

FEDERAL COMMERCIAL COURT

By

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The Honourable Presidium, Mr. Wasi Zafar Minister for law & justice , I think that it is an indication of the importance of the topic and the importance of the federal judicial academy that you have so many leading jurists from around Pakistan here today.

Of course, the centuries old civil and criminal procedures of law have played havoc with our society. There has been a lot of criticism over these laws of the land. The enlightened strata of the society have always demanded for updating laws as per needs of the day. The previous successive governments could not contribute significantly in this connection but the present Shaukat Aziz government seems somewhat resolved to provide speedy and free justice to the people at their doorstep. Resultantly, a comprehensive package of amendments to various laws is in the offing. I appreciate that government has also invited the proposals and recommendations from the Bar associations, professionals and renowned legal experts across the country. Since the key concern is to design and develop a people-friendly legal process and reduce the burden of higher and superior courts by delegating a number of powers and legal authorities to courts at lower level. I have appreciated your deliberations and your consistent focus on the future and I am glad to get in on the act First of all I'll comment upon the proposed legislation on federal commercial court.

Rationale

For a variety of reasons, commercial litigants in Pakistan do not enjoy the services that they expect from a modern court system. At present, a tremendous backlog of cases and a lack of resources enfeeble both the trial and the High Courts. Clogs in the existing judicial machinery operate to impede swift resolution of commercial disputes. This has provided an opportunity for litigants and their lawyers to the vexatious or unmeritorious actions, further crippling the delivery of legal services.

These delays add transaction costs and discourage more robust commercial activity. The nature of the modern economy, furthermore, means that society as a whole has a special interest in swift and correct resolution of commercial cases. The stakeholders in these disputes include more than the immediate parties to the dispute, encompassing employees, creditors, consumers, and the state at large.

To address the hindrances that impede the resolution of commercial, special Commercial Divisions should be established in the High Courts of Sindh and the Punjab. These special commercial courtrooms will transform the role of the courts in commercial matters from a passive arena in which various litigants and their lawyers call the shots to a pro-active institution that can take charge of its cases and deliver satisfactory service.

Pakistan has long recognized the need to accord priority to the setting of commercial disputes. Article 184 of the Court Rules of Sindh, for example, provides that commercial suits "shall be heard in priority to all other suits, appearing on the board on that day". Importantly, the Punjab had a successful experience with the divisional set-up in the 1970s, during which time both efficiency and the disposal range in the Lahore High Court improved. The divisions were abolished in the early 1980s, however, for reasons extraneous to the concern for efficient and effective judicial performance.

In Pakistan, the "company judge" arrangement envisaged by the Companies Act has failed. Thus a clear compartmentalization of commercial litigation in terms of personnel is highly desirable.

I appreciate the initiative of the government, the establishment of the federal courts in the country, aimed at early settlement of disputes in commercial and financial matters and facilitating investment in the country. I have examined the law laid down by the Supreme Court in the cases of Mehran Ali and Sheikh Liaquat Hussain and the provisions of Articles 175, 202, 203, 212, 225 and in particular Article 199 of the Constitution and also kept in mind overall views and perceptions of the lawyer community on the basis of which I make following recommendations.

Recommendations

I have serious objection to section 5 of the bill referring to the appointment of the chief judge and other judges as well as section 18 dealing with the removal from office of the said judges. The proposal has invited opposition from the legal community, which stood grossly offended because the constitution and functioning of the federal court was suggested to be fully under the federal executive and the superior judiciary had no regulatory role. Even the superior judiciary raised objections on the same ground. As a result, the first bill was amended to give the Supreme Court a ceremonial role as a regulatory body and an appellate forum. Still, the new bill has not removed the objection as the proposed court will, for all practical purposes, remain under the administrative authority of the federal executive. It's going to put a judge under undue influence as he would owe allegiance to the president, who has the power to appoint and dismiss him. The establishment of such a court could only be materialised by placing it under the control of the existing judiciary and the judges should be administered the same oath as is prescribed for High Court judges under the Constitution.

