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## Arbitration can Ease the Courts

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**Abstract:** *Alternative Dispute Resolution (ADR) is a solution to cater for a load of cases from ordinary courts. The commercialization of the whole world in recent years demands a parallel system for the resolution of disputes in a speedy and less costly manner. Therefore, legislation of different countries working on Alternative Dispute Resolution (ADR) is more focused on arbitration. This article explains how factors of neutrality and confidentiality in arbitration proceedings enhanced its demand in recent decades for the resolution of conflicts between private parties and state-to-state as well. Due to the narrow grounds of appeal against the award of arbitrators and a broader scope of enforcement of the award, parties are more comfortable in settling their disputes through arbitration. Notwithstanding, third-world countries, including Pakistan, are reluctant to legislate laws on ADR, especially regarding arbitration, that should be focused to build confidence among national and international investors.*

**Key Words:** Alternative Dispute Resolution, Arbitration, Courts, Parallel System, UNICTRAL, Confidentiality, Awards

### Introduction

Arbitration is an exceptionally perceived technique in the world for resolving issues in a more rapid and costless way. The foundation of "Alternative Dispute Resolution" (ADR), in which disputes between the parties are resolved outside of the courts, is arbitration. Arbitration is the best way to resolve disputes without going into detail about legalities and procedures that courts usually follow in daily routine as the precedent of Superior Courts binds national Courts. An American jurist and arbitrator writes in one of his articles (Harry T. Edward) that,

"If I were employed in a job from which I could be fired, and if I did get fired and had a right to challenge my discharge in a forum of my choice, I would rather be in arbitration than in court"

Due to delays in justice in ordinary courts litigants now usually prefer to go for arbitration to redress their grievances.

Although international trade has become more globalised in the twenty-first century, where citizens of one country are connected to the citizens of another

country, trade possibilities and commercial disagreements between them are more likely to occur, arbitration is still encouraged when there is an international dispute. One of the key methods for resolving trade disputes between parties to an international business agreement is international arbitration (LEAP Pakistan, Ahmad Abdul Rehman, 2020).

There are many international arbitration organisations, such as the "International Chamber of Commerce" (ICC), the "London Court of International Arbitration" and the "International Center for Settlement of International Disputes" (ICSID) playing a very important role in arbitration.

However, arbitration has emerged as "the recognised procedure for settling international commercial disputes" in the recent growth of worldwide commerce and transnational investment (Yves Dezalay & Bryant G. Garth, 1996).

The Supreme Court acknowledged and tacitly complimented arbitration when it rendered its decision in the case of "[Steelworkers V. American Mfg. Co.](#), 363 U.S. 564"

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"(1) it was a relatively speedy system of justice; (2) it was mostly informal; (3) it was therapeutic in the sense that it allowed workers to "have their day in court;" (4) it was voluntarily binding; (5) it usually involved a judgment from someone who was well-known and well-respected by the parties; (6) it was relatively cheap; (7) it was a flexible process that could easily be changed to suit the parties; and (8) most importantly, it was an extension of collective bargaining; that is, a private system of jurisprudence, created by and for the benefit of the parties"

It is necessary that two separate systems should be run side by side to resolve the issues between the parties due to alarmingly pending litigation in courts. Further, courts are overburdened which causes hurdles to deciding the disputes in the manner that they should be.

### Advantages of Arbitration

The importance of arbitration arising day by day due to the advantages that parties get during the arbitral proceedings, moreover delays in justice whether (civil or criminal matter) is a universal problem (Zafar Iqbal Kalanauri, [2012](#)). "William E Gladstone," said that "justice delayed is justice denied." But due to arbitration people are getting justice in a speedy or costless manner. Some advantage is promoting the idea of arbitration.

### Cost and Time of Arbitration

Justice means fair trial, so fair trial includes justice in a timely and less costly manner. Usually, in arbitration, cost and time are much less than in litigation, but in some cases, scenarios may be different. However, it depends upon the case to case. In litigation, both parties hire expensive or experienced lawyers to persuade their case for a long period but in arbitration, the cost is divided chiefly between both parties equally. The role of the lawyer is very important in arbitral proceedings; if both parties delay the proceedings that will eventually increase the cost of arbitration proceedings. As in litigation, there are a lot of pre-trial expenses which are missing in arbitration proceedings.

