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Arbitrator's bias and Disclosure of the Conflict of Interest: A need for Adjustment

To safeguard the fundamental right of parties to arbitration to get their dispute adjudicated from the unbiased arbitrator, the Pakistani legal regime needs to develop predictable and consistent principles. This paper explores Pakistani case laws to identify the general principles ascertaining arbitrator's bias, if the enforcement of a foreign arbitral award can be resisted in Pakistan on the ground of arbitrator's bias and to this end, can the principles laid down Pakistani courts regarding judge's bias be relevant.

1. Introduction

It is a fundamental right of the parties to arbitration agreement to resolve their disputes through an unbiased arbitrator. However, to ensure the protection of this fundamental right, the Pakistani legal regime could not establish well-organized principles and crystallized standards regarding due process in general and arbitrator's bias in particular. On the other side, the legal requirement of general predictability and consistency demands that a party to arbitration resisting or seeking the enforcement of award in Pakistan, particularly if he is a foreigner, should be able to foresee beforehand the scope of this defence in Pakistani courts.

In this paper, first, the Pakistani perspective on arbitrator's bias is explored in detail to find out the standards applied by courts while adjudicating the arbitrator's bias and the disclosure requirement. In a similar vein, the validity of the arbitrator's bias as a ground for resisting the enforcement of the award shall also be analysed. The dissection on these topics is concluded with suggestions regarding the exact standpoint that should be adopted to examine the arbitrator's bias as well as the kind of test which should be undertaken in such cases. To discuss these points, the English perspective is also surveyed for a comprehensive analysis. It is important to note, however, that the term "bias" has been used in this paper with reference to both independence and impartiality.

Before setting about the deliberation on the main issues, it is vital to present briefly an overview of the Pakistani arbitration legal regime. Currently, the law dealing with the enforcement of foreign arbitral awards is the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (hereinafter "the 2011 Act"). The 2011 Act has enacted the New York Convention into Pakistani domestic law. This instrument has also repealed Arbitration (Protocol and Convention) Act, 1937 (hereinafter "the 1937 Act"). The 1937 Act was promulgated to incorporate the Geneva Protocol 1923 and Geneva Convention 1927 in Pakistani law and was applicable to foreign arbitral awards. For domestic arbitration and awards, the Arbitration Act 1940 (hereinafter "the 1940 Act") is holding the ground.

2. Discovering the Pakistani Perspective over Arbitrator's Bias

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In Pakistan, the term bias has been dealt with as a subcategory of arbitrators' misconduct. Misconduct of arbitrators is the negative side of due process, that is if any of the ingredients of due process is infracted by the arbitrator, he is said to have violated the due process requirement and committed misconduct. Therefore, in the following sections, first, the term misconduct will be elaborated to establish that it is in fact the negative side of due process. Then the discussion will be narrowed down to the arbitrator's bias to demonstrate it as a subcategory of misconduct. It is followed by a survey and analysis of conflicting judgments rendered by Pakistani courts on the point of whether misconduct (including bias) may become a valid ground to resist the enforcement of a foreign arbitral award.

2.1. Arbitrator's Misconduct: Definition and Explanation

Due process is constitutional protection afforded to the litigants both in civil and criminal proceedings. Article 10A of the Pakistani Constitution with the title as "right to fair trial" reads that:

> For the determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process.[1]

Supreme Court[2] has prescribed the minimum requirements of the due process as follows:

1. Due notice of proceedings affecting the rights of citizen shall be given;
2. Reasonable opportunity to defend shall be given;
3. Honest and impartial adjudicatory forum shall be constituted, and
4. The forum will be of competent jurisdiction.

These essentials of due process had already got reflection in arbitration cases relating to the misconduct of arbitrators. The 1940 Act employs the term "misconduct" without rendering any definition to it.[3] While the courts expressed their inability to constitute an exhaustive definition of "misconduct", they, however, affirmed the vast scope of this term.[4] Although the instances taken into account under the head of "misconduct" seem to be the details of general requirements listed above for the due process, the matter of arbitrator's misconduct had been approached by courts from two dimensions. First, they categorized it as moral and legal misconduct and second, they declared that the arbitrator should misconduct neither himself nor the arbitration proceedings.

