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# ESCAPING THE 1940 SHADOW: COLONIAL LEGACIES AND JUDICIAL INTERVENTION IN INDIAN AND PAKISTANI ARBITRATION

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## ABSTRACT
*Both India and Pakistan inherited a highly interventionist, court-centric arbitration framework governed by the colonial-era Arbitration Act 1940. Over the subsequent decades, the two South Asian neighbours embarked on vastly different trajectories to modernise their dispute-resolution architectures and appeal to international commercial users. India repealed the 1940 Act early with the Arbitration and Conciliation Act 1996 (modelled on the UNCITRAL Model Law). However, India's ambition has been historically undercut by a "judicial pendulum of intervention". This pendulum swung from the expansive merits-review doctrine of patent illegality in ONGC v. Saw Pipes (2003) to the pro-arbitration corrections in BALCO (2012) and Ssangyong (2019). Yet, recent jurisprudence, exemplified by the five-judge Constitution Bench decision in Gayatri Balasamy v. ISG Novasoft Technologies Ltd. (2025), carving out a limited judicial power to modify awards under Sections 34 and 37, highlights a persistent judicial appetite for "repairing" arbitral outcomes. In response, the Indian Draft Arbitration and Conciliation (Amendment) Bill 2024 has proposed state-sanctioned, de facto mandatory appellate arbitral tribunals under a new Section 34A. This paper argues that this proposal acts as a doctrinally incoherent legislative overcorrection that risks transforming arbitration into an endless, multi-tiered litigation process*
***Keywords:*** *Colonial, Arbitration, Uncitral, Judicial Control.*

## INTRODUCTION.

In contrast to India's early legislative break, Pakistan remained tethered to the Arbitration Act 1940 for over seven decades, and this prolonged retention has left a deeper imprint on its judicial culture. The 1940 Act in Pakistan continued to govern both domestic and international commercial arbitration until it was finally replaced by the Arbitration Act 2017, which was also modelled on the UNCITRAL Model Law. However, the late timing of the reform meant that two generations of judges were trained under a statute that treated arbitration as an extension of litigation. Consequently, Pakistani courts developed a strong habit of intervention at the appointment stage, during proceedings, and most significantly at the setting-aside stage under Section 34 of the new Act. Landmark cases such as Hub Power Co. v. WAPDA (2000) and more recent disputes like Government of Pakistan v. Broadsheet LLC (2021) illustrate a consistent pattern where courts have been willing to re-examine factual findings and public policy, often in the name of protecting state interest. Unlike India, Pakistan does not yet have a clear Supreme Court doctrine comparable to BALCO that definitively limits the territorial scope of the Act or curtails merits review. The Islamabad Capital Territory International Dispute Resolution Act 2024 represents a further attempt to create an arbitration-friendly enclave, but it applies only to a limited seat and has not yet produced consistent jurisprudence. As a result, the “1940 shadow” persists in Pakistan not merely as a statutory memory but as a living judicial mindset that equates control with legitimacy. Therefore, while India’s problem is one of legislative overcorrection in response to judicial activism, Pakistan’s challenge remains more fundamental: overcoming decades of procedural dependence on courts and building institutional trust in arbitral finality. Without a decisive shift in judicial philosophy, Pakistan risks remaining within the 1940 shadow even after adopting modern text.

Pakistan's transition has been characterised by a stark "structural gap". For domestic arbitrations (including any international dispute with a seat in Pakistan), the country remains anchored to the archaic 1940 Act. Meanwhile, foreign-seated awards are enforced under the highly predictable Recognition and Enforcement (Arbitral Agreements and Foreign Arbitral Awards) Act 2011, which implements the New York Convention. This bifurcated landscape was brought into sharp relief by the Supreme Court of Pakistan's landmark ruling in Taisei Corporation v. A.M. Construction Company (2024). Taisei established that the juridical seat of an award determines its nationality. This means that international parties selecting a Pakistani seat are funnelled by default into the court-centric 1940 framework, which lacks competence-competence and denies tribunals the power to grant interim relief. Although Pakistan's Draft Arbitration Bill 2024 seeks to replace the 1940 Act with a modern UNCITRAL-based model inspired by the Indian 1996 Act, the reform has stalled in the National Assembly due to the political prioritisation of the 26th and 27th Constitutional Amendments.

