

Pakistan

Orr Dignam & Co

Litigation

1 What is the structure of the legal profession?

Pakistan has a fused legal profession, with no distinction between lawyers practising in the Courts and those who act only as legal advisers. Lawyers are called Advocates and can advise and appear in Courts provided they are licensed to practise by a Bar Council. They must be properly qualified and meet the requirements of the Legal Practitioners and Bar Councils Act 1973 and the enrolment rules of the relevant Provincial Bar Council.

The subordinate judiciary is appointed from Advocates and the judicial service of Pakistan. High Court Judges are appointed from the Bar (where an Advocate must have a minimum of 10 years standing and be at least 40 years of age) and from senior members of the subordinate judiciary. The Judges of the superior Courts (ie, of the High Court and the Supreme Court) are constitutional appointees and have a constitutional safeguard of tenure and can only be removed by the Supreme Judicial Council comprising of Chief Justices of the Provincial High Courts and the Chief Justice of the Supreme Court.

2 What is the structure of the Court system?

The Supreme Court of Pakistan is the highest Court, with jurisdiction to hear appeals from the High Court of each of the four Provinces. These High Courts exercise appellate jurisdiction over their subordinate Courts barring certain specific original jurisdictions (such as company and banking law). The position is different in the City of Karachi in the Province of Sindh, where the original civil jurisdiction of the High Court encompasses virtually all civil claims in excess of a prescribed limit, which is currently 3 million Rupees. For civil matters the subordinate Courts consist of two tiers: Civil Courts, the trial Courts of first instance, and District Courts which hear appeals from the Civil Courts and in certain instances also exercise original jurisdiction.

The Supreme Court has the power, subject to its own rules and any Act of Parliament, to review its own decisions. A decision of the Supreme Court is binding on all other Courts of Pakistan. A decision of the High Court is binding on the Courts subordinate to it.

The Federal Shariat Court deals with Islamic law issues and has the power to strike down any law that is repugnant to the tenets of Islam. Appeals go to the Shariat Appellate Bench of the Supreme Court.

Specialist tribunals deal with matters involving banking recovery laws, service matters, customs, sales tax, central excise and industrial relations.

3 What is the role of the judge (and, where applicable, the jury) in civil proceedings?

There is no jury system in Pakistan. All matters are heard by Judges or Judicial Magistrates.

4 What are the time limits for bringing civil claims?

Under the Limitation Act 1908, civil claims involving recovery of money must generally be brought within three years of the date when the cause of action arose. The limitation for enforcement proceedings ie, for the first execution application of a decree is three years. A suit on a foreign judgment has to be filed within a period of six years from the date of judgment.

5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

Under the Code of Civil Procedure 1908 ("CPC"), a civil suit is generally commenced by filing a Plaint, which is a concise statement of facts and relevant law. Supporting documents are attached as Exhibits. The Court then issues the summons to the defendant(s) to appear and defend the claim.

If the defendant does not enter appearance to contest the suit after being given an adequate opportunity to do so, the matter will proceed *ex parte*. The plaintiff will nevertheless be required to satisfy the Court on its claim before a judgment is announced followed by a decree.

If a defendant appears to defend the claim, it is ordinarily required to file a Written Statement within 30 days, but this period is invariably extended. Thereafter, the Court frames the Issues (points of controversy) upon which evidence will be tendered. After the Framing of Issues, the parties are required to file in Court the documents relied upon along with a list of witnesses.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

The primary documentary evidence is disclosed by the parties with their pleadings. There is no specific obligation to disclose other documents unless an application by the other party is allowed by the Court. Such applications include discovery by interrogatories, discovery of documents, or actual production of documents. The Courts do not allow a party to use these procedural routes to go on a "fishing expedition" of the other side's evidence.

Witness evidence is normally presented by examination-in-chief, cross-examination and, if necessary, re-examination. It has become the general practice of some High Courts to allow parties to file affidavit evidence for each witness instead of the examination-in-chief, with the affidavit exhibiting documents relied upon. The other side then has a right to cross-examine witnesses on the contents of their affidavits. Expert witnesses are allowed where necessary.

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

Subject to Court orders, the parties can extend most time limits by agreement. Substantial changes to procedure are rare, although in practice both the CPC and the practice of the Courts are flexible. Cases proceed fairly expeditiously up to the stage of Framing of Issues, but in the High Court they usually then go into "hibernation" while they await their turn for recording of evidence. This can take several years. Where urgency is clearly demonstrated, there are means available under the CPC to expedite the trial process by the joint efforts of the parties, primarily through recording witness evidence before a Court-appointed Commissioner instead of the Court.

