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# TRANSNATIONAL LITIGATION: A Practitioner's Guide

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Volume 1



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## I. OVERVIEW OF KEY ISSUES

### § 21A:1 In general

Pakistan is a Common Law jurisdiction and follows the adversarial legal system. There is no jury system, and the judge is the sole arbiter of both law and facts. Disputes of civil nature are decided by the courts applying the balance of probabilities (or the preponderance of the evidence) standard.<sup>1</sup>

The Code of Civil Procedure, 1908, is the main legislation that prescribes the procedure for civil litigation. The Code of Civil Procedure empowers the provincial high courts to frame rules for regulat-

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#### [Section 21A:1]

<sup>1</sup>*Messrs. Makma Steel Craft (Pvt.) Ltd. and Others v. Allied Bank Limited* (2017 CLD 302).

ing various aspects of civil litigation before the courts operating within their respective territorial jurisdictions. Hence, its provisions are not uniform across the country.<sup>2</sup> The Code of Civil Procedure does not apply to certain types of civil litigation governed by the special statutes that prescribe different procedure(s) for such litigation.

Other important statutes relating to civil and commercial litigation in Pakistan include the Qanun-e-Shahadat Order, 1984 (the law of evidence), the Limitation Act, 1908, the Contract Act, 1872, and the Sale of Goods Act, 1930. Civil litigation in Pakistan can easily get very protracted and demands efficient case management techniques.

The most preferred mode for settlement of transnational commercial disputes in Pakistan remains international arbitration. However, the local courts are not empowered to provide interim relief in aid of arbitration proceedings pending abroad. A foreign arbitral award can be recognized and enforced as the judgment of a Pakistani court. Here again, the process of enforcement of foreign arbitral awards is quite slow, and the enforcement proceedings can easily take between three to five years to conclude.

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<sup>2</sup>The court procedures discussed in this report, unless expressly stated otherwise, are based on the Code of Civil Procedure, 1908, as amended by the Lahore High Court, and are applicable to the civil courts in the province of the Punjab. The court procedure applicable to the civil courts in the other provinces of Pakistan can be different. However, in most cases, the difference will not be very material.



## VIII. SUMMARY JUDGMENTS AND EQUIVALENT PROCEEDINGS

### § 21A:19 Summary judgments—Substantive requirements

Summary judgment proceedings are only available in respect of suits instituted in the civil courts in the province of Khyber Pakhtunkhwa.<sup>1</sup> The court may, on its initiative or upon an application made by a party, grant summary judgment in respect of the whole or a part of the claim or defense if it is satisfied that:

1. The plaintiff has no real prospects of succeeding on the relevant claim(s) or the defendant has no real prospects of successfully defending the relevant claim(s);
2. There is no genuine dispute as to any material fact requiring a trial; and
3. A party is entitled to judgment as a matter of law.

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<sup>3</sup>Code of Civil Procedure, 1908, Order VIII, Rule 3.

<sup>4</sup>Code of Civil Procedure, 1908, Order VIII, Rule 5.

<sup>5</sup>Code of Civil Procedure, 1908, Order VIII, Rule 6.

<sup>6</sup>Code of Civil Procedure, 1908, Order VIII, Rule 1.

#### [Section 21A:19]

<sup>1</sup>Code of Civil Procedure, 1908, Order XV-A.

Summary judgment also may be granted where the parties agree to have the whole or a part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

The court will decide the summary judgment application based on the pleadings and the documentary evidence produced by the parties. The court will consider the documentary evidence in a manner that is most favorable to the respondent and any doubts regarding any material fact will be resolved against the applicant.

### § 21A:20 Summary judgments—Procedural requirements

The application for summary judgment may be filed at any time after the pleadings are complete and the parties have produced in the court the documentary evidence within their possession or power on which they intend to rely in support of their claim or defense.

When an application for summary judgment is filed, the court must give the respondent at least 14 days advance notice of the date fixed for hearing on such application. The respondent may submit a written reply to the application and provide a copy to the applicant at least seven days before the summary judgment hearing.

The applicant may file a rejoinder to the written reply and provide a copy to the respondent at least three days before the summary judgment hearing. Typically, these timelines are not strictly enforced.

If the summary judgment hearing is fixed by the court on its initiative, the court will issue a notice of the summary judgment hearing to the parties. Any party to the proceedings may file a written affidavit to support or oppose the notice and provide its copy to the other party at least seven days before the summary judgment hearing. Such other party may file a written reply to the written affidavit and provide its copy to the first party at least three days before the summary judgment hearing.

At the summary judgment hearing, the court will hear oral arguments of the parties and consider their pleadings, and the documentary evidence produced by them. Thereafter, the court may:

1. Grant summary judgment with costs;
2. Dismiss the application for summary judgment with costs;
3. Grant partial relief concerning one or more claims or defenses that will be deemed to be established; or
4. Issue any other appropriate order with directions about management of the case.

### § 21A:21 Equivalent proceedings

Summary judgment proceedings are not available in respect of suits instituted in the civil courts in other provinces. However, in certain cases, as discussed below, the courts may proceed to dispose of the suit without conducting a full trial.

