

Private international law

Pakistan: seminal judgment in *Hitachi v Rupali Polyester*

by M J Jaffer and R Z Ackhund

The Supreme Court of Pakistan, in *Hitachi v Rupali Polyester* (1998) SCMR 1618, recently decided the scope of jurisdiction of Pakistani courts over international arbitrations where the law governing the arbitration agreements is that of Pakistan. The court was called upon to determine whether an interim award rendered by an arbitral tribunal in London under the ICC Rules could be filed in court and challenged under the *Pakistan Arbitration Act 1940*. One of the parties to the contract was Pakistani while the other party was Japanese. The substance of the issue before the court was one of jurisdiction and whether the impugned arbitration award was a foreign award or a domestic one.

The dispute between the parties over the quality of the equipment supplied was decided in favour of the Japanese party by an interim award rendered in London. The Pakistani party applied to the court for the removal of arbitrators for legal misconduct and setting aside of the award. These applications were resisted by the Japanese party on the basis of a preliminary objection as to the jurisdiction of Pakistani courts to entertain applications in respect of arbitration proceedings which were taking place in London under the ICC Rules. The matter reached the High Court at Lahore on appeal, who reversed an earlier decision of the Civil Court and held that the Pakistani courts had jurisdiction to consider these applications, inter alia, because the proper law of the contract was Pakistan law and prima facie the award was not a foreign award.

JURISDICTION QUESTION

The substance of the issue before the court was one of jurisdiction and whether the impugned arbitration award was a foreign award or a domestic one.

The Supreme Court resolved these issues when it partly allowed the appeal and held that the award was not a foreign

award, that the jurisdiction of the Pakistani courts was not ousted and that they could consider the question of the misconduct of arbitrators when deciding whether to set aside the award. The essence of the Supreme Court's reasoning was that since the contract between the parties was governed by Pakistani law, the arbitration agreement must be governed by Pakistani law as well in the absence of any stipulation by the parties to the contrary. Further, that the overriding principle was that the courts of the country whose substantive laws govern the arbitration agreement are also the competent courts in respect of matters arising from such arbitration agreements. However, it was held that if the arbitration is conducted outside Pakistan then procedural matters would be governed by the chosen arbitral forum and the curial law of that country and the courts of that country would have the primary jurisdiction over procedural matters concerning the arbitration. The court also held that the arbitration award was not a foreign award within the scope of the *Arbitration Act 1937*, which enacted the Geneva Protocol, because the law governing the arbitration agreement was Pakistani law.

The following principles of Pakistani law can be derived from the Supreme Court's judgment.

- (1) That the proper law of the arbitration agreement governs the validity of the arbitration agreement, which will include matters such as the scope of the arbitration agreement, the constitution of the arbitral tribunal and similar matters, whereas the curial law governs the manner in which the reference is conducted.
- (2) That the proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.
- (3) That 'seat theory' is preferred to the theory of 'delocalised arbitration'.
- (4) In theory it is open to the parties to identify a law to govern the arbitration proceedings different from the law of the country in which the arbitration is taking place.
- (5) That a challenge to the validity or effect of an award is addressed to a court of competent jurisdiction. In general, this will be a court at the place in which the arbitration was held. Further, the presumption must be that the law of the place of arbitration governs the arbitration proceedings.

APPEAL ALLOWED

... The Supreme Court partly allowed the appeal and held that the award was not a foreign award, that the jurisdiction of the Pakistani courts was not ousted and that they could consider the question of the misconduct of arbitrators when deciding whether to set aside the award.

- (6) That the possibility exists that an award might be challenged under the law of a country other than that in which the award was made.
- (7) That while the law of an arbitration agreement usually follows the proper law of the main contract, an arbitration agreement is separable from the main contract between the parties, and arbitration agreements may have different laws which may be provided within the arbitration agreements.
- (8) That the law of the arbitration agreement regulates substantive matters relating to that agreement including in particular the interpretation, validity, voidability and discharge of the agreement to arbitrate and similar issues relating to the reference and enforcement of the award. 

MJ Jaffer and RZ Akhund

Orr Dignam & Co, Advocates, Karachi, Pakistan