The arbitrator is deemed to have committed moral misconduct if he has accepted some bribe or favour from the party in whose favour the award is later announced. On the other hand, legal misconduct means "failure to perform duty judiciously by some breach and neglect to do justice resulting in a substantial miscarriage of justice, though erroneously",[5] for instance, where arbitrator issued no notice to a party and recorded the evidence behind his back, etc.

The term "misconducted himself or arbitration proceedings" has been said to be the arbitrator's failure to fulfil his essential and basic duties eventuating in a substantial miscarriage of justice between the parties.[6] On the other hand, the term "misconducting the proceedings" implies the mishandling of arbitration proceedings by the arbitrator that is likely to become the cause of some substantial miscarriage of justice.[7] The significance and connotation of the term "misconducting the proceedings" embrace all irregularities which may lead to miscarriage of justice and thus have an ambit broader than that of arbitrator's personal misconduct.

2.2. Absence of Arbitrator's Bias as a Requirement of Due Process

Under the 1940 Act, Pakistani courts have pronounced that bias is a subcategory of arbitrator's misconduct or on the positive side, of due process. By looking at the illustrations which were

counted as misconduct of arbitrators, it becomes clear that those instances are, in fact, the manifestation of arbitrators' bias.

In *Muhammad Farooq Shah v. Shakirullah*[8], the Supreme Court, while deliberating the phenomenon of arbitrator's misconduct, stated that "arbitrator after entering into arbitration must not be guilty of any act, which could possibly be construed as indicative of partiality or unfairness." For example, if the arbitrator was presumptive, it would result in the annulment of the award on the basis of the arbitrator's bias.[9] In the same way, an award based on the personal knowledge of an arbitrator would be bad in law.[10] The non-disclosure by an arbitrator of the indebtedness of a party to the arbitration would not amount to judicial misconduct to eventuate in his disqualification unless there was some evidence to demonstrate the predisposition of the arbitrator to his debtor party. However, the situation would be different, in the words of the court, if the arbitrator was indebted to the party and such fact had not been disclosed at the time of reference of the matter to the arbitrator. Court reasoned that, since by lending money to a party, the arbitrator would not become interested in that party or his matter, no analogy could be made between these two cases.[11] To conclude, these judgments are rendered to deal with the misconduct of arbitrators and subsume the examples which are actually the specific instances of arbitrators' impartiality or independence. It is now established that being a subcategory of misconduct and due process, arbitrator's bias will be governed by the same principles which have been applied to the former.

2.3. Due Process and Misconduct: Is Arbitrator's Bias a Valid Ground to Resist Foreign Arbitral Award?

An award, whether it is domestic or foreign, can be contested successfully in England on the basis of arbitrator's bias. The situation is, however, not clear in Pakistan and this ambiguity seems to have started from Sindh High Court's judgment in *Nan Fling Textiles Ltd. v. Shamasuddin*.[12]An award, originating from arbitration in England, was contested in Pakistan on the basis of the arbitrator's misconduct. But the court held that the grounds enshrined in section 30 of the 1940 Act, on the basis of which domestic award might be set aside, were different from those articulated in section 7 of the 1937 Act for the foreign award. For example, a domestic award could be annulled if the arbitrator or umpire had misconducted the proceedings but no such ground was provided in section 7 of the 1937 Act. However, the subsequent judgments pronounced under the 1937 Act on this point are inconsistent. It is submitted that the exploration of judgments pronounced under the 1937 Act is a momentous task. It is because of the fact that these judgements reflect the attitude of Pakistani judges towards the absence of an express inclusion of such ground (misconduct or more specifically arbitrator's bias) in the 1937 Act. This disposition then may be applied to foresee the fate of the New York Convention which also does not contain any specific ground of arbitrator's bias or misconduct. Section 7 of the 2011 Act incorporates Article V of the New York Convention by just alluding to it and declares that "the recognition and enforcement of a foreign award shall not be refused except in accordance with Article V of the Convention." It implies that the relevant provision for arbitrator's bias is Article V(1)(b) providing that the party was "unable to present his case."