**§ 21A:22 Equivalent proceedings—Rejection of plaintiff**

The court may, on its initiative or upon an application made by the defendant, reject the plaintiff filed by the plaintiff, *inter alia*, where the plaintiff does not disclose a cause of action or where the suit appears from the statement in the plaintiff to be barred by any law.<sup>1</sup>

The court must examine the plaintiff before ordering the issuance of summons to the defendant and determine whether the plaintiff is liable to rejection. The idea is to save the court's time from being wasted and to save the defendant from vexatious litigation and the harassment of being subjected to a prolonged and costly trial.<sup>2</sup> However, the court also can reject the plaintiff at a later stage.<sup>3</sup>

While determining whether the plaintiff is liable to be rejected, the court should only examine the averments made in the plaintiff and the documents enclosed therewith, assuming them to be authentic and true. For this purpose, the court should not consider the written statement or any documentary evidence produced by the defendant.<sup>4</sup>

The plaintiff can only be rejected as a whole. The court cannot reject a part of the plaintiff. Thus, where only a part of the suit appears to be barred by law, the plaintiff may not be rejected, and the court will proceed with the trial of the suit.<sup>5</sup>

Order of rejection of plaintiff is not an adjudication on the merits of the dispute. It does not operate as *res judicata*.<sup>6</sup> Hence, it does not preclude the plaintiff from presenting a fresh suit in respect of the same cause of action.<sup>7</sup> An Order of rejection of plaintiff amounts to a decree of the court and can be appealed against.<sup>8</sup>

**§ 21A:23 Equivalent proceedings—Judgment on admission**

Where a party to a suit has made an admission of fact either in its pleading or otherwise, the other party may apply to the court to issue

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**[Section 21A:22]**

<sup>1</sup>Code of Civil Procedure, 1908, Order VII, Rule 11.

<sup>2</sup>*Haji Abdul Karim and Others v. Messrs. Florida Builders (Pvt) Limited* (PLD 2012 Supreme Court 247).

<sup>3</sup>*Nanik Ram v. Ghulam Akbar* (2016 MLD 52).

<sup>4</sup>*Haji Abdul Karim v. Florida Builders (Pvt) Limited* (PLD 2012 Supreme Court 247).

<sup>5</sup>*Mst. Iqbal Begum v. Farooq Inayat and Others* (PLD 1993 Lahore 183).

<sup>6</sup>*Province of the Punjab through Collector, Sheikhpura v. Syed Ghazanfar Ali Shah* (2017 SCMR 172).

<sup>7</sup>Code of Civil Procedure, 1908, Order VII, Rule 13.

<sup>8</sup>Code of Civil Procedure, 1908, section 2(2).

a judgment based on such admission, without waiting for the determination of any other question between the parties.<sup>1</sup>

Such admission must be clear, unambiguous, unqualified, and unequivocal. Still, it is the court's discretion whether to grant such an application.<sup>2</sup> The court may decree the suit to the extent of the admission and proceed with the trial in respect of the remaining questions. In appropriate cases, the court may proceed with the trial in respect of all questions notwithstanding such admission, for instance, where the admission is made on behalf of minors or by a public official.<sup>3</sup>

If the court concludes that the parties to the suit are not at issue on any question of law or of fact, it may at once pronounce judgment.<sup>4</sup> Likewise, where there are several defendants and any one of the defendants is not at issue with the plaintiff, the court may at once pronounce judgment for or against such defendant and proceed with the trial of the suit against the other defendants.<sup>5</sup>

Where the parties are at issue on some question of law or fact and the issues have been framed by the court, the court may proceed to first determine such issues which, in the court's opinion, are sufficient for the decision of the suit. However, before doing so, the court must satisfy itself that no further argument or evidence than the parties can at once adduce is required upon such issues and no injustice will result from proceeding with the suit forthwith.

If the court's finding on the preliminary issue(s) is sufficient for the decision of the suit, the court may pronounce the judgment, accordingly. Otherwise, the court will postpone the hearing of the suit to produce evidence on the remaining issues.<sup>6</sup>

### § 21A:24 Equivalent proceedings—Leave to defend

Where the suit is based on a bill of exchange, hundi, or promissory note, the defendant will not be entitled to appear and defend the suit unless he first obtains leave of the court to appear and defend the suit.<sup>1</sup> For this purpose, before the filing of the written statement, the defendant must file an application seeking leave of the court to appear and defend the suit. The application must show that the matter involves substantial questions of law or fact requiring a trial and that the defendant has a plausible defense.

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#### [Section 21A:23]

<sup>1</sup>Code of Civil Procedure, 1908, Order XII, Rule 6.

<sup>2</sup>*Amir Bibi v. Muhammad Khurshid* (2003 SCMR 1261).

<sup>3</sup>*Bashir Ahmed Khan v. Shamas-Ud-Din* (2007 SCMR 1684).

<sup>4</sup>Code of Civil Procedure, 1908, Order XV, Rule 1.

<sup>5</sup>Code of Civil Procedure, 1908, Order XV, Rule 2.

<sup>6</sup>Code of Civil Procedure, 1908, Order XV, Rule 3.

#### [Section 21A:24]

<sup>1</sup>Code of Civil Procedure, 1908, Order XXXVII, Rule 2.

