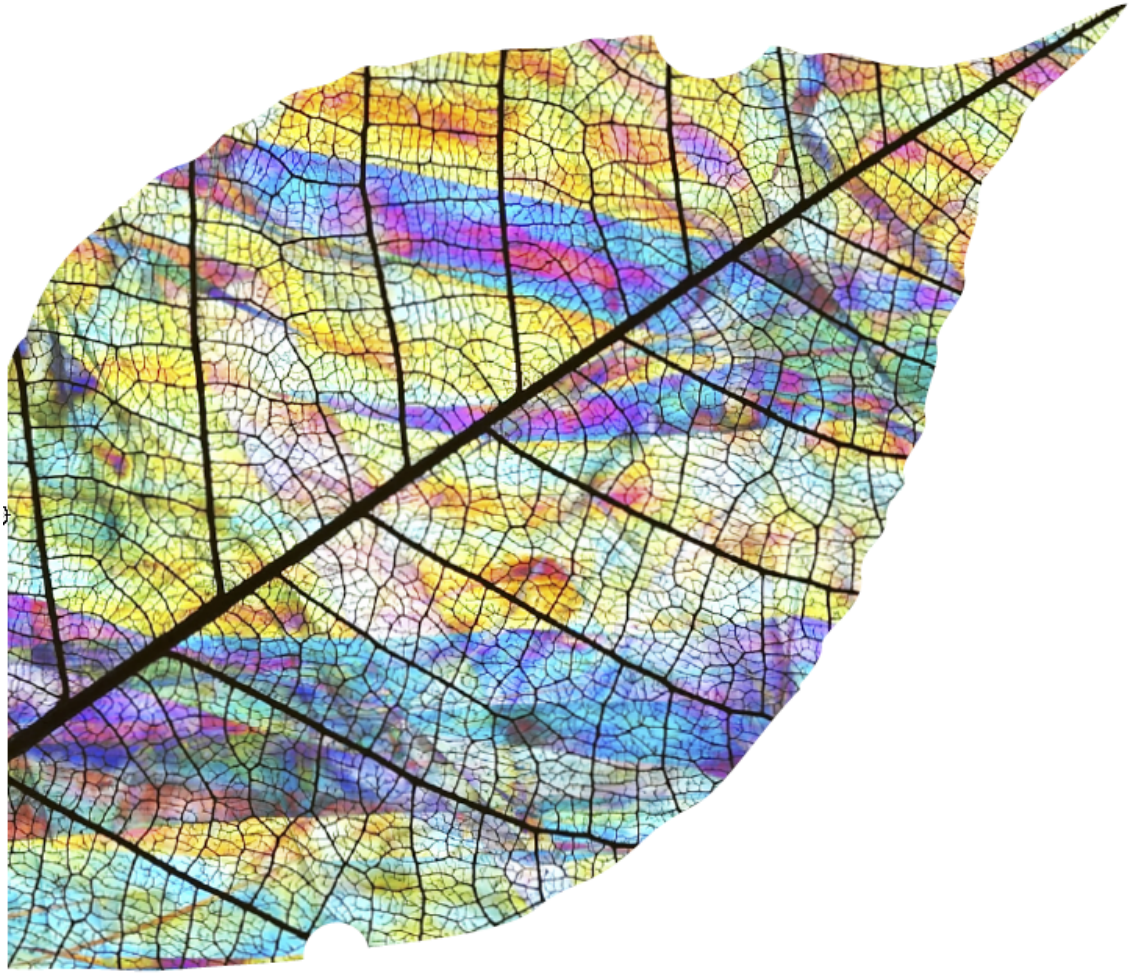
World Universities Comparative Law Project
Legal rating of Pakistan

carried out by the Lahore University of Management Sciences

A production of the Allen & Overy Global Law Intelligence Unit



February 2018

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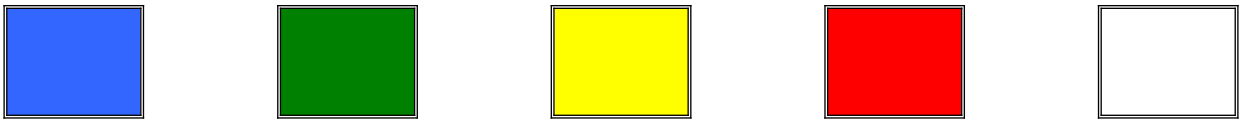

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World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Pakistan was carried out by students at the Lahore University of Management Sciences.