In *Nan Fung Textiles Ltd. v. Nichimen & Co. Ltd*,[13] respecting an award emanating from arbitration with its seat in England, Sindh High Court held that section 7(3) of the 1937 Act enabled the party to resist the arbitral award on

> *any ground other* than the non-existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1), or the existence of the conditions specified in clauses (b) and (c) of sub-section (2).

The court further stated that the "any other ground" encompassed the misconduct of the arbitrator and hence, under 7(3) of the 1937 Act, such misconduct might be contested as a valid ground to resist successfully the arbitral award. To clarify the scope of misconduct, Sindh High Court referred to *Brooke Bon Ltd. v. Conciliator*[14] wherein the "misconduct" was considered in relation to an arbitrator who was appointed under Industrial Relations Ordinance, 1969. In that case, the Supreme Court said "in the judicial sense the misconduct of arbitrator means his failure to perform his essential duty resulting in a substantial miscarriage of justice between the parties." In this regard, it is noteworthy that some cases adjudged under the 1940 Act were referred by respondents, seeking examination of witnesses who were residing abroad. These cases were, however, discarded by the Sindh High Court. The court held that the 1940 Act was applicable to domestic arbitrations only and that cases decided thereunder were inapplicable to a case involving misconduct of arbitrators committed already in a foreign arbitration. However, it is equally important to observe that the court relied on a judgment for the definition and scope of misconduct which had been pronounced in respect of domestic arbitration conducted under Industrial Relations Ordinance, 1969 (a domestic law).

Hence, it may be safely inferred that jurisprudence evolved in respect of the arbitrator appointed domestically would also be relevant to determine the scope of misconduct in international arbitration for enforcement of a foreign arbitral award. It is also noteworthy that the courts initially attempted to establish_two sets of rules - one under the 1937 Act for international arbitrations and the other under the 1940 Act for domestic arbitrations - in order to govern the phenomenon of arbitrator's misconduct to decide the enforcement and annulment of arbitral awards. A glimpse of such an approach or desire developed by judges in the cases decided under the 1937 Act can be found in the statement that the grounds of refusal of enforcement of foreign award including misconduct should be interpreted strictly i.e. inside the four corners of the 1937 Act.[15] This judicial observation signals that the principles governing arbitrators' misconduct or bias as evolved under the 1940 Act should have no application to a case coming under the 1937 Act. This attitude, which could not continue, seems to be very arbitration-friendly and should be employed in cases being adjudicated under the 2011 Act.

However, the case of *Pacific Lloyds Ltd. v. Blessed Enterprises*[16] took a turn opposite to *Nan Fung Textiles Ltd. v. Nichimen & Co. Ltd*.[17] In the former case, the enforcement of the foreign award was resisted by the defendant on the grounds, *inter alia*, of bias since the arbitrator appointed by the claimant wrote in one of his letters the word "leeway." Court first held that the 1937 Act did not furnish arbitrator's bias as a ground for the refusal to enforce an award. Secondly, even if the arbitrator had employed the word "leeway" to lend some time to the claimant, still the respondent failed to prove the precise nature of harm inflicted on him due to this expression. Hence, the award was made the rule of court.