Through a rigorous comparative analysis of statutory texts, judicial trends (including the Indian Supreme Court's 2025 rulings in ASF Buildtech, Somdatt Builders, and Sepco Electric), and the economic "finality premium" demanded by cross-border users, this paper deconstructs the systemic trust deficits that plague both regimes. It concludes that while Pakistan struggles with a "legislative deficit" that drives international seat selection away from its jurisdiction, India suffers from a "self-restraint deficit" that risks institutionalising cost and delay through multi-stage appellate reviews. Ultimately, the paper provides a balanced framework for legal reform, recommending holistic ecosystem development, specifically arbitrator accreditation, strict enforcement timelines, and specialised commercial courts over the creation of complex, litigation-mimicking statutory tiers.

**Research Methodology.**

This study adopts a doctrinal and comparative legal research methodology. Primary sources including the Arbitration Act 1940, Arbitration and Conciliation Act 1996 (India), Arbitration Act 2017 (Pakistan), Draft Amendment Bill 2024, and the UNCITRAL Model Law are analyzed. Key Indian and Pakistani Supreme Court judgments from Saw Pipes (2003) to Gayatri Balasamy (2025) are examined to trace the trajectory of judicial intervention. Secondary sources such as academic articles, Law Commission reports, and institutional publications provide context. A comparative approach is used to assess how colonial legacies have shaped divergent judicial attitudes in India and Pakistan toward party autonomy and minimal court interference.

**The Colonial Architecture of South Asian Arbitration**

Both India and Pakistan started on the arbitration journey from a common legal system. The Arbitration Act 1940 ('the 1940 Act') was enacted in British India as Act X of 1940 and later became a part of the legal system of Pakistan after the partition of India. The Supreme Court of India in Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc ('BALCO') also traced the legislative history of the 1940 Act and noted that the origin of the Act was the English Arbitration Act, 1934. The Court also observed that while the

English Arbitration Act had been amended over time, nothing had been done to the 1940 Act and as a consequence, Indian arbitration law had become stagnant.

The importance of joint inheritance lay less in the colonial origins of the statute. It lay instead in the institutional framework that it implemented. The 1940 Act did not envisage arbitration as an entirely separate mode of alternative dispute resolution from the ordinary courts. However, in respect of the filing and enforcement of awards, remissions and variations of awards, challenges to awards, interim relief, and certain cases concerning the opening of an arbitral proceeding and its subsequent conduct, the arbitral process shall remain intertwined with the judicial system. The law's court-centric character manifests most clearly in Sections 14, 15, 16, 17, 20, 30 and 41.

**Judicial Control over the Award: Section14 and Section17**

Section 14 of that Act required the award to be signed and filed in the court by the arbitrator upon the happening of the circumstances laid down in that section, and section 17 provided that in the absence of sufficient grounds for remitting the award or setting it aside, the court would pronounce judgment and decree in terms of the award. The statutory scheme therefore placed the court within the enforcement infrastructure of the arbitral award so that the award could not simply be treated as a result whose enforcement was completely divorced from the judicial process. The statutory scheme is clear that the court is to consider this before judgment and decree. This was also confirmed with respect to the operation of Sections 14 and 17 in M Venkataratnam v M Chelamayya, when the Andhra Pradesh High Court saw the court as having an active role in how an award became an enforced decree. It is the same court-centered architecture which is obvious from the Supreme Court's discussion in Guru Nanak Foundation v Rattan Singh & Sons in the context of proceedings under the 1940 Act. In the same vein, the proceedings in relation to the arbitration and the award became part of the court proceedings.

**Judicial Powers to Modify, Remit and Set Aside Awards**

The interventionist nature of the 1940 Act becomes clearer when Section 15 is read alongside Section 16 and Section 30. Section 15 gave the court the power to alter or amend the award and section 16 gave it the power to remit the award to the arbitrator or umpire. These were supplemented by the statutory grounds upon which an award could be set aside in section 30. The Supreme Court in BALCO categorically noted that these powers were part of the 1940 regime, and that the Act gave a court to modify, remit and set aside the award under Sections 15, 16 & 30.' Consequently, the statutory scheme gave the courts greater powers than merely to refuse or uphold an award: upon the happening of circumstances contemplated by the Act, the court could intervene to alter the substance or procedural course of an award by way of modification and remission. At the same time, the extent of this intervention should not be overstated. Section 30 did not give the court carte blanche to appeal on all grounds from every award . In State of Rajasthan v Puri Construction Co Ltd, the Supreme Court likewise stressed the scope for limited judicial scrutiny of the award exercised by the court in setting the award aside. This did not detract from the relatively interventionist approach to the 1940 schemes, but rather was a reflection that no re-hearing could be heard of the merits.