Usually, parties mentioned the time limit in their contract for the decision of their dispute through arbitration but now most laws expressly mention deciding the arbitral proceedings in a shorter time. In the beginning, there was no clear interpretation that the arbitrator can adopt a summary procedure or not but this was cleared in the American case "Weirton Medical Center Inc v Community Health Systems Inc, N.D. W. Va. Dec. 12, [2017](#)".

The authority of an arbitrator in the US to "adopt such procedures as are required to give effect to the parties' agreement" and that "procedural problems which emerge out of the dispute and depend on its eventual disposition are presumptively... for an arbitrator to resolve" are both well-established. Even if the arbitration agreements do not explicitly authorise summary judgment, they also do not explicitly forbid it, the court continued.

ICC Rule 22 states that "The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute", "Singapore International Arbitration Centre" ("SIAC") and the "Stockholm Chamber of Commerce" ("SCC") rules states for the expeditious proceedings of the arbitration and also in the first schedule of arbitration act 1940 of Pakistan, the arbitrator should make an award in 4 months. This all shows that in arbitration there is less cost and time as compared to courts of ordinary litigation.

I would point to the elements of cost and speed as objective proof. An article published recently by the "American Bar Association" claims that it takes on average 250 days to file a grievance over an arbitrator's decision. In instances that are expedited, the period is considerably shorter. Comparable cases had substantially lengthier in-court litigation times ("American Bar Association, Committee Reports, Vol. II (Chicago: ABA Press, [1981](#)), 198").

### Neutrality

Neutrality is one of the major factors that encourage arbitration. Place of arbitration and both parties agree to the appointment of the arbitrator, which eliminates the possibility of bias, and impartiality regarding the arbitrators increases the confidence in parties. "Usually, people doubt the place of the arbitration, if the place belongs to one of the parties, despite the fact that some detractors commonly associate independence, impartiality, and impartiality within a narrow definition, the neutrality of an arbiter goes considerably further than the other two ideas". (Giorgio Bernini, Cultural Neutrality 1989 and Pierre Lalive [1984](#)). Additionally, parties like the neutrality of the arbitration seat due to accessibility and other factors.

Now parties may appoint an arbitrator who has different nationality as well to remove all doubts of any kind of biasedness.

The need that an arbitrator's nationality differs from that of the parties is reflected in many international arbitration rules, including the "United

Nations Commission on International Trade Law" ("UNCITRAL") "Arbitration Rules" ("UNCITRAL Rules") ("G.A. Res. 68/109, At 6.7, Dec. 16, [2013](#)"), "the American Arbitration Association International Arbitration Rules" ("AAA Rules") (Art. 12.4) "the London Court of International Arbitration Rules" ("LCIA Rules") (Art. 6, 2014), "the International Chamber of Commerce Arbitration Rules" ("ICC Rules") (Art. 13.5, 2017) and "the World Intellectual Property Organization Arbitration Rules" ("WIPO" Rules) (Art. 20, [2014](#)).

As a result, it has been clearly established in French national legislation that arbitrators must adhere to the same norms of objectivity and independence as judges in domestic courts ("[Articles 1456](#) and 1506(2) of the French Code of Civil Procedure") Supreme court of America ("Commonwealth Coatings Corporation v. Continental Casualty Company, 393 U.S. 145, 147-48, 1968") "the arbitrator neglected to reveal a four to five-year consultancy connection with a party to the arbitration, leading the court to annul an award under the legal theory of evident partiality". The Court, however, did not establish a clear norm of objectivity and independence.

This shows that neutrality has a special place or advantage in arbitration that helps the parties to arbitrate in a free atmosphere without any biasedness, impartiality, or dependence.