It is manifest from this judgment that the arbitrator's bias is not *actionable per se* which is questionable. Similarly, the statement that the 1937 Act did not include bias as a ground to dispute the award might also raise the eyebrows of many. Although, *Nan Fung Textiles Ltd v Nichimen & Co. Ltd*[18] was not binding on the court but the principles laid down in that judgment were discarded without even mentioning them. It may be noticed that although the court in *Pacific Lloyds case* rejected the "bias" expressly as a valid ground to resist the enforcement of an award, yet it impliedly conceded to the misconduct ground for resisting a foreign award. It was

made obvious from the discussion on the word "leeway" and then its impact on the award because the employment of such words from the arbitrator was a clear case of his misconduct. After the implied acceptance of misconduct as a ground to avoid enforcement of an award, the declination to give recognition to arbitrator's bias is not understandable despite the fact that bias is the sub-category of misconduct (as is discussed *supra)*. If the ground of misconduct including bias of arbitrator is not acceded as a defence against enforcement, it may trigger the abuse of the court's process by enforcing unjust awards.

2.4. Principles Governing Arbitrator's Bias

In *Ali Mohammad v. Bashir Ahmad*,[19] Punjab High Court said, "if the arbitrator in the proceedings is influenced from extraneous pressures or seeks dictation from outside, he cannot be termed as impartial." Similarly, in *Director Housing, A.G'S Branch, Rawalpindi v. Makhdum Consultants Engineers and Architects*,[20] although the Supreme Court reiterated the significance of arbitrator's impartiality, it did not prescribe any test or standard to be applied in the subsequent cases to ascertain if the arbitrator was biased or not. Rather, it said that,

> However the question, whether the named or selected arbitrator is likely to act in a biased or unfair manner is always a question of fact which must be answered with reference to the facts and circumstances of each case. It is neither possible nor desirable to state with precision the circumstances from which it may be inferred that the arbitrator is not likely to act fairly and honestly.

It is submitted that while the matter of arbitrator's bias may be dealt with in a case by case manner, it does not prevent a court from setting some general standards regarding the arbitrator's bias that could then be utilized during consideration of the peculiar facts of each case. Nevertheless, the Supreme Court clarified that the "bias" which might become the basis for the disqualification of an arbitrator must be a "personal bias", being of a nature to cripple arbitrator from acting impartially and justly.

In this case, the disputes under three contracts for the construction of three Army houses were agreed to be submitted to Adjutant Generals (AG), General Head Quarters (GHQ) Pakistan Army. The plea of the arbitrator being biased was not accepted by the Supreme Court on numerous grounds. It held that parties' agreement to appoint AG as arbitrator was reached at mutual consent which cannot be subsequently avoided so lightly. The Supreme Court highlighted the fact that AG was the president of the Housing Directorate - the controlling authority - which accorded the contract whereby the contract could never be awarded without his approval. It, however, held that it was an acknowledged fact that arbitrators nominated in most of the arbitration agreements between the government and private parties were officers serving either in the same or some other department of the Government. The prohibition of such arbitrators would result in the disqualification of arbitrators in all the cases where there existed a mere inference of arbitrator's partiality.

The Supreme Court further elaborated that AG was having the office of presidentship of Housing Directorate in his official capacity and nothing on the record signified that he was personally interested in the subject matter of the contract. On the contrary, the admitted position was that the AG, under whose presidentship the contracts forming the subject matter of dispute were awarded, had retired long ago and after his retirement, two more AGs had served in the same office in the same official capacity. Hence the plea of arbitrator's bias was rejected. It is submitted that the appointment of AG was not so trivial to be counted as 'a mere inference of arbitrator's partiality'. Although the arbitrator might not have a personal interest in the matter the

interest of the party whom he was serving and from where he was drawing his salary could never be downplayed. In fact, this situation could have been cured by not confining the interest to the personal one in order to qualify for a successful challenge to an award.

Nevertheless, it was not until *Saleem Ali v. Akhtar Ali*[21] that the standards to check the bias of arbitrators were discoursed. In this case, one party contended that the arbitrator purchased a property from the other party to the dispute and such transaction did not uphold the impartiality of the arbitrator. Punjab High Court observed that such transaction that occurred one year after the pronouncement of the award was neither having any bearing on the arbitrator's impartiality nor on the award.