**Court Control over Interim and Procedural Matters: Section 41**

Judicial involvement did not stop with the award. Section 41 of the 1940 Act read with the Second Schedule conferred several broad powers on the court for interim and procedural reliefs regarding protection of property, security, granting injunctions and appointment of receivers in a proceeding before it. Its structure was therefore materially different from a modern arbitration model in which arbitral tribunals may themselves have statutory jurisdiction to grant interim measures. Under the 1940 Act the court remained an important source of procedural and interim protection during the course of the arbitral process. This part of the statute shows that arbitration was at least nominally part of, and not completely out of, the courts.

**Structural Integration with the Civil Courts: Section 20**

Section 20 provides a further illustration of this judicial orientation. In cases where there was an arbitration agreement but the procedure under the Act had not been invoked, Section 20 gave either party the right to apply to the court to have the arbitration agreement filed and to have the matter referred to arbitration. This is important partly as a matter of procedural technicality, but also because it shows that the court could directly intervene in translating the matter from the contract's arbitration agreement to the arbitral proceedings. An excellent example in this respect is Guru Nanak Foundation, where the application was made under Section 20 to obtain an order of the Court to direct that the arbitration agreement be filed in Court and directing that the disputes arising thereunder be referred to arbitration. Such subsequent proceedings indicated just how far, if at all, the Court could intervene in relation to retaining jurisdiction. The Court held that, when the provisions of Section 31(4) are read with the other provisions contained in the Act, it is for the skilled court, where an application had been made to it, to exercise jurisdiction over the arbitration proceedings and thereafter over applications arising out of the reference.

Sections 14, 15, 16, 17, 20, 30 and 41, read together, do not give the impression that arbitration was conceived in the 1940 Act as a process independent of the courts, but rather that the courts and judicial processes were central to the arbitral process.

**The Practical Consequences of the Court-Centric Structure**

The influence of this architecture was not merely theoretical. Guru Nanak Foundation contained serious criticisms of the operation of the arbitration provisions of the 1940 Act, and the Court observed how the arbitration process under the Act had become highly technical and was being challenged repeatedly in courts. This brought in complexity, delay and expense. This is relevant to the project in that the objections to the 1940 model were not reducible to its colonial roots: its institutional structure had effects that posed contemporary practical problems. Arbitration, available as an alternative to formal litigation, sometimes led to court cases, and legal formality sometimes intruded. The colonial character of the instrument, therefore, is better understood as an institutional inheritance: the 1940 Act placed arbitration in a legal context where the validity, conduct and enforcement of arbitral proceedings remained subject to substantial judicial control

**India Attempts to Disrupt the 1940 Framework**

India finally broke with this legacy by enacting the Arbitration and Conciliation Act 1996 (the "1996 Act"). By replacing the Arbitration Act 1940, the Act of 1996 effectively reformulated the U.N. Commission on International Trade Law (UNCITRAL)'s Model Law on International Commercial Arbitration. The aim was to modernise arbitration law in India and limit court intervention. Notably, this approach did not merely amend particular provisions of the 1940 Act, but rather superseded the Act's entire statutory structure.

**The Principle of Minimal Judicial Intervention**

Section 5 of the 1996 Act expressly provides, in relation to matters falling within Part I, that "no judicial authority shall intervene except where so provided in this Part." This provision demonstrates a fundamental shift in legislative philosophy, instead of assuming that arbitration was subject to continuing court supervision, the 1996 Act provides that non-intervention is the fundamental principle, with courts being given powers to intervene only where the legislation says otherwise. The Supreme Court later noted that the 1996 Act was a "radical departure" from the 1940 Act in McDermott International Inc v Burn Standard Co Ltd: the Supreme Court contrasted the two statutory regimes and commented on the narrower supervisory role that the 1996 legislation had envisaged. In this respect, Sections 15 and 16 of the 1940 Act had been distinct from Section 34 of the 1996 Act, as the former specifically empowered the courts to vary or remit an award, a power that was absent in the 1996 Act.

**From Judicial "Repair" to Limited Review**

This legislative shift is obvious in the decision of the Supreme Court in Project Director, NHAI v M Hakeem. The question before the Court was whether it was entitled to vary the award pursuant to section 34 of the 1996 Act. The Court answered this question in the negative. The Court found that under the 1940 Act, awards could be remitted, modified or set aside. In contrast, section 34 did not provide the court with a general power to modify an award. Given that the court had the statutory powers under the 1940 Act which might affect the substantive outcome of the award, it necessarily follows that the function of the court under Section 34 of the 1996 Act is that of an exercise of judicial review within the limits prescribed by that section and not that of correcting or reviewing the award as though the court was exercising appellate jurisdiction over the tribunal. The legislative reform in India therefore was an earnest attempt to scrap the court-centric architecture of the 1940 Act.