8 What interim remedies are available to preserve the parties' interests pending judgment?

The Courts have wide powers to grant interim relief to preserve the parties' interests pending judgment. These include attachment of property, granting of injunctions, arrest, and interim prohibitory orders to preserve the status quo, etc. Various conditions must be met before this relief will be granted. When seeking "injunctive relief" a *prima facie* case has to be proved, including a threat of irreparable injury. An injunction order will not be confirmed until after a full hearing of the injunction application.

9 What substantive remedies are available?

The Courts have wide powers to award different relief including injunctive relief, declarations, giving directions and awarding damages, including recovery of moneys and mesne profits. Actual loss must be proved in order to recover damages, and the Courts are generally conservative in this respect: substantial compensation or damages awards are unusual, and punitive or exemplary damages are rarely awarded.

10 What means of enforcement are available?

Judgments and decrees are enforced through further Court proceedings, which can be cumbersome and protracted, particularly where clear assets are unavailable or where judgment debtors seek to delay the matter. Where necessary, Court officials are appointed as receivers to sell, take possession, attach, survey, and enforce Court orders. Violation of

Court orders can result in contempt notices being issued by the Court. The Banking Recovery law, (where summary jurisdiction is exercised), includes a procedure for direct enforcement without Court intervention enabling banks to foreclose in order to recover loans provided certain conditions and procedures are complied with.

11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

The Courts have a discretionary power in relation to costs, and do not award costs to a successful party as a matter of course. Even where costs are awarded, these are nominal and do not reflect the actual legal expenses incurred.

The Court has power to order foreign claimants to provide security for costs, usually by depositing cash or furnishing a guarantee in Court. However, this power is discretionary and is rarely used.

12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

Appeals to the High Court generally lie against final orders and judgments only, though certain interlocutory orders can also be appealed. In revenue matters involving Government funds, appeals to the High Court must involve questions of law. Most other first appeals can be on questions of fact and law. Appeals to the Supreme Court require leave of that Court before being admitted under Article 185(3) of the Constitution, unless the appeal is filed as of right under Article 185(2) from a judgment, decree, or final order of a High Court where the High Court has varied or set aside a judgment, decree or final order of the Court immediately below where the monetary value of the subject matter is not less than a prescribed limit (currently is 50,000 Rupees).

An appeal does not operate as an automatic stay of execution. A separate stay application has to be made to the Appellate Court. A stay may be granted (in some cases subject to security being furnished) if appellant can show that the appeal has a real prospect of success which would be rendered nugatory if the stay was refused.

13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

Foreign states enjoy a restrictive state immunity under the laws of Pakistan but such immunity does not extend to acts of a commercial nature. Any sovereign act of a government is immune. State entities are fully subject to the jurisdiction of the Pakistan Courts.

14 What procedures exist for recognition and enforcement of foreign judgments?

A creditor under a foreign judgment has three options:

- (i) to seek direct execution under the relevant provisions of the CPC, if the country rendering the judgment is designated by the Government of Pakistan as a reciprocating territory;
- (ii) to file a suit in Pakistan on the basis of a foreign judgment, treating it as a cause of action; or
- (iii) to file a suit on the original cause of action.

Enforcement proceedings can only be challenged on specific grounds set out in the CPC:

- (i) where the judgment has not been pronounced by a Court of competent jurisdiction;
- (ii) where it has not been given on the merits of the case;
- (iii) where it appears on the face of the proceedings to be founded on an incorrect view of international law or refusal to recognise the law of Pakistan in cases where such law is applicable;
- (iv) where the proceedings in which the judgment was obtained are opposed to natural justice;

(v) where it has been obtained by fraud; and

(vi) where it sustains a claim founded on a breach of any law in force in Pakistan.

15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

Under the Pakistan Legal Practitioners and Bar Councils Rules, 1976 (“the Rules”) (promulgated under the Legal Practitioners & Bar Councils Act, 1973), contingency fees are not expressly prohibited, but the Rules do prohibit lawyers from having any personal interest in their client’s case. The Rules also impose upon all advocates, as officers of the Court, an independent obligation to assist the Court in the imparting of justice, and this may be compromised if they had an interest in the outcome of a case. It therefore follows that it is not permissible to charge contingency/conditional fees or enter into any other arrangement that results in a lawyer acquiring an interest in the case.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model Law?

