

# Pakistan's Approach Towards the Misconduct of an Arbitrator

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Arbitrators act in a quasi-judicial manner, which is defined by the Black's Law Dictionary (9<sup>th</sup> Edition) as “an act performed by a judge who is not acting entirely in a judicial capacity”. Nonetheless, an arbitrator assumes a certain level of trust and responsibility because their conduct plays a vital role in developing the public's perception of the arbitral process. According to a Dutch Court, arbitrators are comparable to judges and should be able to judge freely.<sup>2</sup> Thus, the decision of an arbitrator is entitled to the utmost respect and weight. However, this rule is subject to limitations; for instance, where the arbitrator has engaged in misconduct or compromised the proceedings. Arbitral misconduct exposes not only the parties but also the arbitrator to inevitable consequences.

This Article consists of four parts. Part I briefly introduces the relevant provisions of the Arbitration Act 1940, relating to arbitrators' misconduct. Part II dives into the proper construction of the term 'misconduct' by the Pakistani courts. Part III discusses the doctrine of arbitral immunity, and an arbitrator's criminal and civil liability for misconduct in arbitration. Finally, Part IV concludes that Pakistani courts, on the one hand, protect the victim of unfair arbitral proceedings; and, on the other hand, safeguard the integrity of arbitrators from undue harassment.

## **I. THE MISCONDUCT UNDER THE ARBITRATION ACT**

Two main provisions of the Arbitration Act of 1940 (“Act”) deal with the arbitrators' misconduct in arbitral proceedings: (i) section 30(a); and (ii) section 11(2).

Section 30(a) of the Act allows a party to the arbitration agreement to challenge the arbitral award on the ground that an arbitrator or umpire has misconducted himself or the proceedings. Pakistani courts have construed this ground to include serious errors of law by the arbitral tribunal. It is an exception to the general rule provided in the Act which not only attaches the presumption of correctness to the award, but also treats the arbitral award as final, binding, and with *res judicata* effect.

Section 11(2) of the Act authorizes the court to remove the arbitrator who misconducted himself or the proceedings. However, where the court removes one or more arbitrators, the court can appoint a person to act as a sole arbitrator in place of the persons displaced.<sup>3</sup> For such purposes, it does not matter if the arbitration agreement between the parties provides that disputes be referred to an arbitral tribunal comprising more than one arbitrator. The Islamabad High Court in

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<sup>2</sup> *ASB Greenwold v. NAI and arbitrators*, LJN# BJ7834, 7 December 2009.

<sup>3</sup> *Federation of Pakistan Through D.G. National Training Bureau v James Construction Company (Pvt) 2018 PLD ISL 1.*

*Federation of Pakistan Through D.G. National Training Bureau v James Construction Company (Pvt)* held that the agreement between the parties could not override the express provisions of the statute which empower the court to appoint a person to act as sole arbitrator in place of the person or persons replaced.<sup>4</sup> The High Court further concluded that the “arbitrator misconducted the arbitration proceedings by meeting the representative of the petitioner (in the respondent's absence) and taking a decision (in the co-arbitrator's absence) to the detriment of the respondent by not assuming jurisdiction over the matter.”<sup>5</sup>

## **II. AN ALL-ENCOMPASSING CONSTRUCTION OF THE TERM “MISCONDUCT”**

Misconduct is not defined in the Act; thus, the first question is what amounts to misconduct thereunder. The Supreme Court of Pakistan in *Gerry's International (Pvt.) Ltd. v Aeroflot Russian International Airlines* construed ‘misconduct’ to mean both “legal misconduct” and “moral misconduct.”<sup>6</sup> Legal misconduct means misconduct which by no means is a result of moral turpitude, dishonesty or any unethical or immoral conduct.<sup>7</sup> Such misconduct is an outcome of some honest, though erroneous, breach and neglect of duty and responsibility on the part of the arbitrator causing a miscarriage of justice.<sup>8</sup> It also includes any irregularity of action which is not consonant with general principles of equity and good conscience, which ought to govern the conduct of an arbitrator.<sup>9</sup> On the other hand, moral misconduct requires that there must be a lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.<sup>10</sup> Nevertheless, the Supreme Court was of the view that it is not possible to give an exhaustive definition as to what may amount to misconduct.<sup>11</sup> Thus, to substantiate the legal as well as moral misconduct, the following four non-exhaustive circumstances were provided by the Supreme Court, which may constitute a ground for ‘misconduct’:

- [(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;
- (ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference; (iii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and (iv) if there has been irregularity in the proceedings.<sup>12</sup>

The Lahore High Court in *Khalid Abbas v. Hafiz Muhammad Farooq* also supplemented the abovementioned non-exhaustive list by providing another detailed list of circumstances which may amount to misconduct on the part of the arbitrator.<sup>13</sup> These include: (a) a neglect of duties and responsibilities by an arbitrator; (b) the arbitrator acts contrary to what courts of justice expect

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<sup>4</sup> Ibid [15].