The members of the Faculty of Law at the Lahore University of Management Sciences who assisted the students were:

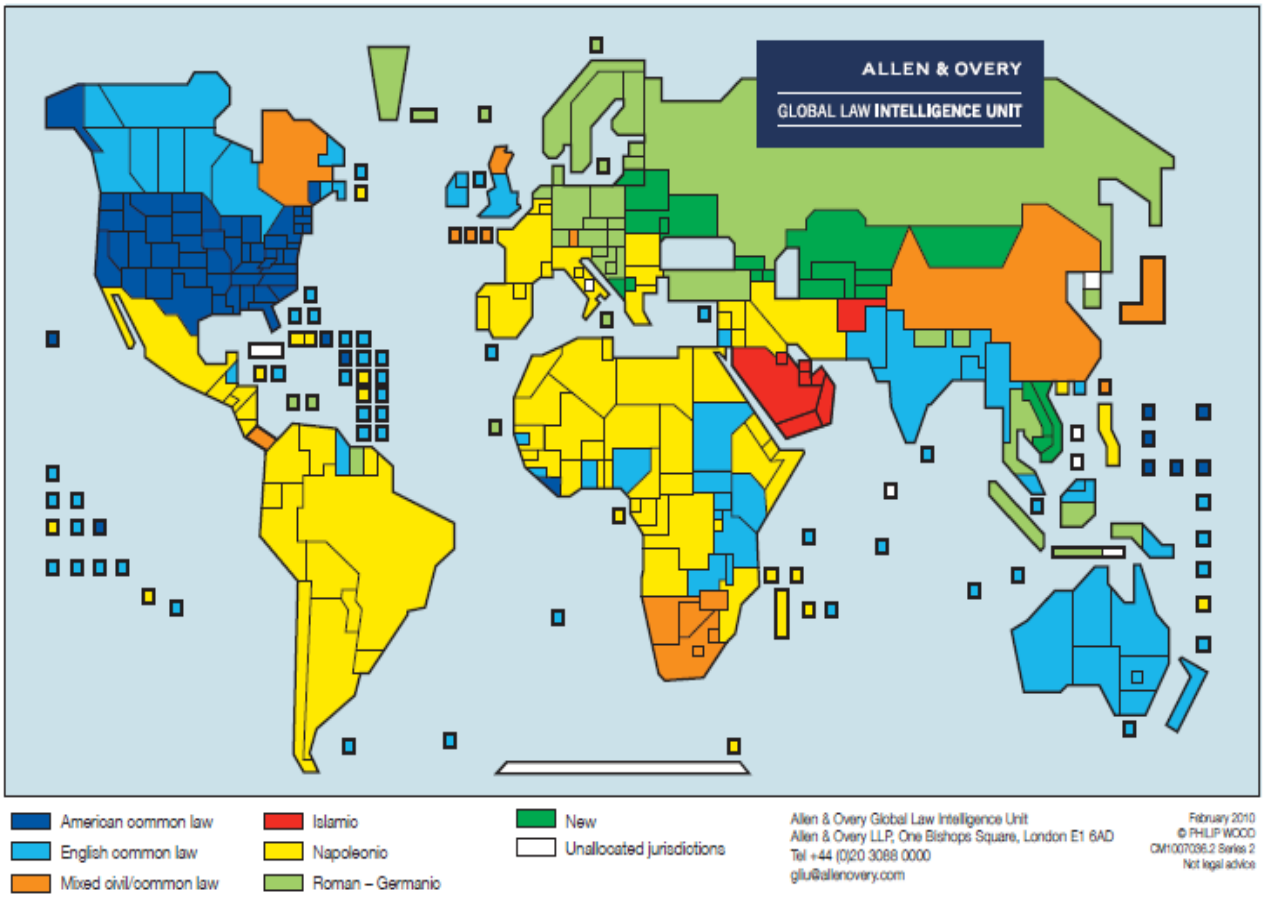
Uzair Jamil Kayani - Visiting Assistant Professor

The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were:

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword

It has been an honour and a pleasure to work with my students on the Pakistan volume of Allen & Overy's World Universities Comparative Law Project. Most of the research for the project was done as part of our commercial law class at the Shaikh Ahmad Hassan School of Law in 2017. Many citations were revised after Pakistan passed a new omnibus law for companies, the Companies Act of 2017. Further revisions were added after valuable input from Mr. Philip Wood, CBE, Q.C. (hon.), and Ms. Melissa Hunt at Allen & Overy, L.L.P.

Pakistan is an English common law jurisdiction, with some infusion on Islamic law in select areas. As the fifth most populous country in the world, a rapidly developing economy, a very young population, and home to rapidly growing retail, services, agricultural, and IT industries, Pakistan is an attractive emerging market for direct investment. However, perceived shortcomings of the legal system can dissuade businesses from entering the country. New entrants often seek special protections from the government, including access to alternative dispute resolution in neutral fora. This report provides details on some of the issues that are of interest to businesses and legal practitioners that may have cause to engage with Pakistan's corporate and commercial laws.