It is proposed that the chief judge and other judges should be appointed from a panel prepared by the Chief Justice of Pakistan after consultation with other professional bodies including public organizations. The Supreme Court and High Court judges should not be eligible for any paid public office after retirement. The retirement age of the judges of federal commercial court should be 62 years.

There should be no parallel authority with the executive to appoint judges outside the panel prepared by the Chief Justice. The judges should be taken from professional lawyers, former judges and civil servants having experience of not less than 15 years on the subject of the jurisdiction of proposed federal court. A judge of such a court must not be removed from his office by the president without adopting the procedure prescribed by the constitution for the removal of a judge of the High Court/Supreme Court. Similarly, the appointment of ad hoc judges must be based on recommendation made by the Chief Justice.

The federal court should always sit in Division Benches and in each bench a judge with law degree must sit along with a technocrat. Like income Tax tribunal, where an accounting and judicial member sit together as a division bench.

The oath, as provided by the Schedule I, enunciates that the chief judge "will abide by the code of conduct issued by the president." The legal community has been agitating against the text of the oath that has no mention of the constitution. They understand that the federal court will be obliged to the president and not subordinate to the constitution. I believe the oath should be the same as is prescribed for High Court/Supreme Court judges under the constitution.

The bill purposes that principal seat of the proposed court shall be in Islamabad. The federal government may establish registries and benches at other places, including provincial headquarters, at a later stage. I suggest that there should be registries permanent benches at provincial headquarters.

In order to protect the decisions of the Federal Commercial Court from the Judicial Review by the High Court under article 199, in its' constitutional jurisdiction, it is proposed that a new chapter be added in the Constitution of the Islamic Republic of Pakistan as 3-B on the pattern of Chapter 3-A which was inserted to establish the Federal Sharia Court.. There also has to be a specific provision in the Constitution to make all decisions of Federal Shariat Court binding on High Court and courts subordinate to it. The Court will have to be given power to make rules for carrying out the purpose of the said Court by Constitutional amendment as well.

In my opinion by restricting the right to appeal to a mere leave to appeal in the Supreme Court amounted to confusion, which would do more harm than good in the backdrop of the government's intention to expedite disposal of cases. Where a right to appeal is available, a case could be reopened entirely but where leave to appeal is provided, the scope to take up a case becomes narrow and limited. Under the proposed bill leave to appeal to the Supreme Court is only available in cases listed under the bill's Schedule II and III. I propose there should be one appeal by right to Supreme Court against all final decisions by Commercial Court.

In England, a commercial court has existed in practice since 1895, and in 1971 this commercial court was constituted as part of the Queen's Bench Division. The ten judges attached to this court are nominated by the Lord Chancellor as specialists in commercial law, and, with the help of a simplified procedure (e.g. the power to decide cases by documentary evidence alone, thereby avoiding the delays associated with oral testimony), they aim to ensure that commercial practice is conducted as simply and as speedily as possible. What makes the English commercial court such a well-respected institution is the excellence of its judges, the high quality of the advocacy, and the efficiency of its operations. In fact, the commercial court in England is so successful that foreign litigants on matters that do not concern British nationals frequently use it. Countries like Thailand and Indonesia have set up specialist commercial courts with exclusive jurisdiction over commercial matters as well. In South Asia, Sri Lanka has established a separate commercial court complex for Colombo.

To establish fully-functional federal Commercial court at this time, the Pakistan will have to make a major investment in human resources. Commercial matters are usually complex, and they frequently require the skills and knowledge of judges and practitioners who are fluent in commercial law. One story that may be indicative tells of a High Court Judge in Karachi with little or no commercial experience who queried a lawyer about the meaning of "a bill of lading" when referred to this instrument during a hearing. Furthermore, these courts should employ administrative officials responsible for determining the best dispute resolution method – often something other than adjudication. Alternative dispute resolution ("ADR") methods are now considered a necessary component of every modern courthouse, but with ADR comes the need to train those individuals who will be evaluating, directing, and resolving cases in the service of the Commercial court.

The raison d'être of a specialized Commercial court is the efficiency generated by judges well-versed in commercial law. A specialized Commercial Court will encourage this development of a cadre of judges who are specialists in commercial matters similar to their counterparts in England and elsewhere. By providing for a particular focus on commercial resolution, it is possible to improve the training of judges in commercial law.