Punjab High Court however proscribed the arbitrator from behaving even after the pronouncement of the award in a way that might create an apprehension in the mind of one of the parties to arbitration that the arbitrator colluded with his adversary. In this regard, in the words of the Punjab High Court, the arbitrator must not be found "guilty of any act which can possibly be construed as indicative of partiality, unfairness or bias." After saying this, the court went on to lay down the criterion to determine bias and stated that

> bias, signifies a real likelihood of an operative prejudice, whether conscious or unconscious..... the facts and circumstances should be such as to *convince the conscience of a reasonable person* that the fountain of justice has not remained unsullied and unpolluted. . . . *The apprehension must be judged from a healthy, reasonable and average point of view, and only the apprehension of an average honest man can be taken note of.*

Although given with clarity, these principles of "real likelihood" and third, honest and reasonable observer were not followed by courts in subsequent cases. For example, in *Surriya Rehman v. Siemens Pakistan Engineering Company Ltd.*,[22] the plaintiff under two agreements concluded with the defendant, was obliged to make a supply of medicines on daily basis to the defendant's employees along with the provision of comprehensive medical consultation and other related paramedical staff services. Both the contracts included an arbitration clause mandating to appoint the defendant's MD as arbitrator for any future disputes.

On plaintiff's assertion of arbitrator's bias, as he was the Managing Director of the defendant, Sindh High Court declared that it was well established that the mere fact of an officer or director of a company having been selected to function as arbitrator was "no ground in and of itself not refer the parties to arbitration." Moreover, Sindh High Court also noticed the fact that in the instant case the arbitrator had been chosen by his office instead of his name, i.e. the holder of the office of Managing Director for the time being would act as an arbitrator to resolve the dispute. Thereupon, the court concluded that "the question of bias, if any, would arise in respect of the acts or omission of an individual and allegations of bias cannot be made against an office as such." Hence the arbitrator was declared to be unbiased.

2.5. English Perspective

In England, in order to arrive at decision, the first 'reasonable suspicion test' was formulated in *the King v. Sussex Justices.*[23] This test was then replaced by 'real danger test' in *Regina v. Gough*[24] which mandated that the existence of 'real danger' of judge's bias was to be decided from the vantage of the judge and hence court was personified as a reasonable man with a fact that its knowledge was extended to the evidence employed in the case, the access to which was never available to the person sitting in the courtroom (a reasonable man). House of Lords then extended the application of this test to all adjudicators including arbitrators.

The 'real danger test' was later modified by 'reasonable likelihood test' in *Porter v. Magill*[25] and the standpoint of a judge to decide the existence of a danger of arbitrator's bias was also adjusted to the vantage of a third fair-minded person. This adjustment was made on the basis that the former test gave excessive primacy to the court's view by giving inadequate regard to the public perception of the irregular incident. According to this test "the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[26]

Like English courts, Pakistani courts in non-arbitration cases also expressly mentioned that the premise on which the edifice of Pakistani jurisprudence as to the adjudicator's bias is erected is that the justice should not only be done but also seen to be done.[27] It is, however, noteworthy that there may be instances when a court may be compelled to choose between "justice should not only be done" and "but also seen to be done." This may be the case when the material before the court instructs it that there was no bias on the part of the adjudicator, the justice dictates to declare the judge unbiased and uphold his decision, if any. This falls into the category of "justice should not only be done". However, if the judge follows "it should also be seen to be done" and discards his own objective opinion by looking at the matter from the perspective of third person, who in the words of Lord Goff on *Gough case*, can never have access to the material before the court, this third person's view may dictate that the adjudicator should be declared biased (where opinion is subjective and based on partial and incomplete facts). If the judge also follows the opinion of a third person, it would amount to giving up the substantial justice in favour of cosmetic justice or reality in favour of appearance, which seems to be a miscarriage of justice. In this regard, the preferable approach seems to be the judge's vantage.