I am grateful to my students in the commercial law class of 2017, the faculty and dean of the Shaikh Ahmad Hassan School of Law, and Allen & Overy, L.L.P. for providing us with this opportunity to analyse Pakistan's corporate laws and compare them with other jurisdictions.

Uzair Kayani
Visiting Assistant Professor
Faculty of Law

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Pakistan with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

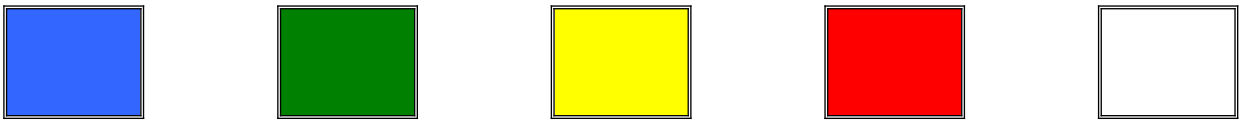
The survey was carried out by students at Lahore University of Management Sciences. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of Lahore University of Management Sciences, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

Methodology

The survey uses colour-coding as follows:

True **False** **Can't say**



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Pakistan. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavour to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations

as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In Pakistan, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True			False	Can't say
X				

Comment:

A set-off is a defence to money owed; Black's Law Dictionary defines it as "a counterclaim or cross-demand; a claim or demand which the defendant in an action sets off against the claim of the plaintiff, as being his due, where: he may extinguish the plaintiff's demand, either in whole or in part according to the amount of the set-off."[1] (Illustrated with an example, this would mean that where A owes B a hundred dollars and B owes A sixty dollars, the mutual debts will be set off and A will have to pay B 40 dollars). Insolvency set-off in the UK is governed by statute, with Section 323 of the Insolvency Act 1986 and Rule 4.90 of the Insolvency Rules 1986. The Act calls for the set-off to be mandatory in case of liquidation, and is intended to do "substantial justice" between the parties.[2]

In Pakistan, section 46 of the Insolvency Act 1920 deals with insolvency set-off (produced below):-

> "**46. Mutual dealing and set-off** - Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."[3]

Most of Section 46 shares identical phrasing with Section 323 of the UK Insolvency Act 1920.

[1] http://thelawdictionary.org/set-off/ accessed May 4, 2017
[2] http://clients.squareeye.net/uploads/3sb/documents/The_mutuality_of_assignment_in_subordination.pdf accessed May 4, 2017
[3] Insolvency Act 1920, s 46

The major precedent regarding setting-off of mutual debts in cases of insolvency was set in *Haji Muhammad Sabir v Ghazi Commercial Finance Limited* (P L D 1985 Lahore 229). The Court cited Indian cases as precedent for setting conditions for the insolvency set-off to take place. These conditions state that both the claims a) must be debts, b) be of pecuniary nature, c) be between the same parties i. e. the insolvent and the creditors, d) and be in the same capacity or right).[4] The judgment also mentions the equitable nature of this set-off provision.

The relevant portion of the judgment, which discusses the application of Section 46, is reproduced below:-

> "Under section 46 of the same Act, where there have been mutual dealings between an insolvent and a creditor proving, or claiming to prove a debt under the Act, an account can be taken of what is due from the one to the other in respect of such mutual dealings, and the sum due from one can be set off against any sum due from the other, and the balance of the account, and no more, can be claimed or paid on either side respectively. The words "mutual dealings" in section 46 should not be confused with mutual dealings arising out of a "mutual open and current account", as that expression is used in Article 85 of the First Schedule to the Limitation Act, 1908. The principle behind section 46 is to prevent injustice which would arise after a person who is the insolvent's creditor on one account and his debtor on the other, is compelled to pay the entire amount due by him, receiving only a dividend on the amount due to him. See *Seth Radha Kishan v. Firm Ganga Ram* (23 1 C 927) and *Sundaravaradan v. Official Liquidator, T. N. B. Subsidiary Company* (A I R 1940 Mad. 266). Thus, where two persons have dealt with each other on mutual credit and one of them becomes insolvent, the account can be settled between them and the balance only, which is found due on either side, is treated as payable. In order that section 46 may apply, both the claims must be debts, both must be pecuniary, both must be between the same parties i. e. the insolvent and the creditors, and both must be in the same capacity or right".[5]
>
> The answer, thus, to the question of insolvency set-off in case of mutual debts is that the creditor will have the mutual debts set-off, and that such a remedy is applied by the Courts automatically because it becomes mandatory in case of liquidation. This is because the phrasing of the Pakistani statute is exactly the same as its counterpart's in the United Kingdom, where the insolvency set-off in case of mutual debts is also mandatory. The conditions relevant to such a set-off are listed above with the relevant judgment cited.
>
> **Conclusion**: TRUE; the blue box needs to be picked. However, in this scenario, (unlike the general meaning of the blue box which states that the parties are free to engage because the law is relaxed over the matter) the law *does* intervene and settles the issue of mutual debts between creditor and debtor in cases of insolvency set-off.

