure or Exceptional Event in most case providing for EOT usually and financial compensation extremely rarely.

17 responses



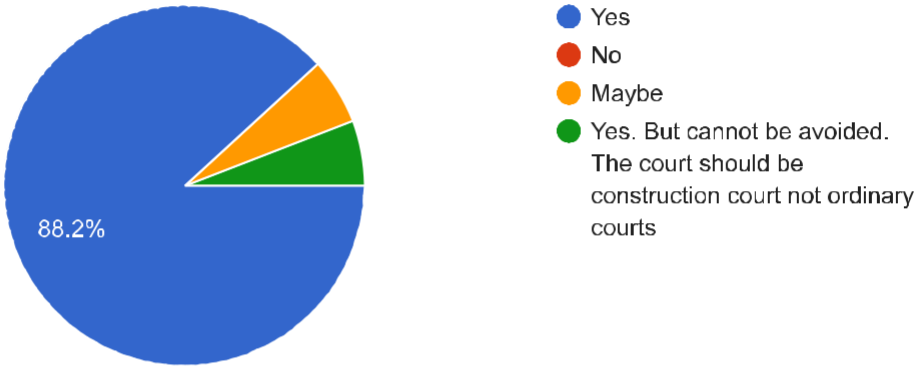
F.I.D.I.C. version applied to contract should be at least '99 as this would vastly improve contracts while simultaneously providing enough case data to understand the clauses with now a global history of over 2 decades.

15 responses



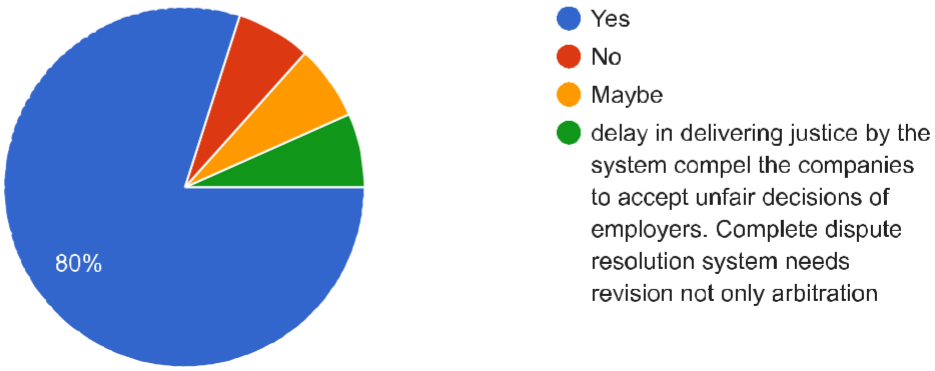
Court involvement should be minimized in arbitration. Instead a detailed framework should be established on the subject, inclusive of its jurisdiction and procedure, to be managed by a single national arbitration institute.

17 responses



Well reputed organizations working in construction industry avoid registering a legal matter, most of the conflicts are not even termed as a conflict in their official letters to concerned authorities. Do you think increased confidentiality in arbitration will help bring in user confidence?

15 responses



CHAPTER-5

5. Conclusion

In this study we have begun by reiterating the significance of arbitration as an alternative dispute resolution mechanism. We conclude that amicable settlement procedures are most efficient but without a solid framework of arbitration in place, users will have only litigation to rely on if disputes become confrontational. It is no hidden truth that disputes in our industry are often very confrontational, simultaneously the burden on our judiciary has been established with the shared statistics. It is thus very wise to improve arbitration laws in Pakistan.

The age of inventions has mostly passed away. We do not need to formulate entire laws from scratch on the subject, which would have proven quite difficult. As a result, we have analyzed the history and recent developments in arbitration of Australia, Singapore, Georgia, Palestine and India. We analyze some countries on a larger model level, some to develop a specific procedure of arbitration and some to learn more specific developments at a clause by clause level.

We have then taken a look at the dismissal state of arbitration and contract laws in general in Pakistan. We study specific problems with the Arbitration Act of 1940 and then establish a comparison from aforementioned learnings to local ones.