The application will be decided by the court on affidavits. If the court grants the leave, the suit will proceed and be decided by the court after framing the issues and based on the witness and documentary evidence produced by the parties. The leave may be granted by the court either unconditionally or subject to conditions. In case the court refuses to grant the leave to the defendant, it must forthwith decree the suit.

A similar procedure is laid down under the Financial Institutions (Recovery of Finance) Ordinance, 2001, for the settlement of certain disputes between financial institutions and their customers. Recently, the Punjab Commercial Courts Ordinance, 2021, prescribed a similar procedure for the settlement of certain commercial disputes.

## **IX. INTERIM AND CONSERVATORY RELIEF, INJUNCTIONS, AND SIMILAR EMERGENCY MEASURES**

### **§ 21A:25 In general**

The civil courts are granted extensive powers to grant temporary injunctions, interlocutory orders, and other interim relief. However, except for domestic arbitration proceedings, the court can exercise these powers only in relation to the substantive proceedings pending before it.<sup>1</sup> In cases where the substantive proceedings are pending abroad, a court in Pakistan will not grant interim relief in aid of such proceedings.

### **§ 21A:26 Temporary injunction**

Where any property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, the court may pass an appropriate injunctive order to stay and prevent the wasting, damaging, alienation, sale, removal, or disposition of such property until the disposal of the suit or until further orders.<sup>1</sup>

The court also may grant a temporary injunction where the defendant threatens or intends to remove or dispose of his property to defraud his creditors. Likewise, the court also may grant a temporary injunction to restrain the defendant from committing a breach of

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#### **[Section 21A:25]**

<sup>1</sup>*Messer Four Friends v. Domex Boric etc.* (1979 SCMR 83).

#### **[Section 21A:26]**

<sup>1</sup>Code of Civil Procedure, 1908, Order XXXIX, Rule 1.

contract or another injury.<sup>2</sup> Typically, the following three conditions must co-exist for the grant of an interim injunction:<sup>3</sup>

1. *Prima facie* case, i.e., the prima facie existence of a right in the applicant and its infringement by the respondent;
2. Irreparable loss i.e., in case the injunction is not granted, material damage or injury will accrue to the applicant that cannot be adequately compensated by an award of damages; and
3. Balance of inconvenience i.e., the inconvenience that the applicant will undergo in case the injunction is not granted will be comparatively greater than that which is likely to arise from granting it.

The grant of a temporary injunction is an equitable remedy and is discretionary by the court. In appropriate cases, the court may grant a temporary injunction under its inherent powers under section 151 of the Code of Civil Procedure even if the above three conditions do not co-exist.<sup>4</sup>

A temporary injunction may be granted *ex-parte*. But the court must issue notice to the respondent before granting it. A temporary injunction becomes effective the moment it is communicated to the respondent.<sup>5</sup> A temporary injunction granted *ex-parte* must be confirmed or withdrawn by the court after hearing the respondent. A respondent also may apply for setting aside the temporary injunction.

A temporary injunction issued by a civil court automatically ceases to have an effect upon the expiration of a specified period unless it is extended by the court after a re-hearing of the matter and for reasons to be recorded for such extension.<sup>6</sup> But this rule does not apply to the temporary injunctions issued by the high courts.<sup>7</sup>

### § 21A:27 Attachment before judgment

A plaintiff may apply to the court to order the defendant to furnish appropriate security for production, as and when required by the court, of his property sufficient to satisfy the decree that may be passed against him or to show cause why he should not furnish security. An application to this effect can be made by the plaintiff at

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<sup>2</sup>Code of Civil Procedure, 1908, Order XXXIX, Rule 2.

<sup>3</sup>*Muhammad Saad and AAnother v. Amna and 27 Others* (2015 YLR 1).

<sup>4</sup>*Mst. Salma Jawaid and 3 Others v. S. M. Arshad and 7 Others* (PLD 1983 Sindh 303).

<sup>5</sup>*Mrs. Rashida v. Mrs. Shahzad Khanem and Others* (1999 YLR 910).

<sup>6</sup>Code of Civil Procedure, 1908, Order XXXIX, Rule 2B.

<sup>7</sup>*Samir Oosman v. Rex Talkies Pvt. Ltd.* (PLD 1997 Sindh 579).

any stage of the suit before the final judgment.<sup>1</sup> The plaintiff must identify the property sought to be attached and its estimated value. However, the court may dispense with this requirement.

To obtain an order of attachment before judgment, the plaintiff must satisfy the court that the defendant is about to dispose of his property or remove it outside the jurisdiction of the court with an intent to obstruct or delay the execution of the decree that may be passed against him. Such an order cannot be sought on the sole basis that the defendant is a foreigner and has no assets in Pakistan to satisfy the decree that may be passed against him.<sup>2</sup>

If the defendant fails to show cause why he should not furnish security or fails to furnish the required security within the time fixed by the court, the court may pass an order for the attachment of the defendant's property. Such attachment will continue until when the defendant furnishes the required security, or when the suit is dismissed.<sup>3</sup> This remedy is not frequently granted by the courts.