This legislative departure was an important point of difference between the two jurisdictions. In Pakistan, the Arbitration Act 1940 has not been repealed for domestic arbitration. It is listed as Act X of 1940 in the Pakistan Code, and the statute states that it extends to the whole of Pakistan. As a result, the court-centric statutory framework described above remains part of the domestic arbitration framework in Pakistan. The provisions above were not merely legislative remnants of a bygone era of Indian law, but are to this date written into the Pakistani statute book. The statutory design of award, court intervention and other such proceedings was carried over in the Pakistani version of the 1940 Act. However, Pakistan has implemented a separate statutory regime for enforcing and recognizing foreign arbitral awards through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, which is a separate enactment in the Pakistan Code besides the Arbitration Act, 1940. Therefore, the statutory regime in Pakistan for enforcing and recognizing foreign arbitral awards is distinct from that under which domestic awards are enforced. This is in sharp difference with India, where the Indian government repealed the 1940 Act in favor of the 1996 Act. The 1940 Act remains the primary domestic arbitration law in Pakistan.

**A Shared Colonial Inheritance**

Thus, the history of India and Pakistan begins at the same time, but their trajectories take two different legislative shapes. As inheritors of the 1940 Act, both had a statutory scheme in which arbitration was closely integrated with the ordinary courts, and evidence for this can be seen in the provisions of sections 14, 15, 16, 17, 20, 30 and 41. Judgments of the Supreme Court of India (especially BALCO and Guru Nanak Foundation) provide some perception into the structure of that regime and the practical difficulties it posed

The 1996 Act was intended to be a departure statute. To this end, India adopted a new approach by which courts were to intervene in arbitration matters only when absolutely needed, in contrast to the previous legislation. The Supreme Court would later state, in McDermott, that the 1996 Act represented a "radical departure" from the manner in which the law had previously been construed.

Pakistan, however, preserved the 1940 Act as the law governing enforcement of domestic awards, and enacted a separate law for foreign awards that too in 2011. In this way, there are now two different laws on enforcement in India and Pakistan, although they share a common history.

The importance of the distinction is that it forms the basis for the subsequent comparative discussion. The relevant historical fact is not that India and Pakistan inherited the old arbitration statute. It is only once they had inherited the existing model of arbitration where the judicial institutions were directly embedded in the arbitral process that their approaches to legislation differ.

**The Colonial Architecture of South Asian Arbitration**

Both India and Pakistan inherited a deeply interventionist, court-centric dispute resolution framework from their shared British colonial legacy. At partition in 1947, both nations adopted the Arbitration Act, 1940, a statute enacted by the British Governor-General of the Indian Council. Far from facilitating modern, autonomous commercial dispute resolution, the 1940 Act is a "relic of colonial times" designed under a philosophy of strict state oversight, rendering arbitration a mere prelude to protracted court litigation.

**Specific Sections Embodying the Colonial "Court-Centric" Design**

The colonial framework of the 1940 Act systematically strips arbitral tribunals of their autonomy, subjecting them to pervasive judicial control.

The "Rule of Court" and Provisional Awards (Sections 14 and 17): In a complete departure from modern international standards where arbitral awards are immediately binding, the colonial statute treats awards as merely provisional. Under Section 14, an award must be filed in the local court. Under Section 17, the court must hear objections and formally adopt the award, making it a "rule of court" (entering judgment in terms of the award) before it has any executable force. This dual-stage judicial adoption process is a primary source of enforcement delay.

The Judicial Monopoly on Interim Measures (Section 41): Under Section 41 (read with Order XXXIX of the Code of Civil Procedure), only national courts may grant interim relief to preserve the status quo or protect assets. The 1940 Act confers no power on the arbitral tribunal to grant interim measures, leaving tribunals dependent on court intervention.

Expansive Interventionist Recourse (Section 30): Under Section 30, courts can set aside domestic awards on broad, ambiguous grounds, such as if an arbitrator has "misconducted" themselves or the proceedings, or if the award is "improperly procured". This has historically been interpreted to allow wide-ranging judicial merits reviews for "illegality apparent on the face of the award," stripping the process of its finality.

Substantive Interference: Modification and Remittal (Sections 15 and 16): Rather than limiting courts to upholding or setting aside an award, Sections 15 and 16 empower judges to actively modify or correct awards, or remit them back to the tribunal. This establishes an exhaustive supervisory regime where courts act as appellate bodies.