3. Disclosure of Conflict of Interest

In Pakistan, the requirement of beforehand disclosure and its importance were elaborated by Punjab High Court in *Saleem Ali v. Akhtar Ali*[28] wherein it declared that the arbitrator appointed by the parties must unveil every fact

> which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual ought to be made, so that each party may have every opportunity of considering whether or not to make a reference to him.

For instance, the court stated that, if the arbitrator did not disclose the fact of his financial indebtedness to one of the parties, the other party upon discovery of this fact may revoke the reference and also get the award set aside.

However, if before accepting the mandate of arbitration, an arbitrator made a disclosure of all the facts, this would not subsequently afford any party ground to raise objections on the arbitrator's impartiality. This is so because the court would not release a party from bargain upon which he concurred, how much "improvident it may consider it" so long as the court was persuaded that the party complaining of arbitrator's bias already knew it.[29] For instance, when a party appointed its permanent auditor as an arbitrator without masking the disclosure of this fact to the other party, such appointment was declared improper.[30]

Similarly, in *Dar Okaz Printing and Publishing Limited v. Printing Corporation of Pakistan (Private) Limited*,[31] an arbitration agreement stipulated the appointment of the Managing Director of the respondent company as the sole arbitrator. The challenge of such arbitrator on the basis of bias was rejected by the Supreme Court which held that the appellant had agreed to the appointment of Managing Director of the respondent company by its free will. The other fact

which Supreme Court highlighted was that the respondent company was controlled by the government wherein the MD was appointed by the Cabinet Division of the Government of Pakistan. Therefore, the MD was expected to be a brilliantly qualified person in both corporate as well as legal affairs including "contractual liabilities of the parties, fiscal aspects, administrative and management skill as well as sense of propriety, equity and justice." The Supreme Court concluded that with these qualifications and skills, MD could not be doubted to arbitrate a dispute between the parties with favour or fear.[32] It is, however, to note that in many cases the party contracting with the Government has weak bargaining power. It agrees to the appointment of a Government's official despite knowing the fact that such an appointee draws its salary from the Government.

English view is different as to the effect of disclosure made in circumstances similar to those mentioned above in Pakistani perspective. For instance, the English court held that a person should not be the judge of his own cause and this principle encompasses every situation where a judge had a pecuniary interest in the outcome of the proceedings or was so closely connected with the party in the dispute that he would be termed as acting in his own cause.[33] As is discussed infra, the English courts have started using the IBA Guidelines which means that such cases would fall in the Non-waivable Red List.[34] This further supports the non-waiver by a party of arbitrator's bias on account of the latter's disclosure in any of these situations.

However, on the extent of the disclosure from the arbitrator, unlike Pakistani jurisprudence, the English stance is very much clear. For instance, in an English case, on the request of one of the parties to the arbitration, the arbitrator had been advising the client of the former as to the matter before the court not relevant to the arbitration with the fact that both the arbitration and court proceedings were going on simultaneously. It was a few days before the pronouncement of the award when the arbitrator declared his involvement in the litigation. A challenge of the award on the basis of arbitrator's non-disclosure or late disclosure was rejected in the court which held that so far as the obligation of the arbitrator to disclose the matters which may create real possibility of bias is concerned, they may make a wider disclosure precautiously but they are not obliged to do so. In that respect, the late disclosure from the arbitrator would be tantamount to a serious irregularity under section 68. [35] In other words, the arbitrator is bound to disclose only the material facts and not every background detail.[36] In *Helow v. Secretary of State for the Home Department*,[37] English courts even went further when they counted the matter of disclosure of arbitrator's interest prior to or at the time of his appointment to be "only one factor, and a marginal one at best". The court stated

> thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing.

4. Relevance and Application of IBA Guidelines

The acceptability of International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines") in English law is increasing gradually which is not the case in Pakistan. In *ASM Shipping Ltd v. TTMI Ltd*.,[38] the English court expressly stated that IBA guidelines are inappropriate for they are the incomprehensive illustrations of arbitrator's bias. This stance as to the IBA Guidelines got milder in *A and others v. B, X*,[39] wherein they were held to be mere guidelines that could not override the national law on the

point. However, by discussing the provisions of IBA Guidelines and applying them, it rejected the applicant's assertion that the bias from the arbitrator fell under the Red-Waivable List.