The court also may order an immediate interim attachment of the defendant's property pending the decision on the plaintiff's application, *i.e.*, a conditional attachment. A conditional attachment order will remain operative until the final adjudication on the attachment application filed by the plaintiff.<sup>4</sup>

An order of attachment does not create any charge, lien, or priority in favor of the plaintiff. Any right over the defendant's property created in favor of a third party before the order of attachment remains unaffected by subsequent attachment of such property.<sup>5</sup>

### § 21A:28 Appointment of receivers

The court may, on its initiative or upon an application made by a party to the suit, appoint a receiver of any property that is the subject matter of the suit. Such appointment is made to preserve the *status quo* pending the adjudication of the suit, and to safeguard the interests of all the parties.<sup>1</sup>

The appointment of a receiver is an equitable remedy and is at the court's discretion. However, it is deemed the harshest interim mea-

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#### [Section 21A:27]

<sup>1</sup>Code of Civil Procedure, 1908, Order XXXVIII, Rule 5.

<sup>2</sup>*New Bengal Shipping Company v. Eric Lancaster Stump* (PLD 1952 Dacca 22).

<sup>3</sup>Code of Civil Procedure, 1908, Order XXXVIII, Rule 9.

<sup>4</sup>*Messrs Shirkat-I-Ahbab and Another v. National Bank of Pakistan and 4 Others* (PLD 1969 Supreme Court 349).

<sup>5</sup>Code of Civil Procedure, 1908, Order XXXVIII, Rule 10.

#### [Section 21A:28]

<sup>1</sup>*Asadullah Mirbahar and Another v. Mrs. Ayesha Muzahir through Attorney and 9 Others* (PLD 2011 Karachi 151).

sure and is sparingly ordered by the courts. A court will appoint a receiver upon satisfaction that it is *just and convenient* to do so. For instance, where the property that is the subject matter of the suit is in danger of being wasted. However, a mere misapprehension of mismanagement or misappropriation of such property will not constitute a valid ground for the appointment of the receiver.<sup>2</sup>

While ordering the appointment of a receiver, the court will remove any person from the possession and custody of the property and commit the same to the possession, custody, or management of the receiver. The receiver does not possess any inherent powers by virtue of his appointment. The court will confer upon the receiver any or all the following powers in respect of the property in his receivership:

1. Institute or defend suits;
2. Realize, manage, protect, preserve, and improve the property;
3. Collect rents and profits and apply and dispose of such rents and profits; and
4. Execute documents.

The receiver must submit his accounts in respect of the property under his receivership and pay the amounts due from him as directed by the court. The receiver will be liable for any loss occasioned to the property by his willful default or gross negligence.<sup>3</sup> In case of his failure, the court may direct his property to be attached and may sell such property and apply the proceeds to make good any amount found to be due from him.

### § 21A:29 Other interlocutory orders

In addition to the above, the court also may pass certain other interlocutory orders. The court may order the sale of any movable property being the subject matter of the suit or attached before judgment in such suit which is subject to speedy and natural decay, or which may be desirable to be sold at once for any other just and sufficient cause.<sup>1</sup>

The court also may pass an order for the detention, preservation, or inspection of the property that is the subject matter of the suit, or as to which any question may arise in the suit. The court may authorize a person to enter any premises in the possession of any party to such a suit. The court also may authorize any sample to be taken, observations to be made, or experiments to be tried, which may seem neces-

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<sup>2</sup>*Mobin Rafique v. Rashid Ahmed* (PLD 2012 Sindh 449).

<sup>3</sup>Code of Civil Procedure, 1908, Order XL, Rule 4.

#### [Section 21A:29]

<sup>1</sup>Code of Civil Procedure, 1908, Order XXXIX, Rule 6.



sary or expedient for obtaining full information or evidence.<sup>2</sup> However, an order of this nature can only be made after notice to the concerned party.<sup>3</sup>

The court also may issue appropriate interlocutory orders in the exercise of its inherent powers where the court deems it necessary for the ends of justice or to prevent the ends of justice from being defeated.<sup>4</sup> However, the inherent powers can only be exercised where there is no provision in the Code of Civil Procedure applicable to the case.<sup>5</sup> Where there is a specific prohibition of a particular act in the law, the court cannot circumvent such prohibition in the exercise of its inherent powers.<sup>6</sup>

The court can exercise its inherent powers to act *ex debito justitiae* for granting interim relief like Mareva injunctions against a foreign defendant.<sup>7</sup> However, the local courts are extremely reluctant to issue such orders. Likewise, there is not a single reported case where a local court may have issued a Norwich Pharmacal order or an Anton Piller order. It is doubtful whether a civil court can issue an Anton Piller order as the Code of Civil Procedure specifically requires the court to pass a search order after issuing notice to the concerned party.

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<sup>2</sup>Code of Civil Procedure, 1908, Order XXXIX, Rule 7.

<sup>3</sup>Code of Civil Procedure, 1908, Order XXXIX, Rule 8.

<sup>4</sup>Code of Civil Procedure, 1908, sections 94 and 151.

<sup>5</sup>*Muhammad Sadiq v. Mst. Bashiran and 9 Others* (PLD 2000 Supreme Court 820).

<sup>6</sup>*Messrs. Pan Asian Trading Corporation, Lahore v. Government of the Punjab through its Secretary, Industries and Mineral Development Department, Lahore and 2 Others* (PLD 1978 Lahore 382).

<sup>7</sup>*Habib Bank Limited v. Messrs Zuchini Industries Pakistan (Pvt.) Limited and 6 Others* (2005 CLD 602).