Mission Statements

The Singapore courts have adopted a trilogy of proclamations on court governance that could be usefully adapted for the needs of a commercial court. These are The Justice Statement, which identifies universal justice values common to civilized nations. The Framework of Core competencies, which provides the knowledge capital needed to drive the courts into the next century, and The Strategic Framework, which provides benchmark which the court's performance can be assessed.

Judicial Training

Countries like Sri Lanka have established a judicial training institute that trains judges in commercial law matters (among other subjects). The Federal Judicial Academy in Pakistan should establish a similar program that would concentrate on commercial law matters and attract participants from neighboring countries such as Sri Lanka, Bangladesh, and Nepal. The Singapore courts have forged such relationships with the U.S. based National Center for State Courts, the U.K Lord Chancellor's Office, the Australian institute of Judicial Administration, and the Australian state and federal judiciaries. This high-level interaction liberates the local judge from the restrictions of his own national background permits an exchange of ideas on current problems facing commercial judicial administration, and allows for the importation of successful practices that have been tested in other.

Singapore Court Performance set by Benchmarks

Constancy and appraisal institutions in the business world regularly praise the courts of Singapore for their performance in the expeditious handling of business disputes. It has produced a self reflective judiciary dedicated to institutionalizing internal reforms. In fact, Singapore took the lead in providing court based mediation, and in 1997 the Singapore Mediation Centre was established. During the short span of its existence, the Centre has been recognized by more established mediation in the U.S., the U.K Australia, and Hong Kong.

Institutional Operations

The idea to establish Commercial Court in Pakistan grows out of the belief that the justice system should make a wide range of dispute resolution processes available to litigations. In this vein, the professional administrative staff of the Commercial court should subject all new cases when filed to special scrutiny, directing litigants and their lawyers, whenever possible, to modes of dispute settlement other than a full trial settlement. The unique features of this modern courthouse should be the individual diagnostic case screening and case management services that it provided to litigants free of charge, vexatious and frivolous actions would be filtered out in this process, and only genuine commercial disputes not susceptible to mediation or conciliation would go to that.

Commercial Court Judges

Should be answerable to the Chief Justice of Pakistan and drawn from within the existing High Court judiciary or recruited especially for the Commercial Court. They should be trained in commercial law in Pakistan (at the Federal Judicial, Academy) or overseas.

Commercial Court Administration (Phased-in)

Answerable to the Chief justice of commercial court; these specially trained administrators will sort new cases and direct litigation and lawyers to ADR whenever possible. In addition, they will manage the gradual introduction of information technology Initiative as well as the incremental transition to modern court management techniques (e.g., multi-door). Recruited as honours graduates, the Commercial court administrators will be sent to the Federal Judicial Authority for their pre-service training.

Commercial Division Conciliators, Mediators, and Neutrals (Phased-in)

Answerable to both the Chief Justice and Commercial Court Judges, these ADR specialists will resolve new commercial cases referred to them by the Commercial Court administrators as well as pending cases refereed by the Chief Justice and the Commercial Court Judges. Conciliation will be drawn from among retired judges, senior attorneys, and other respected individuals in the professional legal community, Mediators and neutrals will be drawn from among doctors, lawyers, university professors, and accountants.

Introduction and use of ADR options in the Commercial Court

ADR can now be counted among (the) major developments in the evolution of court management, and the use of ADR has proliferated across all the jurisdictions and areas of the law. This is especially true of the commercially advanced jurisdictions of the Asia-Pacific region, including Singapore and Hong Kong, which have begun to encourage the use of an expanded array of dispute resolution methods. In fact, many Asian societies, including Pakistan with its long tradition of 'panchayats' and 'jirgas', find that their traditions support a non-confrontational approach to conflicts. ADR is often a more satisfactory process than traditional litigation, because it helps people preserve

- provide services at times and places convenient to the parties.
- allows sufficient time for the parties to make informed decisions, and allow sufficient time for the parties to make informed decisions, and provide the services at a low cost.
- The mediation environment also allows disputants to avoid rules of evidence and time constants. As an escape valve allowing potential litigants to let off steam, then, the mediation process redirect disputes that could produce vengeful and protracted litigation.