Again in *Sierra Fishing Company v. Hasan Said Farran & Others,*[40] the applicability of IBA Guidelines was discussed by the court. In this case, the Bank that appointed the arbitrator had been getting legal services in the past from a law firm that was owned by the father of that arbitrator and which the arbitrator had also been a part of. Additionally, the arbitrator also acted in past as legal counsel to the Bank for two years. The court concluded that a fair-minded observer would put these facts into paragraphs 1.4 of the Non-Waivable Red List, paragraph 2.3.6 of Waivable Red List and paragraph 3.1.4 of Orange List. Similarly, the arbitrator's involvement in the drafting of the main agreement and arbitration agreement, conferring on him jurisdiction as to the claims of transfer of shares although his jurisdiction ought to have been confined to money claims; was held to have fallen in paragraphs 2.1.1 and/or 2.1.2 of the Waivable Red List of the IBA Guidelines. It is to note that both the common law and the IBA Guidelines apply third-person vantage. More recently in *Watts v. Watts*,[41] the matter of repeated appointments of the arbitrator (25 times) by the defendant was decided to have imposed a disclosure obligation on the arbitrator under the Orange List of IBA Guidelines.

5. Bias from non-Arbitration Judgments

The judgments decreed under non-arbitration matters have been followed in the English legal regime by the courts to constitute the principles governing the phenomenon of arbitrator's bias. In Pakistan, as well, the judgments rendered with regard to the bias of judge in civil litigation have very frequently been relied on by the Pakistani courts in arbitration matters.[42] However, it may be submitted that a complete reliance on the non-arbitration judgments to derive principles and apply them in the matters of arbitrator's bias may not be a good idea.

The approach on the test to ascertain the judge's bias is not consistent in Pakistani judgments. Pakistani jurisprudence does not see the presence of bias from the perspective of the judge. Rather the judgments may be demarcated into two groups. The first category of judgments holds that a reasonable third person should conclude about the subsistence of bias[43] whereas the second set of judgments postulates that a litigant should have apprehension about the bias.[44] Similarly, some judgments speak about the presence of "apprehension" or mere suspicion[45] while others speak about the "real possibility" or "real likelihood"[46] of bias. Further, there are judgments where it is not possible to define whether the court has prescribed the test of "real apprehension", "real likelihood" or "real danger" and also if such possibility has to be observed from the standpoint of the litigant himself or from the perspective of a third reasonable person.[47]

6. Conclusion

To conclude with, like English law,[48] the arbitrator's bias should be *actionable per se* in Pakistan i.e. when the bias is proved, then to set aside the award, party should not be required to bear out with evidence the miscarriage of justice inflicted upon him by such bias because the right to have a fair hearing from an unbiased arbitral tribunal is fundamental one and no loss greater than the adjudication by a biased arbitrator can happen to the party.[49]

The other issue pertains to the question whether the same standards should be applied on a judge as well as arbitrator. In that respect, Pakistani legal tradition of extracting such standards from litigation judgments should be shun. The significance of this suggestion is manifest when we see very inconsistent judgments on judge's bias from Pakistani judiciary. The other reason is that the judicial jurisprudence evolved under the 1940 Act has been dominated by the fact that the courts

have been utilizing their supervisory role for the arbitration conducted inside Pakistan as per sections 14 to 17, 30 and 33.[50] Therefore, the jurisprudence having such a purpose and effect cannot be justifiably extended to the arbitration proceedings or award resulted outside the domain of such supervisory jurisdiction of Pakistani courts.