Pakistan’s Arbitration Act 1940 (“1940 Act”) is based on earlier English arbitration enactments. The 1940 Act deals with domestic arbitrations and provides a complete code for arbitration. On July 14, 2005, a new law was promulgated called the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 (VIII of 2005) (“the 2005 Ordinance”), which gives legislative effect to the Union Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The 2005 Ordinance which extends to the whole of Pakistan applies to arbitration agreements made before, on or after July 14, 2005, but not to foreign arbitral awards made before July 14, 2005.

17 What are the main national arbitration institutions?

There are no formal national arbitration institutions in Pakistan. As mentioned above, the 1940 Act provides a complete code for the conduct of domestic arbitrations.

18 Are there any restrictions on who may represent the parties to an arbitration?

Parties may represent themselves or be represented by an Advocate of their choice. The rules do not allow foreign lawyers to represent clients in Pakistan, and this prohibition extends to arbitration proceedings.

19 What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement should be in writing but need not be contained in a formal document. The naming of arbitrators is not essential, nor is the signing of the agreement, as long as its terms and conditions are readily ascertainable and freely agreed between the parties. Arbitration may be agreed to by correspondence between the parties. It may also be agreed by a statement made by the parties’ counsel that is recorded by a Court.

Under the 2005 Ordinance recognition and enforcement of a foreign arbitral award requires a duly authenticated original award (or a duly certified copy), together with the original agreement (or a certified copy), which must include an arbitral clause in a contract signed by the parties or contained in an exchange of letters.

20 Can the Court refuse to stay litigation if there is a valid arbitration clause?

The 1940 Act provides that where a party to an arbitration agreement commences legal proceedings against the other party in respect of any matter agreed to be referred to arbitration, the other party may apply for a stay of the legal proceedings. The Court must be satisfied that “there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement”. The Court has the discretion to refuse to stay litigation if there are “compelling reasons”.

Under the 2005 Ordinance, the Court does not appear to have any discretion to refuse to stay legal proceedings filed in violation of the arbitration agreement, and is required to refer the parties to arbitration unless it finds the arbitration agreement is null, void, inoperative or incapable of being performed.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who is the appointing authority?

The 1940 Act provides that the reference shall be to a sole arbitrator unless otherwise expressly provided. The sole arbitrator is appointed by consent of the parties. If the parties cannot agree on an appointment, then an application can be made to the Court to appoint an arbitrator. Typically, the arbitration clause provides for two arbitrators, one to be appointed by each of the contracting parties. The arbitrators, before entering upon the reference, appoint an umpire. If the arbitrators cannot agree on an award, the matter will be decided by the umpire's award.

22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

The Court may, on the application of a party, remove an arbitrator (or umpire):

- (i) who fails to use all reasonable dispatch in entering on and proceeding with the arbitration and making the award, or
- (ii) who misconducts himself or the proceedings.

The Court can also be asked to revoke the authority of an arbitrator on grounds including partiality or bias.

23 Does the domestic law contain substantive requirements for the procedure to be followed?

The provisions of the 1940 Act are supplemented by the CPC and Pakistan's rules of evidences, but these do not have to be strictly adhered to in arbitral proceedings.

24 On what grounds can the Court intervene during an arbitration?

The Courts retain a supervisory jurisdiction over the conduct of arbitrations. This includes the power to intervene in relation to the appointment and removal of arbitrators or umpires, the power to determine the existence or otherwise of an arbitration agreement, (which would also decide whether the arbitrators have jurisdiction or not) and power to order the detention, preservation, inspection, interim custody or sale of any goods which are the subject matter of the arbitration and the securing of the amount in dispute.

25 Do arbitrators have powers to grant interim or conservatory relief?

Under the 1940 Act, unless the arbitration agreement provides otherwise, an arbitrator may, have the power to make an interim award. For all other interim relief it is necessary to apply to the Courts.

26 When and in what form must the award be delivered?

Where the agreement is silent on the time limit, the arbitrator must make an award within four months of entering on the reference. If an umpire must decide, they must make the award within two months after entering on the reference, or within such time as the Court allows. The Court may increase the time for making the award, regardless of whether the time limit has expired or not. The arbitrators can also, with the consent of the parties, extend the time for making the award. The award must be in writing and signed by the arbitrators or umpire, and must give sufficient detail of the basis for the decision to enable a Court to consider any question of law that may arise.