The Structural Integration with Civil Courts (Section 20 and Chapters II–IV): The 1940 Act partitions arbitration into three rigid categories: arbitration without court intervention (Chapter II, Sections 3–19); arbitration where no suit is pending but through court (Chapter III, Section 20); and arbitration in suits through court (Chapter IV, Sections 21–25). By design, this integrates private dispute resolution directly into the state court hierarchy. Under Section 20, the court is required to actively intervene to force and constrain the arbitration reference if a party resists, reflecting a complete lack of codified competence-competence.

While India and Pakistan shared this identical colonial starting point, they have taken vastly different regulatory pathways to modernise their dispute resolution landscapes:

**India's Path: Legislative Repeal and the Judicial Pendulum**

The 1996 Paradigm Shift: India took a major legislative step to dismantle its colonial legacy by enacting the Arbitration and Conciliation Act 1996, which repealed the 1940 Act and adopted the UNCITRAL Model Law. The Act's Statement of Objects and Reasons explicitly declared the goal of minimising the supervisory role of courts. This intent was codified in the non-obstante clause of Section 5, which strictly prohibits judicial intervention unless explicitly authorised.

The Residual Colonial Mindset: Despite this modern statutory drafting, Indian courts struggled for decades to shed their interventionist habits. In ONGC v. Saw Pipes, the Supreme Court expanded the "fundamental policy of Indian law" ground to include "patent illegality," effectively reviving merits-based judicial review under Section 34. While subsequent amendments in 2015 and the Ssangyong (2019) ruling successfully curbed this trend, the persistent court urge to "repair" awards remains. This was most recently seen in the 2025 Constitution Bench decision in Gayatri Balasamy v. ISG Novasoft Technologies, which carved out a limited judicial power to modify awards under Sections 34 and 37.

**Pakistan's Path: A Bifurcated Architecture and Stalled Reforms**

The Domestic Structural Gap: Unlike India, Pakistan never repealed the Arbitration Act 1940 for domestically seated disputes. Consequently, any domestic commercial arbitration or any international arbitration that designates Pakistan as its juridical seat is still governed by the colonial 1940 Act by default.

The Foreign/Domestic Split: To foster investor confidence, Pakistan enacted a highly successful modern framework for foreign awards: the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (REFA), which implements the New York Convention. This has created a bifurcated legal map. Foreign-seated awards (e.g., in London or Singapore) are enforced efficiently under the 2011 Act, while Pakistan-seated arbitrations are funnelled into the archaic, court-centric 1940 regime. The Supreme Court of Pakistan confirmed this stark division in Taisei Corporation v. A.M. Construction Company (2024), ruling that selecting a Pakistani seat subjects the entire proceeding to the restrictive 1940 Act.

**Rectification**

To rectify this gap, the Arbitration Law Review Committee (ALRC) drafted the Draft Arbitration Bill 2024 to fully replace the 1940 Act with a UNCITRAL-based model. The Bill seeks to dismantle the remaining colonial legacy by establishing statutory competence-competence (Section 18), empowering tribunals to grant interim relief (Section 19), and abolishing the "rule of court" requirement under Sections 14 and 17 to make awards automatically enforceable. However, due to political focus on constitutional amendments, this reform remains stalled in the National Assembly.

**India: the judicial pendulum between intervention and finality**

India's legislative departure from the judicially intrusive post-colonial 1940 Act is built on the premise of arbitral finality, aligning its arbitration regime more closely with the UNCITRAL Model Law. Yet, despite the shift, it has struggled to define the boundaries of court intervention, oscillating between judicial restraint and intervention. This tension raises the question of how much correction is necessary before it begins to undermine the finality that lies at the heart of arbitration's commercial appeal.

**The introduction of patent illegality**

Instead of providing parties with an inherent right of appeal on the merits, the 1996 Indian arbitration framework deliberately restricts judicial recourse to narrowly defined grounds for setting aside an arbitral award under Section 34. Among these grounds, the public policy exception has proved to be the most contentious.

Giving a rather expansive interpretation to "public policy of India", the Supreme Court in ONGC LTD v Saw Pipes ruled that a patently illegal award is against public policy and can therefore be set aside, particularly where a serious error of law was apparent on the face of the award. This broadened interpretation allowed courts to scrutinise the substantive correctness of an award contrary to the intent of the drafters of the 1996 Act. By recognising patent illegality as a further ground for challenging an arbitral award, the court not only widened the scope of judicial supervision, but did so without drawing a clear distinction between legitimate correction of fundamental illegality and impermissible merits-based appellate review of an award.