Conciliation in the Commercial Court

Retired Judges and senior lawyers should act as conciliators in the Commercial Court. Unlike mediation, however, wherein the target groups are the actual disputants, commercial conciliation involves lawyers representing the disputing parties.

Even where a full settlement is not reached, the advantages of conciliation are still significant. First, lawyers for the disputing parties are forced to re-evaluate their positions during the course of the conciliation process, and often they will be forced to settle after focusing on the facts of

the case. Second, even where the matter proceeds to trial, most of the issues will have been settled, leaving the judge to resolve a small number of central issues.

Other Consideration for the Commercial Division

The management consultant, under the supervision of the chief justice, would develop an annual operational work plan and timelines for the disposition of cases. The consultant would also help the Commercial Court to absorb current technology, such as allowing the electronic filing of documents and the use of electronic bench books. Finally, s/he would be charged with the duty of auditing the performance of the court by assessing whether or not there was a timely rendering of decisions and judgments, an estimation of legal and other costs that were increased as a result of poor case management, and a sampling of decisions to ensure that the quality of justice has not been compromised. This audit should be a public document and should be considered when taking into account the salary and promotion prospects not only of the judges of such courts but the entire support staff so that the latter will also have a stake in the success of the venture.

Human Resources

However, the problem of finding suitable persons to man such an institution still remains. Furthermore, the Commercial court will refer cases ADR meaning that judges must be supported by a well-trained lay staff as well as by qualified neutral.

Training Commercial Court Judges

Commercial judges should receive both theoretical and practical training within Pakistan or abroad, Young judges who show promise should be sent for overseas training. Promotion and salary increments should be keyed to performance, which can be evaluated by Supreme Court judges by an independent appraising institution. Peer pressure also could be averted if the decision of the courts are promptly published and evaluated by the academic community.

Commercial Court Administrator

For the administrative support staff, trainers from the United States or Singapore can provide intensive training in the use of information technology and case management, In the Commercial Division, staff members playing key roles should be honours graduates (at least) and they should be sent abroad for training and further education in what is increasingly a meaningful specialization.

Commercial Division Mediators, Neutrals, and Conciliators

Although ADR comprised various levels of informality, the skills required to maintain that system might be difficult to find. In the United States, with its vast pool of learning Institution, non-profit organizations, and community service groups, it is not difficult to find skilled volunteers. However, even those volunteers need to be trained to sit down with disputing parties, invite them to tell their stories, encourage the parties to listen to one another, and help them reach an amicable solution. In the U.S, it is estimated that a minimum of thirty hours of “hands-on” training in mediation theory and skills are required. These skills include putting the disputants at ease, describing the mediation process, coaxing the full story and context from the disputants asking procedure questions, helping the parties invent and consider options, slumping agreements, maintaining confidentiality, and adhering the ethical stands.

Law schools should be encouraged to recruit and train doctors, lawyers, university professors, and accountants to serve as potential recruits. These individuals will be accredited as neutrals after satisfying both theoretical requirements. In addition, these institutions should pay special attention to the recruitment of women. Apart from enlarging the base of neutrals, this practice will be useful in situation where women are involved in a dispute. The presence of a female neutral will assist in creating an atmosphere congenial to a successful mediation.

In performing their functions, neutrals should be immune from civil damages for statements, actions, omissions, or decisions made in the course of ADR proceedings (unless that statement, action, omission, or decision is made fraudulently), and no action should be allowed against a neutral without a clearance certificate issued by the chief judge of the Commercial Division,. At

the same time, neutrals should be subjected to the same ethical standards as High Court judges, including the standards of probity and confidentiality that are expected by the litigants. Neutrals who egregiously violate certain ethical norms (e.g., taking bribes or misusing information disclosed during the mediation process) should be liable to criminal sanctions.