## XVI. DAMAGES

### § 21A:49 Acceptable kinds of damage recovery in contracts

Section 73 of the Contract Act, 1872 (the “**Contract Act**”), deals with the award of monetary compensation for the breach of a contract that does not contain any stipulation as to payment of liquidated damages<sup>1</sup> or penalty<sup>2</sup> in case of a breach.

Where such a contract is broken, the innocent party is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to the innocent party which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract to be likely to result from the breach of it. Compensation cannot be awarded for any remote and indirect loss or damage caused to the innocent party because of the breach.<sup>3</sup>

Compensation may be awarded in the form of general or special damages. General damages are awarded for the loss and injury which the law presumes to naturally result from the breach in the usual course of things. Once loss or injury is proven, general damages are presumed to follow and are granted by the court applying the rule of thumb.<sup>4</sup>

Special damages are awarded for the loss or injury that arises under the special circumstances which were reasonably anticipated by the parties when they entered into the contract. To claim special damages, a claimant must plead and prove the precise amount of pecuniary loss caused to him as a result of the breach.<sup>5</sup>

Where the contract provides for payment of a specified amount as

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#### [Section 21A:49]

<sup>1</sup>Liquidated damages are a sum specified in the contract that is recognized as a genuine pre-estimate of losses suffered by an innocent party due to Another party’s breach of contract.

<sup>2</sup>Penalty is a sum of money stipulated in the contract in *terrorem* (to frighten) to drive a party to fulfill his obligations under the contract.

<sup>3</sup>*Daoud Shami v. Emirates Airlines* (PLD 2011 Supreme Court 282).

<sup>4</sup>*Government of Khyber Pakhtunkhwa and Others v. Syed Jaffar Shah* (2016 MLD 223).

<sup>5</sup>*Azizullah Sheikh and Another v. Standard Chartered Bank Ltd.* (2009 SCMR 276).

liquidated damages or penalty upon a breach of contract, the innocent party is entitled to receive a reasonable monetary compensation not exceeding the amount specified in the contract from the party who has broken the contract.<sup>6</sup> Pakistani law, unlike Common Law, does not distinguish between liquidated damages and penalty clauses in the contracts.

As a rule, penalty clauses are not enforced by the local courts. Liquidated damages clauses can be enforced but the grant of liquidated damages requires positive evidence that the loss or injury was suffered by the party claiming compensation. Liquidated damages may be refused by the court if the quantum of actual loss is not proved.<sup>7</sup>

While determining the quantum of monetary compensation, the court will aim to restore the innocent party, as far as money can do, to the position which would have existed if the breach of contract would not have occurred.<sup>8</sup> The court will not award compensation in excess of the actual loss or damage suffered by the innocent party. Furthermore, the court also will consider whether the innocent party took all reasonable measures within its power and possession to mitigate the loss or damage resulting from the breach.<sup>9</sup>

#### § 21A:50 Issues relating to lost profits

An innocent party will be entitled to compensation for any loss of profits directly resulting from the breach of contract. For the loss of profits that do not naturally arise in the usual course of things, to be entitled to receive compensation, the innocent party must establish that it had duly informed the contract-breaker about such loss or that the parties had contemplated such loss of profits at the time of making the contract. The following two illustrations to section 73 of the Contract Act explain the principle:

1. Party A delivers to Party B, a common carrier, a machine, to be conveyed without delay, to Party A's mill informing Party B that his mill is stopped for want of the machine. Party B unreasonably delays the delivery of the machine, and Party A, in consequence, loses a profitable contract with the government. Party A is entitled to receive from Party B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the government contract.

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<sup>6</sup>Contract Act, 1872, section 74.

<sup>7</sup>*Atlas Cables (Pvt.) Limited v. Islamabad Electric Supply Company Limited and Another* (2016 CLC 1677).

<sup>8</sup>*Pakistan v. Messrs. A. Ismail Jee & Sons Ltd.* (1980 CLC 1522).

<sup>9</sup>*State Life Insurance Corporation of Pakistan v. Messrs. Bibojee Services Limited and Another* (1999 MLD 2750).

2. Party A, a builder, contracts to erect and finish a house by the first of January, so that Party B may give possession of it at that time to Party C, to whom Party B has contracted to let it. Party A is informed of the contract between Party B and Party C. Party A builds the house so badly that, before the first of January, it falls and must be rebuilt by Party B, who, in consequence, loses the rent which he was to have received from Party C and is obliged to make compensation to Party C for the breach of his contract. Party A must make compensation to Party B for the cost of rebuilding the house, for the rent lost, and for the compensation made to Party C.

An innocent party also may claim compensation for loss of opportunities or loss of chance of gaining something, which results directly from a breach of contract. This is to compensate the innocent party, who is deprived of the chance to receive a particular benefit or avoid a particular risk, due to such a breach.

#### § 21A:51 Standard of burden of proof for recovery

The initial burden of proof in a suit for recovery of damages for breach of contract lies with the claimant who must specifically plead and prove the existence of the contract between the parties, the breach thereof by the other party, the actual damage or loss caused to the claimant as a result of the breach, and the quantum of damages with reasonable certainty.<sup>1</sup>

The claimant also must establish his readiness and willingness to perform the contract.<sup>2</sup> The claimant must produce sufficient and trustworthy evidence to discharge this initial burden. Mere general or vague allegations would not be sufficient to discharge it. As required in most cases of civil nature, the court will decide the case by applying the balance of probabilities (or the preponderance of the evidence) standard.