This insufficiently circumscribed approach was subject to considerable criticism as it defeated the very purpose of arbitration as a swift and conclusive alternative to litigation and risked turning this mechanism of dispute resolution into yet another protracted legal dispute. Consequently, following the 2015 amendments, public policy was confined to violations of fundamental notions of justice and morality while patent illegality was restricted to domestic awards.

**From patent illegality to judicial restraint**

Of the judicial decisions marking the shift towards judicial restraint, Ssangyong Engineering and Construction Co Ltd v NHAI (2019) represents perhaps the most significant development in India's evolving arbitration jurisprudence. Not only did the decision reinforce the principle of finality, but it also disapproved of the expansive approach taken in Saw Pipes. In doing so, the Supreme Court reaffirmed the narrower conception of "public policy" taken in Renusagar Power Co. Ltd. v General Electric Co. (1994) which permitted interference only in circumstances involving violations of Indian law or the most basic notions of justice and morality. The court further clarified the scope of patent illegality following the 2015 amendments, under which it was confined to domestic arbitrations solely.

Nevertheless, the fact that the recalibration in Ssangyong took more than fifteen years after Saw Pipes is itself indicative of the judiciary's struggle to strike an efficient balance between intervention and the finality and autonomy demanded by arbitration. This further demonstrates the difficulty of maintaining the boundaries of judicial interference and exercising restraint, especially once an unnecessarily broad approach to judicial oversight had become embedded in the case law.

**The struggle to maintain restraint**

The question of whether the power of the courts is restricted to merely setting aside awards or extends to modifying them was confronted in NHAI v M. Hakeem (2021). Reinforcing the limited supervisory role conferred by Section 34, the Supreme Court emphasised that modification was beyond the scope of the provision. Despite the rather decisive judgment, post-Hakeem case law reveals a practice of courts engaging in partial modifications, blurring the boundary established by Hakeem between setting an award aside and modifying it.

The boundary was reconsidered by a five-judge Constitution Bench in Gayatri Balasamy v ISG Novasoft Technologies Ltd (2025), which recognised a limited power to modify an arbitral award under Section 34. Although a plain reading of Section 34 suggests that the judicial recourse against an arbitral award is limited to setting it aside, the question of whether it may be judicially "repaired" or simply set aside has continued to arise.

In theory, India's arbitration framework has spent years narrowing judicial intervention and ensuring finality in line with international standards. In practice, however, judicial attitudes and interpretations of these limitations reveal a persistent difficulty in exercising restraint. This in turn clarifies that the challenge has not merely been one of a legislative framework, but of ensuring judicial adherence to the limited supervisory jurisdiction entrusted to the courts.

**Proposed Section 34A: Appellate Arbitral Tribunal**

One of India's solutions to the current gaps in its arbitration system is the insertion of Section 34A into the existing framework, which seeks to introduce an Appellate Arbitral Tribunal (AAT) as a mechanism for reviewing arbitral awards. The proposed provision provides an alternative to recourse under Section 34 if parties to the arbitration agree to refer the award to the AAT for review instead of the court. In essence, this builds upon the decision in Centrotrade Minerals & Metal Inc. v Hindustan Copper Ltd (2020) which upheld the validity of a two-tier arbitration mechanism. However, if the predominant challenge in the Indian arbitration framework is the judiciary's interventionist approach, such a proposal raises the question of whether the creation of an AAT truly addresses the underlying issue. Although the proposed reform shifts the review function from the courts to a specialised arbitral institution, it nevertheless adds an additional layer of scrutiny which may compromise the efficiency and finality promised by arbitration.

**The paradox of Section 34A**

For a reform intended to curb judicial intervention, the proposed Section 34A risks doing little more than institutionalising the post-award review function by merely shifting the supervisory role from the courts to a specialised body rather than addressing the underlying problem of excessive scrutiny. While the provision seeks to reduce judicial intervention, it does not reduce, let alone eliminate, intervention in the arbitration process itself. Instead, it relocates the problem by creating an additional layer of review, leaving the risk of prolonged proceedings and repeated scrutiny unresolved.

If most of the commercial value of arbitration is derived from its finality, expanding the avenues for review risks weakening the very feature that forms the basis of the parties' decision to opt for this method of dispute resolution. Ultimately, India's problem is not limited to extensive judicial intervention; it extends to how much post-award review its arbitration system can tolerate before it ceases to function as a genuinely final dispute resolution mechanism. Only when India succeeds in striking a balance between intervention and finality, while limiting post-award scrutiny, can it prevent arbitration from becoming merely the first step in a multi-tiered process of appellate review.