<sup>5</sup> Ibid [21].

<sup>6</sup> *Gerry's International (Pvt.) Ltd. v Aeroflot Russian International Airlines* 2018 SCMR 662 [8].

<sup>7</sup> (n 2) [24].

<sup>8</sup> (n 2) [24].

<sup>9</sup> (n 5).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> *Khalid Abbas v. Hafiz Muhammad Farooq* 2004 LHC YLR 274.

from him before allowing finality to an award; (c) where the arbitrator has refused to postpone a meeting for purpose of allowing a party to engage counsel when the other party unexpectedly turns up with counsel; (d) if the arbitrator made an award without having heard all the evidence; (e) if evidence of witnesses is recorded behind the back of a party; (f) if a party has not been allowed reasonable opportunity of proving his case; (g) if the arbitrator has not brought to the notice of opposite party, a document he received from the adversary, or not given the such party an opportunity of meeting the inferences deducible from them; (h) where the irregularities in the proceedings are proved and amount to improper hearing of the matter in dispute; (i) if finding is perverse or unsupported by evidence before the arbitrator; (j) if arbitrator decides a disputed question without going into evidence – in such a case, he would be said to have decided blindly; (k) if there is an indication of gross negligence or recklessness on the face of record; and (l) where there is some mistake of fact which is either admitted or clearly beyond reasonable doubt.<sup>14</sup>

These abovementioned circumstances reflect most of the grounds of an arbitrator's misconduct, and demonstrate the motivation of the Pakistani courts to prevent injustice to the victims of an unfair arbitral process.

Measures to prevent misconduct are a fruitful remedy crafted very carefully over a period of years by the courts to build trust in the public in support of the arbitral process. On the other hand, it was feared that the parties, especially the award debtor, might abuse this remedy to their own advantage. Categorizing misconduct into legal and moral misconduct poses a serious problem, whereby a party might bring any act of the arbitrator within the ambit of 'misconduct'. This might not only halt the arbitral proceedings, but it may also deprive the award creditor of enforcing the decision of the arbitrator. Thus, the Supreme Court, in *Mian Brothers v. Lever Brothers of Pakistan Ltd.*, defined the boundaries of 'misconduct' to maintain the integrity of the decision of the arbitrator; it was stated by the Supreme Court that it is not enough to only allege the misconduct against the arbitrator but also to prove it to the satisfaction of the court.<sup>15</sup> In this way, the party alleging any arbitral misconduct is charged with the onus to prove the same, thus avoiding any abuse of this remedy.

### **III. ARBITRAL IMMUNITY**

Once an arbitrator is removed and the award is set aside for the arbitral misconduct, a question arises whether legal action can be brought against such arbitrator for the misconduct. Unquestionably, an arbitrator is a quasi-judicial officer exercising judicial functions, and there is as much reason in his case for protecting and ensuring his impartiality, independence, and freedom from undue influence as in the case of a judge. In arbitration proceedings, the arbitrator is the sole and final judge of all questions of law and fact.<sup>16</sup> Immunity is generally granted to the judiciary which exempts a judge from liability or any legal proceedings arising out of the discharge of their juridical duties. This immunity is called judicial immunity. The duties of an arbitrator are similar to a judge; thus, an arbitrator should be able to discharge their duties with the same immunity as a

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<sup>14</sup> Ibid.

<sup>15</sup> *Mian Brothers v. Lever Brothers of Pakistan Ltd.* 2006 PLD SC 169.

<sup>16</sup> *Hodgkinson v Fernie* 1857 3 C.B. (N.S.) 189.

judge.<sup>17</sup> The doctrine of arbitral immunity exempts an arbitrator from any legal proceedings or liability.

The doctrine of arbitral immunity makes the arbitrator immune from liability of its acts performed in its arbitral capacity and generally safeguards all functions primarily related to the arbitral process. Like all other doctrines, there are also pros and cons of arbitral immunity.