### **Confidentiality and Privacy**

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Confidentiality and privacy, although the main edge of the arbitration to save the parties from dirty washing, do not appear in the newspaper or television on daily basis. In litigation, usually high profile goes side by side through media trial but in arbitration, if parties want to run arbitration is confidential, they can do so.

Moreover, there is a distinction between privacy and confidentiality, in privacy parties disallow the third party to participate and in confidential proceedings parties never disclose any information about the arbitration proceeding to the third party that may include any witnesses, documents, pleadings, and transcript. Therefore, confidentiality imposes a greater cost on the parties to the Agreement than privacy since it forbids disclosure of any information and discourages other parties from intervening in the proceedings (Confidentiality in International Arbitration, [Chapter 20](#))

In "UNCITRAL Model Law on International Commercial Arbitration" which most countries follow in drafting their laws has no such clause of confidentiality. It is open to a party to add such a clause

or not in the agreement. Therefore, the parties may include such a condition in their arbitration agreement (International Commercial Arbitration, 2nd edition, pp. 2779 - 2831). In contrast, there are some countries that focus on implied confidentiality like Swiss and Singaporean Courts ("Int. Coal Pte Ltd v. Kristle Trading Ltd and another and another Suit, [2008](#) SGHC 182"), now India amended the Act in 2019 ("Arbitration and Conciliation Act, 1996") As per proposed Section 42A, "The parties to the arbitration agreement, the arbitrator, and the arbitral institution are all subject to a secrecy duty".

Also, "The administrative Dispute Resolution Act of 1996" (ADR Act) establishes a general rule that neither parties nor arbitrators may be forced to reveal arbitral communications without authorization, previous disclosure, a legal requirement, or a ruling from a court that such disclosure is essential (Section 574 Administrative Dispute Resolution Act of [1996](#)).

Most laws put the obligation of privacy and confidentiality on arbitrators not to disclose the information of arbitration like "ICC Rules, whose article 6 of Appendix I, and article I of Appendix II", "only impose duties on arbitrators and the staff of the International Court of Arbitration, but not on the parties", although article 22.3 "authorizes the Arbitral Tribunal to make orders concerning confidentiality upon the request of any party". Similarly, "article 37.1 of the ICDR rules of the AAA" "only imposes duties of confidentiality on arbitrators and Administrator" and article 37.2 "establishes that the tribunal may make orders concerning confidentiality".

The above rule shows that confidentiality has one of the major edges of arbitration that attracts the parties to arbitrating to protect their goodwill and reputation in society.

### **Appointment of Arbitrator**

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Arbitration has several benefits, one of which is that parties may appoint their arbitrators or a seat of arbitration which saves from any corrupt or biased judge of the judicial system. Although there are many experienced judges that are sitting in the national courts, they have to deal with all the cases, so their expertise is not limited to the specific field or in international arbitration complexities are more in the case that is difficult to handle with the national judges. Hence, parties appoint arbitrators that have a firm knowledge of their issues. The calibre of the arbitrators picked will have a significant impact on the outcome of the arbitration procedures ("J. D. M. Lew, L. A. Mistelis and S. M. Kroll, [2003](#)").

Usually, parties add a clause in the arbitration agreement regarding the criteria for the appointment of the arbitrator. There is always one arbitrator or three arbitrators in the proceedings. A single arbitrator is nominated by each side, and either both parties or the tribunal itself may pick the third arbitrator. Parties have the basic right to choose the arbitrators they choose to use (Emilia Onyema, 2005). When "The makeup of the arbitral tribunal or the arbitral procedure was not in line with the agreement of the parties, "the New York Convention (Article V. 1 (d) New York Convention, 1958)" and "UNCITRAL Model Law (Article 24, 2, iv)" turn to annul an award.

The appointment of the arbitrator is one of the main tasks for parties if parties appoint an arbitrator that has no such knowledge will cause difficulty for them. The appointment of an arbitrator is based on the trust of the parties. People naturally brought all their disputes to Moses throughout his forty years of wandering in the wilderness. Exodus describes how Moses spent days resolving conflicts, working from very early in the morning until very late at night (Exodus, ch. 18, verse 13). So the burden of the appointment is on the parties to decide who will be the arbitrator for their case, indeed the appointment of an arbitrator gives more transparency in the arbitration proceedings.