#### § 21A:52 Currency conversion

If the currency of a contract is a foreign currency, or where the amount claimed under a contract is payable in a particular foreign currency and payment is demanded in that foreign currency, the court

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#### [Section 21A:51]

<sup>1</sup>*Syed Ahmad Saeed Kirmani v. M/s. Muslim Commercial Bank LTD., Islamabad* (1993 SCMR 441).

<sup>2</sup>*Bashir Hussain Siddiqui v. Pan-Islamic Steamship Co. Ltd.* (PLD 1967 Karachi 222).

will have the authority to pass the judgment and decree “for so much in foreign currency or the Pakistan rupees equivalent thereof.”<sup>1</sup>

The judgment debtor would then have the option to either make payment in foreign currency or its equivalent in Pakistan rupees at the rate of exchange prevalent on the date the payment is made. The requirement under the Pakistani foreign exchange law must be complied with to take such payment outside Pakistan.

### § 21A:53 Recovery of damages in tort, product liability, and other non-contractual bases

Being a Common Law jurisdiction, the law of torts in Pakistan is largely based on English law.<sup>1</sup> The award of damages is the main remedy under the law of torts. Here too, the damages are mostly compensatory.

Damages may be categorized as general or special. General damages are awarded where the loss or injury is proved but there is no yardstick to gauge it in monetary terms such as mental torture and pain. General damages are awarded by the court applying the rule of thumb. To claim special damages, a claimant must plead and prove the precise amount of pecuniary loss caused to him because of the tortious act. In determining the quantum of damages, the court follows the principle of *restitutio in integrum* and aims to put the innocent party in the position he would have been in had the tortious act not been committed.<sup>2</sup>

In exceptional cases, particularly those involving egregious conduct, the court may award exemplary or punitive damages.<sup>3</sup> Typically, such damages go beyond the amount meant for compensating the innocent party and aim to punish the tortfeasor and enforce the deterrent effect of tortious acts. Likewise, in some cases, the court also may award nominal damages. This is where no actual loss or injury has been caused to the innocent party, but an infringement of such party’s legal right is established. In practice, the courts in Pakistan do not award heavy damages in tort claims.

Under the Consumer Protection Act, the manufacturer is liable to compensate the consumer for any loss or injury (including damage to

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#### [Section 21A:52]

<sup>1</sup>*Terni S.P.A. v. PECO (Pakistan Engineering Company) Ltd.* (1992 SCMR 2238).

#### [Section 21A:53]

<sup>1</sup>*Abdul Majeed Khan v. Tawseen Abdul Haleem and Others* (PLD 2012 Supreme Court 80).

<sup>2</sup>*Abdul Majeed Khan v. Tawseen Abdul Haleem and Others* (PLD 2012 Supreme Court 80).

<sup>3</sup>*Islamic Republic of Pakistan through Secretary, Ministry of Railways and Others v. Abdul Wahid and Others* (2011 SCMR 1836).

the product itself, economic loss, and loss of use of the product) proximately caused by certain defects in the product.<sup>4</sup> Such loss or injury must arise from a reasonably anticipated use of the product by the consumer. Where the consumer has not suffered any loss or injury from the defective product except the loss of use or utility of the product, the manufacturer's liability will be limited to the return of consideration (or a part thereof) and payment of the costs as may be directed by the court.<sup>5</sup>

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<sup>4</sup>Punjab Consumer Protection Act, 2005, section 4.

<sup>5</sup>Punjab Consumer Protection Act, 2005, section 10.

**XXI. ARBITRATION****§ 21A:68 In general**

The Arbitration Act, 1940, governs the arbitration proceedings being conducted in Pakistan, the enforcement of domestic arbitration agreements, and the enforcement of domestic arbitral awards. The Arbitration Act is not based on the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law.

Only disputes of civil nature can be settled through arbitration. Disputes regarding alleged criminality cannot be settled through arbitration.<sup>1</sup> Where exclusive jurisdiction in respect of a matter has been granted to a special court or tribunal such as for winding-up of a company such matter cannot be referred to arbitration.<sup>2</sup>

An arbitration agreement must be in writing but is not required to be signed by the parties. The doctrine of separability is recognized by the local courts. An arbitration clause is deemed severable from the contract of which it forms a part and can survive its termination or invalidity of the contract.<sup>3</sup>

Pakistan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”). Pakistan signed the New York Convention on 30 December 1958 and ratified it on 14 July 2005. On 19 July 2011, Pakistan enacted the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (“NYC Act”), to incorporate the New York Convention into the municipal laws of Pakistan.

Pakistan has signed bilateral investment treaties (BITs) with 52 countries. Out of these, at least 32 BITs are in force. A majority of these BITs provide for the settlement of investor-state disputes through arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of

**[Section 21A:68]**

<sup>1</sup>The Hub Power Company Limited (HUBCO) through Chief Executive and Another v. Pakistan WAPDA through Chairman and Others (PLD 2000 Supreme Court 841).