Conciliators should be selected from a pool of retired judges, senior attorneys and others in the legal profession who have a reputation for integrity and a deep knowledge of the law. These conciliators could provide pro bono services, or, depending on the complexity of the matter, fee weaknesses of their clients' cases in order to promote a pre-trial settlement.

The Bar and other institutional Partnerships

Apart from commercial judges, the administrative support staff, and the ADR specialists, support and cooperation from others will be critical. These include the bar and international institutions that will cooperate with the Commercial Court.

In formulating a code of ethics applicable to its members, provincial bars should include a chapter on the use of ADR, adopting guidelines similar to those of the U/S Model Rules of Professional Conduct, which note that "there will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning representation".

Together with the bar, the Commercial Court must have access to externally operated programs via partnerships that deliver high quality ADR services to litigants. Some organizations that have formal successful partnerships with the courts include institution of higher learning (e.g. the Harvard Mediation) Program at Harvard Law School and the Boston Mediation Clinic, bar councils and related groups, dispute resolution centers, and religious institutions.

Physical Infrastructure

In order to facilitate the establishment of Commercial court, at the High Courts, certain courtrooms should be set aside especially for the purpose of hearing commercial cases which should be renovated. Additionally, office facilities to house the Commercial Court administrators and meeting rooms to house the commercial conciliators, mediations, and ADR neutrals should be constructed.

- electronic filing and email facility to allow for easier communication,
- a website explaining the uses of the Commercial Court,
- computers and internet access for word processing and research capability and
- Password-protected sites to advise lawyers about the status of their cases.

Personnel

No new judges should be hired for the Commercial Court. Judges form a cadre with expertise in commercial cases within the ranks of the existing High Court judges should be transferred to commercial court, there may be the odd judge recruited from the subordinate level for his or her expertise and past experience in commercial litigation. Only the latter situation would entail an increase in salary and benefits.

The Commercial Court administrators and ADR specialists are positions which are being phased to over time. It may be that with some training, present court personnel could serve as Commercial Court administrators. If the administrators are recruited a determination will have to be made as to which grade an administrator would fall under and what the attendant salary would be for his or his position. The ADR specialists would offer their services free of charge, except perhaps in a case of extreme complexity where a free for service could be could be agreed upon.

Infrastructure

For the time being, Commercial Court judges can hear cases in the High Court facilities. Perhaps a separate section of the High Court would be redesignated as commercial courtrooms.

In time, a decision must be made whether the entire Commercial Court should be relocated outside of the High Court building.

Equipment

Computer equipment and transcribing gadgets for Commercial judges is recommended.

Programs

As stated in the Rationale, the Pakistan government will have to make a major investment in training to create a group of judges well-versed in the intricacies of commercial law.

In-Service training

The judges selected for Commercial Court should receive at least one week of training in commercial law related topics. The training sessions should be conducted by a senior judge and a senior advocate, both with extensive experience in commercial litigation; the trainers also may want to utilize the services of a resource of a person from the Federal Judicial Academy who can provide ideas on how to structure the training sessions for the judges. The judges should also hold a two or three-day annual conference, in order to discuss topics of mutual concern with regards to commercial litigations.

Training for ADR mediators and neutrals

As recommended above, training for those who would serve as ADR mediators and neutrals in the Commercial Division should be handled by learning institutions that are able to put together specialized courses. The learning institutions should bear the cost of preparing the courses and training materials, while the potential ADR specialists would pay fees to attend the courses.

The Civil and Criminal Justice System in Pakistan is confronted today with serious crises of abnormal delays. Delay in litigation of Civil and Criminal Cases has become chronic and proverbial. The phenomenon is not restricted to Pakistan; it is rather historical and universal. It is inherent in every judicial system, which meticulously guards against any injustice being done to an individual, in a civil dispute or criminal prosecution. A paramount principle of the Criminal Justice System is that an accused is punished only after his guilt is proved beyond a shadow of doubt. Similarly, justice demands that in the trial of a Civil Case, the dispute must be decided strictly in accordance with the law and on the principal of equity, justice and fair play. Such universally recognized and time-tested principles are in accordance with the injunctions of Islam as Holy Quran ordains that Muslims must eschew injustice, coercion, and suppression.