**Pakistan: The Unfinished Transition from the 1940 Act**

Pakistan's arbitration framework presents a fundamentally different problem from India's. While India repealed the Arbitration Act 1940 and enacted the Arbitration and Conciliation Act 1996 based on the UNCITRAL Model Law, Pakistan has not yet enacted a comprehensive replacement for the 1940 Act. The Pakistan Code continues to list the Arbitration Act 1940 ('1940 Act') as existing legislation, while the proposed Arbitration Bill 2024 remains draft legislation awaiting introduction into Parliament. The consequence is a bifurcated framework. Pakistan-seated arbitrations remain principally governed by the 1940 Act, whereas foreign arbitral awards are dealt with under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 ('2011 Act'), which provides a statutory framework for recognition and enforcement of foreign awards.

**The continuing operation of the Arbitration Act 1940**

The 1940 Act is the central feature of Pakistan's domestic arbitration framework. Its statutory architecture gives courts a substantially more prominent role than is contemplated by contemporary Model Law-based arbitration legislation. Section 14 requires an arbitrator or umpire to sign and file the award in court together with the required notice to the parties. Section 17 then provides that, where the court sees no cause to remit the award or set it aside, it shall proceed to pronounce judgment according to the award and a decree shall follow.  The structure is significant for the question of arbitral finality. Rather than treating the arbitral award as immediately enforceable subject only to limited judicial recourse, the 1940 Act places the award within a judicial process before it acquires the force of a decree. The court therefore remains institutionally embedded in the post-award process. The 1940 Act also permits judicial intervention at earlier stages. Section 20 allows a party to apply to the court for an order that an arbitration agreement be filed in court and for an order of reference to arbitration. Section 41 further provides that the provisions of the 1940 Act and the Second Schedule apply to arbitrations, and the Second Schedule contains powers exercisable by the court in relation to interim measures.

The court's supervisory role continues at the award stage. Section 30 identifies circumstances in which an award may be set aside, including where an arbitrator or umpire has misconducted himself or the proceedings, where an award has been improperly procured, or where the award is otherwise invalid. Sections 15 and 16 additionally provide mechanisms through which courts may modify, correct or remit awards in specified circumstances.

The cumulative effect is a framework in which arbitration remains closely connected to judicial supervision. The problem is therefore not merely that the 1940 Act is old; its underlying statutory architecture places the courts at several important stages of the arbitral process.

**The 2011 Act: Pakistan's separate framework for foreign awards**

Pakistan subsequently introduced a substantially different statutory framework for international enforcement through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011. The 2011 Act provides for the recognition and enforcement of foreign arbitral awards and arbitration agreements. Its structure is considerably more aligned with the New York Convention framework than the 1940 Act. Section 4 addresses enforcement of arbitration agreements, while section 6 provides for enforcement of foreign arbitral awards. Section 7 sets out circumstances in which enforcement may be refused. This creates an important distinction in Pakistan's arbitration landscape: the legal treatment of an arbitration may depend significantly upon whether the resulting award is classified as domestic or foreign.

**Taisei Corporation v A.M. Construction Company: the significance of the seat**

This distinction was brought into sharp focus by the Supreme Court of Pakistan in Taisei Corporation v A.M. Construction Company, 2024 SCMR 640. The case concerned an arbitration seated in Singapore. The Supreme Court considered whether the resulting award was a foreign award for Pakistan's 2011 legislation. The Court adopted a territorial approach, treating the juridical seat of arbitration as determinative of the award's nationality for this purpose. The importance of Taisei for Pakistan's reform debate is therefore considerable. A party choosing Pakistan as the juridical seat does not simply select a geographical location; it selects a legal framework. The choice can determine whether the arbitration remains within the 1940 domestic regime or whether a resulting award falls within the 2011 foreign-award framework. This makes the absence of a modern Pakistan-seated arbitration statute particularly significant for international commercial users. The problem is not merely historical. The continuing existence of the 1940 Act affects the legal consequences of choosing Pakistan as a seat.

**The Draft Arbitration Bill 2024: An Attempt to Escape the 1940 Act**

Pakistan's most significant attempt to replace the Arbitration Act 1940 is the Draft Arbitration Bill 2024 ('Bill'), prepared by the Arbitration Law Review Committee chaired by Justice Syed Mansoor Ali Shah. The Committee was established to examine the deficiencies in Pakistan's existing arbitration framework and develop comprehensive legislation aligned with international and regional best practices. The proposed legislation is based on the UNCITRAL Model Law on International Commercial Arbitration and is intended to replace the 1940 Act with a modern framework for both domestic and international arbitration.