<sup>2</sup>*Orix Leasing Pakistan v. Colony Thal Textile Mills Ltd.* (PLD 1997 Lahore 443).

<sup>3</sup>*Lakhra Power Generation Company Limited (LPGCL) v. Karadeniz Powership Kaya Bey* (2014 CLD 337).

1965 (“ICSID Convention”). Pakistan signed the ICSID Convention on 6 July 1965 and ratified it on 15 September 1966. On 30 April 2011, Pakistan enacted the Arbitration (International Investment Disputes) Act, 2011 (“AIID Act”) to incorporate the ICSID Convention into the municipal laws of Pakistan.

Certain arbitration agreements and foreign arbitral awards that are not enforceable under the NYC Act or the AIID Act may be enforced under the Arbitration (Protocol and Convention) Act, 1937 (“APC Act”). The APC Act was enacted to implement the Geneva Protocol on Arbitration Clauses of 1923 (Geneva Arbitration Protocol) and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (Geneva Awards Convention).

### § 21A:69 Enforcement of arbitration agreements

Different principles apply to the enforcement of arbitration agreements depending on the applicable legislation. If a party to an arbitration agreement governed by the Arbitration Act commences legal proceedings, any other party to such agreement may apply to the court to stay such proceedings and to refer the parties to the arbitration.<sup>1</sup>

Such an application must be made before filing the written statement or taking any other step in the proceedings. An applicant seeking a stay of legal proceedings must exercise extreme care and caution as the mere seeking of adjournment(s) for filing a written statement can constitute a step in the proceedings.<sup>2</sup> The party seeking enforcement of the arbitration agreement also must establish that it was all along ready and willing to settle the dispute through arbitration.

However, even if the above conditions are met, still it is not mandatory for the court to stay the legal proceedings and to refer the parties to the arbitration. In suitable cases, the court may refuse to stay the legal proceedings such as where all parties to the suit are not party to the arbitration agreement and it is not possible to segregate the claim or dispute between such parties without fear of conflicting decision, or where it is manifest that the arbitrator is not likely to decide the dispute fairly, or where it is shown that the defendant is not ready and willing to do all things, necessary to the proper conduct of the arbitration.<sup>3</sup>

Unlike the Arbitration Act, the NYC Act does not grant the court

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#### [Section 21A:69]

<sup>1</sup>Arbitration Act, 1940, section 34.

<sup>2</sup>*Infospan (Private) Limited v. Messrs. Telecom Foundation and Another* (2017 CLC 131).

<sup>3</sup>*Messrs. Tradesmen International (Pvt.) Ltd. through Chief Executive v. Federation of Pakistan through Secretary Ministry of Food Agriculture and Livestock and Others* (2005 MLD 541).



discretion on whether to stay the legal proceedings commenced in violation of the arbitration agreement.<sup>4</sup> Thus, where legal proceedings have been commenced before a court in Pakistan in violation of an arbitration agreement covered by the NYC Act, the court is obligated to stay the legal proceedings. The court may only refuse to stay the legal proceedings on very limited grounds mentioned in article II of the New York Convention i.e., the arbitration agreement is null and void, inoperative, or incapable of being performed.<sup>5</sup>

### § 21A:70 Domestic arbitration proceedings and enforcement of domestic arbitral awards

The Arbitration Act, though outdated, is the complete code for all matters about domestic arbitration from the enforcement of the arbitration agreement to the enforcement of domestic arbitral awards.

The Arbitration Act allows the parties freedom to choose the procedural rules for the conduct of arbitration proceedings. In case the parties do not set any specific procedural rules, the certain default rules contained in the Arbitration Act will apply. Ad-hoc arbitration is the most popular form of arbitration in Pakistan. There is no reputable arbitration institution or institutional arbitration rules.

The arbitration proceedings can be conducted with or without the intervention of the court. In either case, the Arbitration Act grants the court extensive powers to supervise and regulate the arbitration proceedings. Where a party refuses to join arbitration, the court can compel such party to join arbitration per the arbitration agreement.<sup>1</sup> The court also can appoint, remove, or replace the arbitrator. In case of a delay, the court can compel the arbitrator to conclude arbitration proceedings and to file the arbitral award in the court.

The court also can modify the arbitral award submitted by the arbitrator, remit the same to the arbitrator for reconsideration, or supersede the arbitration proceedings in certain circumstances. However, the arbitrator is the sole judge of all questions, both of law and fact, and the court cannot review the merits of the dispute or the arbitral award.<sup>2</sup> Where the court sees no reason to remit or set aside

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<sup>4</sup>*Messrs. Travel Automation (Pvt.) Ltd. through Managing Director v. Abacus International (Pvt.) Ltd. through President and Chief Executive and 2 Others* (2006 CLD 497).

<sup>5</sup>Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, section 4.

#### [Section 21A:70]

<sup>1</sup>Arbitration Act, 1940, section 20.

<sup>2</sup>*Gerry's International (Pvt) Ltd. v. Aeroflot Russian International Airlines* (2018 SCMR 662).

the arbitral award, it will proceed to pronounce judgment in terms of the award.<sup>3</sup>

The competence-competence principle is recognized by the local courts.<sup>4</sup> Thus, an arbitrator can rule on the question of its jurisdiction. However, an arbitrator is not empowered to grant interim relief or compel the attendance of the parties or witnesses. The Arbitration Act empowers the court to grant appropriate interim relief including injunctive orders in support of domestic arbitration proceedings.<sup>5</sup> Likewise, the court also is empowered to issue processes to the parties and witnesses whom the arbitrator desires to examine.