On this subject we conclude that Pakistan can follow two models in wholistic sense. One means clubbing of industries such as construction and manufacturing to help arbitration become more widespread and develop a more versatile set of laws and framework on the subject. The second is to aspire to become a center of international commercial arbitration for the South East Asian region especially for friendly countries. This will help bring in investments, improve our standing in the region and provide immense expertise and data on the subject to pioneer dispute resolution mechanisms in the future.

With regards to developing a specific procedure of arbitration, we have done so with three primary aims. It is a time barred model, with penalties imposed on any party causing unnecessary delay and lastly it will help arbitrators save time by not having to develop procedures for most cases.

As for the model to be implemented we conclude that Pakistan should go for a adjusted model of the UNICITRAL Model Law in its most updated version at the time of application. We have discussed in detail a number of modifications that may be necessary in this respect.

We have also supplemented our learnings with the help of two case studies of different natures. These helped us to see ground realities beyond the nature of literature coverage. As a result, we concluded that PMI has to be involved in not just the process of arbitration but in site management too. We thus also looked at how disputes may arise and be solved owing to the global pandemic Covid-19.

Finally, a brief survey on all these findings was conducted with a limited number of experts on the subject of dispute resolution and contract and claim managers to help us further gauge the scenario.

We hope we have at least been successful in establishing some of the groundwork for further research on the subject locally and provide impetus to a successful updating of arbitration laws in Pakistan.

6. REFERENCES:

1. A. A. Gulghane, Prof P. V. Khandve. Department of civil engineering, Prof Ram Meghe College of Engineering and Management /Sant Gadge Baba Amravati University, Arbitration in Construction Industry: An Overview, India
2. Arbitration Act of 1940.
3. Bunni & Loyd QC, 2001: Final Report on Construction Industry Arbitrations. ICC International Court of Arbitration Bulletin Vol. 12 No. 2.
4. Cheung, 1999: Critical factors affecting the use of alternative dispute resolution processes in construction. International Journal of Project Management Vol. 17, No. 3, Elsevier Science Ltd.
5. Clough, Sears and Sears, 2005: Construction Contracting; A Practical Guide to Company Management, 7th Ed. . John Wiley & Sons Inc.
6. Comparison Between Arbitration Proceedings Under Arbitration Act Of 1940 And International Rules Of Arbitration For Large Scale Construction Projects Of Pakistan.
7. Edward R. Fisk PE and Wayne D. Raynolds, the 9th Edition of "Construction Project Administration" By.
8. Fisk & Raynolds, 2010: Construction Project Administration, 9th Ed. . Prentice Hall.
9. Hinze.2010 :Construction Contracts, 3rd Ed. . McGraw Hill.
10. Impact of The Recent Reforms On Indian Arbitration Law
11. Jannadia, Assaf, Bubshait, & Naji, 2000: Contractual methods for dispute avoidance and resolution (DAR). International Journal of Project Management,
12. Joseph T. McLaughin, Arbitration and Developing Countries
13. Khan-2013: Alternate Dispute Resolution and Arbitration. The Counsel Magazine.
14. Lavers, Fenn, & Gameson, 1992: Construction Conflict: Management Analysis and Resolution. In Construction Conflict Management (pp. 3-20). London UK: E & FN SPON / Chapman & Hall.
15. Leon Chung, Elizabeth Poulos, and Elizabeth Macknay, Arbitrational Procedures and practices in Australia.
16. Lessons from General and Varied Contexts, 2003 J. DISP. RESOL. 319, 341 2003
17. Rules of Conciliation and Arbitration: PEC, March,2009.
18. Steven Austermiller, Rescuing Arbitration in the developing world: The extraordinary case of Georgia,
19. The Arbitration Act and The International Arbitration Act
20. The Importance of the Rule of Law and Respect for Contractual Rights in Transition Countries, 17 EUR. BUS. L. REV. 327, 333, 2006
21. Tucker, 2005: An Overview of Alternative Dispute Resolution Use in Construction Industry.
22. Warren B Chik, Recent Developments in Singapore on International, Commercial Arbitration.