27 On what grounds can an award be appealed to the Court?

An appeal to the Court to set aside an award can be made on one or more of the following grounds:

- (i) where the arbitrator or umpire has misconducted themselves or the proceedings;
- (ii) where the award is made after the issue of an order by the Court superseding the arbitration or after the arbitration proceedings have become invalid; or
- (iii) where the award is improperly procured or is otherwise invalid.

28 What procedures exist for enforcement of foreign and domestic awards?

In relation to domestic arbitrations under the 1940 Act, the arbitrators or umpire shall, if requested of any party or directed by the Court, file the award in Court together with any depositions and documents. The Court must give notice of the filing to the parties. It will then either:

- (i) pronounce judgment according to the award, where the Court sees no cause to remit the award to the arbitrator for reconsideration; or
- (ii) set the award aside.

Once the judgment is pronounced, a decree will follow and (subject to appellate review) the decree may be executed as a judgment of the Court.

Under the 2005 Ordinance, foreign arbitral awards are recognised and enforced in the same manner as a judgment or an order of the Court in Pakistan, except where Article V of the New York Convention applies. Article V provides that the recognition and enforcement of a foreign arbitral award may be refused at the request of a party against whom it is invoked, only if they furnish proof to the effect that:

- (i) the parties to the agreement were, under the law applicable to them, under some incapacity; or
- (ii) the agreement is not valid under the law to which the parties have subjected it or, under the law of the country where the award was made; or
- (iii) the party against whom it is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present their case; or
- (iv) the award deals with a matter not contemplated within the terms of the submission to arbitration or contains decisions beyond the scope of the submission to arbitration; or
- (v) the composition of the arbitral tribunal or the arbitral procedure followed was not in accordance with the agreement of the parties or not in accordance with the law of the country where the arbitration took place; or
- (vi) the award has not yet become binding on the parties or has been set aside or suspended by the country in which, or under the law of which, the award was made.

Generally, the recognition and enforcement of foreign arbitral awards may also be refused if the authority in the country where recognition and enforcement is sought finds the subject matter of the dispute is incapable of settlement by arbitration under the law of that country, or the recognition or enforcement of the award will be contrary to the public policy of the country. This principle applies to Pakistan.

Note:

As the 2005 Ordinance has only recently been promulgated, its provisions have not yet been interpreted by the Courts in Pakistan. Accordingly, its true effect in facilitating the recognition and enforcement of foreign arbitral awards is yet to be determined. The new law has been promulgated as an Ordinance, meaning that it is in force for a limited duration only (four months under Article 89 of the Constitution of Pakistan). The Ordinance will have the same force and effect as an act of parliament, but it will ordinarily be repealed four months from its promulgation, unless it is re-enacted by the President or approved by the National Assembly.

29 Can a successful party recover its costs?

There is no provision for recovery of costs in the 1940 Act, but the arbitrators may at their discretion award costs. Such an award may not cover the actual costs involved.

Alternative dispute resolution

30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution during or before the proceedings?

There is no law that requires the parties to a dispute to consider or submit any form of alternative dispute resolution before or during proceedings in Pakistan. However, most commercial contracts in Pakistan require the parties to try to resolve disputes amicably by following certain agreed procedures, before resorting to arbitration or litigation.

Orr Dignam & Co

Contact [Sajid Zahid](#)
[1-B, State Life Square, I.I. Chundrigar Road, Karachi, Pakistan](#)
Phone [+ 9221 241 5384, 241 6003, 241 5086](#)
Fax [+ 9221 241 6571, 241 8924](#)
e-mail orrdig1@cyber.net.pk
Website www.orrdignam.com

Orr, Dignam & Co. is one of the largest Firm of Advocates in Pakistan with fully operational offices in Karachi and Islamabad. The firm specialises in civil law, with particular emphasis on corporate and commercial laws and arbitration. The firm handles arbitrations (both domestic and international), having considerable experience of arbitration under the Pakistan Arbitration Act 1940 and International modes of arbitration, including the Rules of Arbitration and Conciliation of the International Chamber of Commerce and the London Court of International Arbitration. The Firm's civil litigation portfolio covers cases in the High Courts and the Supreme Court.