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[1] Section 5 of the Constitution (Eighteenth Amendment) Act, 2010 (Act of 2010).
[2] *Nadeem Arif v. IG Police, Punjab*, 2011 SCMR 408.
[3] Section 11 of the Arbitration Act 1940.
[4] *Province of Baluchistan v. Muhammad Hassan*, 1988 CLC 1583; *Abdullah Contractors v. WAPDA*, 2006 YLR 589.
[5] *Ibid*.
[6] Government of *Pakistan v. Asian Associated Agencies*, PLD 1974 Karachi 155.
[7] *Abdullah Contractors* (n 4).
[8] 2006 SCMR 1657.
[9] *National Fibers Ltd. v. Government of Pakistan*, PLD 2004 Lahore 722.
[10] *Variety Traders, v. Government of Pakistan*, PLD 1980 Karachi 30.
[11] *S. M. Fazail & Co.v. Overseas Cotton Co*., PLD 1959 Karachi 320.
[12] PLD 1979 Karachi 762.
[13] 1999 YLR 2226.
[14] PLD 1977 SC 237.
[15] *Nan Fung Textiles Ltd. v. Nichimen & Co. Ltd.*, 1999 YLR 2226; *European Grain & Shipping Ltd. v. Polychem Company Ltd.*, PLD 1990 Karachi 254; *Ghulam Ali and others v. Ghulam Sarwar Naqvi*, PLD 1990 SC 1.
[16] 2007 CLD 661.
[17] *Nan Fung Textiles Ltd.* (n 15).
[18] 1999 YLR 2226.
[19] 1989 CLC 2194.
[20] 1997 SCMR 988.
[21] *Ibid.*
[22] PLD 2011 Karachi 571.
[23] [1924] 1 K.B. 256.
[24] [1993] A.C. 646.
[25] [2001] UKHL 67.
[26] For the characteristics of fair-minded observer, see *A and others v. B, X* [2011] EWHC 2345 (Comm).
[27] *Asif Ali Zardari and another v. The State*, PLD 2001 SC 568.
[28] PLD 2004 Lahore 404.
[29] *Saleem Ali v. Akhtar Ali and others*, PLD 2004 Lahore 404. See also *Director Housing, A.G'S Branch, Rawalpindi v. Makhdum Consultants Engineers and Architects* 1997 SCMR 988.
[30] *Bata Shoe Co. Ltd. v. Government of Pakistan*, PLD 1970 Karachi 784.
[31] PLD 2003 SC 808.
[32] See also, *Lahore Stock Exchange Limited v. Fredrick J. Whyte Group*, PLD 1990 SC 48 and *Director Housing, A.G's Branch* (n 29).
[33] *Laker Airways Inc. v. F.L.S. Aerospace Ltd. and another* [2000] 1 W.L.R. 113.
[34] For instance see paragraphs 1.2 to 1.4 of Non-Waivable Red List.
[35] *A v. B* (n 26).
[36] *Watts v. Watts* [2015] EWCA Civ 1297.
[37] [2008] UKHL 62, at 58.
[38] [2005] EWHC 2238 (Comm).
[39] [2011] EWHC 2345 (Comm).
[40] 2015 EWHC 140 (Comm).
[41] [2015] EWCA Civ 1297.
[42] *Director Housing* (n 29).
[43] *Asif Ali Zardari* (n 27).
[44] *Ibid*; *Chairman, Federal Land Commission v. Sardar Ashiq Muhammad Khan Mazari* 1985 SCMR 317 *Government of N.W.F.P v. Dr. Hussain Ahmad Haroon and others*, 2003 SCMR 104
[45] *Chairman, Federal Land Commission* (n 44); *Asif Ali Zardari* (n 27).
[46] *Benazir Bhutto v. The President of Pakistan* 1992 SCMR 140; *Asif Ali Zardari* (n 27).
[47] *Gharibwal Cement Ltd., v. Secretary, Revenue Division, Islamabad* 2003 PTD 2872; *Government of N.W.F.P* (n 44).
[48] *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43; Watts (n 36).
[49] *ASM Shipping Ltd* (n 38).
[50] *Zakaullah Khan v. Government of Pakistan*, PLD 1998 Lahore 132.