### § 21A:71 Enforcement of foreign arbitral awards under NYC Act

A foreign arbitral award covered by the NYC Act will be recognized and enforced in the same manner as a judgment or order of a court in Pakistan.

An application for recognition and enforcement of a foreign arbitral award must be filed in the high court within whose territorial jurisdiction the award-debtor resides, works, or has an asset(s) to satisfy the foreign arbitral award.<sup>1</sup> The application must accompany the documents listed in article IV of the New York Convention. Other documents that may support the applicant's case should also be filed along with the application.

After the filing of an enforcement application and the preliminary hearing, the high court will summon the respondent who may oppose the recognition and enforcement of the foreign arbitral award by relying on any of the grounds listed in article V of the New York Convention. A suit seeking nullification of a foreign arbitral award is not maintainable.<sup>2</sup>

The NYC Act does not prescribe any special procedure for the enforcement proceedings. Rather it requires the high court to follow, as nearly as possible, the procedure laid down in the Code of Civil Procedure for the suits. Thus, where the matter involves investigation and adjudication of disputed facts, the high court may frame issues

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<sup>3</sup>Arbitration Act, 1940, section 17.

<sup>4</sup>*Orient Power Company (Private) Limited v. Sui Northern Gas Pipelines Limited* (2021 SCMR 1728).

<sup>5</sup>Arbitration Act, 1940, section 41(b).

#### [Section 21A:71]

<sup>1</sup>*Rossmere International Limited v. Sea Lion International Shipping Inc.* (PLD 2017 Baluchistan 29).

<sup>2</sup>*Abdullah v. CNAN Group Spa* (PLD 2014 Sindh 349).

and require the parties to produce evidence to determine whether any of the grounds listed in article V of the New York Convention apply.<sup>3</sup>

Typically, the enforcement proceedings can take between three to five years to conclude. But where the issues are framed by the court, the enforcement proceedings can be unreasonably prolonged over many years.

Where the high court concludes that none of the grounds listed in article V of the New Your Convention are attracted, it will recognize the foreign arbitral award, pass a decree in terms of the foreign arbitral award which will be executed under the Code of Civil Procedure. A foreign arbitral award, after its recognition, will be treated as binding on the persons between whom it was made and may be relied on by any of them by way of defense, set-off, or otherwise in any legal proceedings in Pakistan.<sup>4</sup>

#### § 21A:72 Enforcement of foreign arbitral awards under the APC Act

Certain foreign arbitral awards in commercial matters that are unenforceable under the NYC Act can be enforced under the APC Act. However, such a foreign arbitral award:

1. May not be made under an arbitration agreement governed by the laws of Pakistan;
2. Must be final;
3. Must be made in pursuance of an arbitral agreement to which the Geneva Arbitral Protocol applies;
4. Must be made between persons subject to the jurisdiction of two contracting states declared by Pakistan as parties to the Geneva Awards Convention;
5. Must be made within a territory to which the Geneva Awards Convention applies; and
6. Must satisfy the requirements listed in section 7 of the APC Act that is broader in scope than article V of the New York Convention.

A foreign arbitral award that satisfies the above conditions can be enforced in Pakistan in the same manner as a domestic arbitral award. Such foreign arbitral award will be treated as binding for all purposes on the persons as between it was made and may be relied on

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<sup>3</sup>*Jess Smith and Sons Cotton LLC v. D.S. Industries* (2019 CLD 23).

<sup>4</sup>Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, section 6.

by any of them as a defense, set-off, or otherwise in any legal proceedings in Pakistan.<sup>1</sup>

A party seeking enforcement of a foreign arbitral award under the APC Act may institute a suit requesting the court that such foreign arbitral award be filed in the court. The plaintiff must file the original or an authenticated copy of the foreign arbitral award along with other evidence regarding compliance with the requirements listed above. The court will summon the defendants to show cause why the foreign arbitral award should not be enforced. Where the court is satisfied that the foreign arbitral award is enforceable, it will pronounce judgment and decree according to the award. Such decree will be executed under the Code of Civil Procedure.

**§ 21A:73 Enforcement of ICSID arbitral awards under the AIID Act**

The AIID Act governs matters related to the enforcement of the ICSID arbitral awards. The AIID Act specifically excludes the application of the Arbitration Act to the proceedings under the AIID Act.

A person seeking recognition and enforcement of an ICSID arbitral award may apply to the high court to register such an arbitral award. Upon its registration, an ICSID arbitral award will, as respects the pecuniary obligations which it imposes, be of the same force and effect for execution as if it had been a judgment of the high court and will be executed as such by the high court. The AIID Act empowers the Government of Pakistan to frame rules specifying the matters required to be proved by the applicant in enforcement proceedings under the AIID Act. However, to date, no rules have been issued by the Government of Pakistan under the AIID Act.

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**[Section 21A:72]**

<sup>1</sup>Arbitration (Protocol and Convention) Act, 1937, section 4.