The Bill's most significant departure from the 1940 Act is its proposed principle of judicial non-intervention. Section 6 provides that courts and judicial authorities shall not intervene in matters governed by the proposed legislation except where intervention is expressly permitted by the Bill. This seeks to reverse the court-centred structure of the 1940 Act by making judicial intervention the exception rather than an inherent part of the arbitral process. The Bill also gives arbitral tribunals greater autonomy over their own proceedings. Section 18 recognises the principle of competence-competence, allowing a tribunal to rule on its own jurisdiction, including objections concerning the existence or validity of the arbitration agreement. This represents a significant departure from the 1940 framework and places the tribunal, rather than the court, in the first instance at the centre of questions concerning its own jurisdiction.

The proposed legislation similarly strengthens the tribunal's ability to protect the subject matter of the dispute. Section 19 empowers tribunals to grant interim measures, including measures concerning the preservation of property, securing the amount in dispute, maintaining the status quo, preventing the dissipation of assets and appointing receivers. The Bill therefore reduces the tribunal's dependence upon courts for interim protection, while retaining a role for judicial assistance where required. Perhaps most importantly for the question of finality, the Bill provides that an arbitral award shall be final and binding upon the parties. Section 40 further restricts the circumstances in which an award may be varied, amended, corrected, reviewed, added to or revoked. This marks a clear departure from the 1940 Act, under which the award is brought before the court and may ultimately be made the subject of a judgment and decree.

The Bill also attempts to narrow the scope of post-award judicial intervention. Section 39 provides that recourse against an arbitral award may be made only by an application for setting aside and specifies the grounds upon which such an application may succeed. The provision also limits the public-policy inquiry and provides that a court should not review the merits of the dispute merely under that ground. The Bill nevertheless retains patent illegality appearing on the face of the award as an additional ground for setting aside domestic awards. At the same time, it provides that an award cannot be set aside merely because of an erroneous application of law or through reappreciation of evidence.[7] This creates an important tension within the proposed reform: while the Bill seeks to prevent courts from functioning as appellate bodies, the retention of patent illegality leaves a limited avenue through which domestic awards may remain subject to judicial scrutiny.

The Bill consequently represents a fundamental attempt to dismantle the court-centred architecture of the 1940 Act. Rather than treating arbitration as a process operating under continuous judicial supervision, it places the arbitral tribunal at the centre of the dispute-resolution process and confines judicial intervention to specifically defined circumstances. Its approach is therefore substantially closer to the modern conception of arbitration as an autonomous and final method of dispute resolution. However, the reform remains incomplete. The Bill has not yet replaced the 1940 Act and remains draft legislation. The Law & Justice Commission of Pakistan currently describes the Arbitration Bill 2024 as 'Draft legislation presented to the Federal Minister, Law and Justice for introduction in the Parliament'.

The significance of the Bill therefore lies not in what Pakistan's arbitration law currently is, but in the direction in which it seeks to move. If enacted, it would provide Pakistan-seated arbitration with the modern statutory framework that has been absent under the 1940 Act. Until then, Pakistan remains caught between an outdated domestic arbitration regime and the more modern framework governing the recognition and enforcement of foreign awards.

**Pakistan's unfinished transition**

Pakistan's position is therefore distinct from India's. India completed its statutory departure from the 1940 Act in 1996, but subsequently struggled with the extent to which courts should intervene in awards under the new legislation. Pakistan has not yet completed the first step. Its foreign-award regime was modernised through the 2011 Act, and its Supreme Court has increasingly recognised the importance of arbitration, but Pakistan-seated arbitration remains connected to the 1940 Act.

The Draft Arbitration Bill 2024 represents the most significant attempt to close this legislative gap. It would replace the 1940 Act with a framework based on the UNCITRAL Model Law, restrict judicial intervention, recognise competence-competence, give tribunals powers to grant interim measures and strengthen the finality and enforceability of awards. However, the Bill remains draft legislation rather than enacted law.

Pakistan's problem can therefore be characterised as a legislative deficit rather than merely a judicial one. The country has recognised the deficiencies of the 1940 Act, enacted a modern framework for foreign awards, developed important pro-arbitration jurisprudence and drafted comprehensive replacement legislation. Yet the fundamental statutory transition has not been completed. The result is that the colonial framework remains relevant precisely where Pakistan would need the strongest modern arbitration infrastructure: where the parties choose Pakistan itself as the arbitral seat.

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