On the one hand, it is valid to argue that arbitral immunity helps to ensure the finality of the award and prevents an unsuccessful party from suing the arbitrator. Otherwise, fewer skilled persons would be prepared to act as arbitrators due to the risk of incurring substantial liability. The doctrine of arbitral immunity strengthens the independence of arbitrators and their ability to focus with a free spirit on the merits and procedures of the case.<sup>18</sup> Allowing a legal action against the arbitrator for any error of judgment is considered harassment.<sup>19</sup> The Peshawar High Court in *Haq Nawaz Khan v the State* considered the criminal proceedings against the arbitrator as “undue harassment.”<sup>20</sup> On the other hand, policy arguments against arbitral immunity should also be taken into account. For instance, it can be argued that arbitral immunity may encourage carelessness, and promote the arbitrators to prioritize the finality of the decision over individual justice.

The English Arbitration Act of 1996 provides two circumstances where an arbitrator can be held liable: in the case of unreasonable resignation and bad faith.<sup>21</sup> However, bad faith means: “(a) malice in the sense of personal spite or a desire to injure for improper reasons; or (b) knowledge of absence of power to make the decision in question.”<sup>22</sup> Unlike the English Arbitration Act of 1996, the Arbitration Act of 1940 does not explicitly provide for the liability of arbitrator or its immunity. If the arbitrator has misconducted himself or the proceedings and is proved, generally, the award is set aside, and the arbitrator is removed from conducting the arbitration proceedings. Once the court removes the arbitrator for misconduct, section 11(3) of the Act takes away his right to receive any remuneration for his services.

Having said that, if the Act does not provide for the liability of an arbitrator, it does not mean that the arbitrators have absolute immunity. There are limitations to such immunity. Hence, it is imperative to see the view of Pakistani courts towards the immunity of an arbitrator.

In *Haq Nawaz Khan v the State*, criminal proceedings were brought against the arbitrators for misappropriating the subject matter of the arbitration. It was contended that arbitrators acted with “mala fide” intent.<sup>23</sup> The High Court quashed criminal proceedings against arbitrators and held that:

[I]f the arbitrators had misconducted, the remedy under the Arbitration Act was available in any case. No action, and that too of criminal nature, can be initiated against the

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<sup>17</sup> (n 1).

<sup>18</sup> Doyin Rhodes-Vivour, ‘Immunity of arbitrators’, (West Law India, 2017).

<sup>19</sup> Fouchard, P.; Gaillard E.; Goldman B., ‘Fouchard, Gaillard, Goldman on international commercial arbitration Kluwer Law International’, (The Hague, 1999) 593.

<sup>20</sup> *Haq Nawaz Khan v the State* 2005 YLR 1850 [5].

<sup>21</sup> The English Arbitration Act 1996 (UK), Articles 25, 26 & 29.

<sup>22</sup> Le club de jurists: Ad hoc committee, ‘Report: The arbitrator’s liability’, (Paris, 2017) 111.

<sup>23</sup> (n 19) [2].

arbitrators ... If the vehicles were misused or somebody has trespassed beyond his authority, a suit for damages will certainly be maintainable.<sup>24</sup>

The High Court closed the door of criminal proceedings against the arbitrator; however, it left open the door to civil liability for damages against the arbitrator.<sup>25</sup> The arbitrator who “misused” or “exceeds” his authority will be exposed to a civil action for damages.<sup>26</sup> In other words, the arbitrator who misconducts himself or the proceedings is prone to a civil action. However, in terms of practical approach, because arbitrators are exposed to the risk of personal liability by reason of law under which arbitration is to take place, they might refuse to accept appointment unless the parties insure them.

#### **IV. CONCLUSION**

The misconduct of an arbitrator is a well-crafted remedy for a victim of unfair and unjust arbitration proceedings. If an arbitrator misconducts himself or the proceedings, they are disentitled to receive the remuneration for their services. However, Pakistani courts are inclined towards the doctrine of arbitral immunity and are motivated to shelter arbitrators from criminal liability. Although the immunity protects arbitrators from undue harassment, the same is not absolute, and a civil action for damages can be brought against an arbitrator for misconduct.

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<sup>24</sup> Ibid [4].

<sup>25</sup> Bhandari Naqvi Riaz, ‘First-step analysis: arbitration in Pakistan’, (Lexology, 24 Feb 2020), <<https://www.lexology.com/library/detail.aspx?g=fb17baa0-25f4-4416-ae1e-32fadc655bda>> accessed at 10 July 2020.

<sup>26</sup> (n 19) [4].