## Appeal

In arbitration proceedings are completed on a fast track, so there is no concept of appeal against arbitration award, once the award is made, it is final in its nature so therein parties have to accept that award, usually, in ordinary courts, there are two or three more upper fora in which parties file an appeal against their decision that consumed years of years in litigation or to get an award that parties finally get from the court of the first instance.

Although parties can challenge the award of arbitration but with a very narrow scope, and material illegality in law that is not easy to establish, moreover, the inability to appeal strengthened the concept of arbitration.

In "Guangzhou Dockyards Co. Ltd v E.N.E. Aegiali" An appeal against an arbitral decision that was based on a factual issue was rejected by Commercial Court. Blair J deemed it "extremely questionable" that the court had the authority to hear an appeal of factual conclusions made by arbitrators. Even if the parties had consented to such an appeal, this would still be the case, according to Blair J's interpretation of the contract's arbitration clause.

In a nutshell, finality is one of the considerable advantages of arbitration if the remedy of appeal or review is available against the arbitration award, so there remains no difference between litigation and arbitration.

## Enforcement of Award

When parties get the award in their favour next step for them to enforce that award in the jurisdiction of the losing party also becomes very easy due to the enforcement of the "New York Convention" (hereinafter referred to as a convention) by different countries, there are 166 state members of the Convention ("Status and text, New York Convention").

According to "Redfern and Hunter" (4<sup>th</sup> ed, Sweet & Maxwell 2004 at para 10-23) "the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards" is:

"[T]he most important treaty relating to International Commercial Arbitration. Indeed, it may be regarded as a major factor in the development of arbitration as a means of resolving international trade disputes"

Article 26 of the Vienna Convention on the Law of Treaties (1969), which stipulates that: "Every treaty in effect is binding upon the parties to it and must be fulfilled by them in good faith," obligates all members of the convention to enforce the award in their respective territories. States should thus adhere to the "pacta sunt servanda principle" and take action to enact legislation in accordance with Conventions and Treaties that are applicable to them (4<sup>th</sup> ed, Sweet & Maxwell 2004 at para 10-23).

A handbook for interpreting the "New York Convention of 1958" was also developed by the International Council for Commercial Arbitration (ICCA). A manual for judges was also released, outlining the inquiries to be addressed and the procedures to be used by the Courts in order to apply the Convention. The following list of the Convention's overarching goals and objectives is taken from the handbook: "The Convention is predicated on a bias in favour of enforcement" (emphasis added). It benefits international trade and commerce by making the execution of the arbitration agreement and arbitral awards easier and safer. It offers extra commercial security measures for purposes of engaging in cross-border dealings.

Moreover, only article 5 of the Convention states the ground of refusal to enforce the award but that is very narrow, that's why hundreds of awards are enforced under the umbrella of the convention.

## Conclusion

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There is a lot of litigation pending in normal courts, only in Pakistan, there are almost 2186113 cases pending, such an amount of pending litigation creates severe doubt in the competency of the judicial courts. Justice Mansoor Ali Shah addressing a seminar in November in Lahore, Justice of the “Supreme Court of Pakistan” that “Litigation is a scenario in which you go in as a bull but leave as a sausage,” We must carefully investigate the idea that some issues might best be handled by extending the use of collective bargaining and arbitration for the resolution of disputes ([Rubin, Arbitration](#)). In Pakistan, there are laws and forums for

arbitration but, that need to be more regularized or mechanized for the smooth running of arbitration institutions and awareness should be given to people about the benefits of arbitration.

Finally, I'd want to reaffirm what Judge Rubin said in his address to the Academy at the 1978 conference in New Orleans.:

"It seems to me that arbitration is not only a just means of resolving disputes, but that even the most formal proceeding is much faster, less expensive, and more responsive to industrial needs than the best-run courts available today. It is a myth that access to justice must mean access to the courts"( [Rubin, Arbitration](#)).

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