Mir Asfandyar Khan Mohmand

Najam Ul Hassan Aftab Alvi

[4] *Haji Muhammad Sabir v Ghazi Commercial Finance Limited* P L D 1985 Lahore 229
[5] Ibid.

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In Pakistan, the law offers a security interest which is highly protective of the secured creditor.

True			False	Can't say
	X			

Comment:

In Pakistan, the legal protection of the rights of secured creditors is catered for by two main statutes that discuss the nature of secured creditors and the type of asset involved. Protection for secured creditors that are financial institutions is governed by The Financial Institutions (Secured Transactions) Act 2016 (hereinafter **"Secured Transactions Act"**), which is restricted to register those transactions where the charged asset is movable property. The Financial Institutions (Recovery of Finance) Ordinance 2001 (hereinafter **"Recovery of Finance Ordinance"**) determines the flexibility with which secured creditors can recover finances from a mortgage agreement. Although the Secured Transactions Act affords considerable convenience to secured creditors, a repeal of the "Sale of mortgaged property" clause[6] of the Recovery of Finance Ordinance has chipped away at this legal protection.

As per the Secured Transactions Act, a security interest[7] encompasses a right, title, encumbrance or interest of any kind upon movable property created by a security agreement in favour of the secured creditor. If the customer and the secured creditor have agreed to create a security agreement in favour of the latter, the security interest will ensure the performance of the customer's obligation under a finance, without regard to the form of the transaction or ownership of title to movable property. Here, too, movable property[8] is

[6] The Financial Institutions (Recovery of Finance Ordinance), s 15
[7] The Financial Institutions (Secured Transactions) Act 2016, s 2(xlviii)
[8] Ibid, s 2(xxix)

broadly defined to include any tangible or intangible property other than land; for example, rights under letters of credit, rights under trust receipts, title documents, negotiable instruments, intellectual property, goodwill, goods-in-transit, agricultural produce and items attached to immovable property all fall under the non-exhaustive list of movable property.

Moveable assets account for most of the capital stock of a private firm, in particular of Small and Medium Enterprises (**"SMEs"**). A modern secured transactions law unlocks the potential value of moveable assets when it allows borrowing on its basis. The preferential treatment to financial institutions is justified due to their ready access to funds at any given time and ease of outreach to borrowers through an existing network[9].

A secured creditor has preferential rights over a charged asset, even if the borrowing entity undergoes bankruptcy or restructuring. Once bankruptcy proceedings are initiated, a secured creditor can claim priority of security interest over all other creditors. While the Secured Transactions Act is undoubtedly favourable for financial institutions, it discourages every other creditor to lend money to businesses. A secured creditor, by definition in this new law, can only be a financial institution. All other lenders, authorised or licensed by provincial governments, can neither register their interests nor can they receive preference under the new law.[10]

As per the S. 15 of the Financial Institutions (Recovery of Finance) Ordinance, 2001, financial institutions had the authority to sell a mortgaged property without the intervention of the Courts. This section was struck down by the Supreme Court in 2014 on grounds of being in violation of Article 10A of the Constitution of Pakistan, 1973.[11] Article 10A grants a person a right to fair trial and due process in the face of any criminal charge, or for the determination of his or her civil rights and obligations. As a result of this judgment, financial institutions which are mortgagees cannot recover finances by way of proceeds from a mortgaged property without the intervention of Courts. This makes the process of recovery arduous, resulting in difficulties for mortgagee financial institutions in recovering their finances in case of default.

Hence, the statement that Pakistan's law offers a security interest that is highly protective of the secured creditor is partly true, but not quite. Although the Secured Transactions Act facilitates financial institutions, the intervention of courts in mortgage agreements where the recovery of finances is at stake greatly limits the freedom accorded to secured creditors.

Umair Ahmad (19090045)

Hiba Fatima Hassan (19090011)

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

[9] Faryal Nazir, „Secured Transactions Law: a cost benefit analysis" (*Dawn*, 20 June 2016) <https://www.dawn.com/news/1265985> accessed 1 May 2017
[10] Ibid.
[11] *National Bank of Pakistan v SAF Textile Mills* PLD 2014 SC 283

Q3 Pakistan has a universal trust for all assets.

True			False	Can't say
X				

Comment:

Pakistan belongs to the group of common law countries. Common law jurisdictions have universal trust for all assets.

Trust entails a relationship where one person, the trustee, holds title to the assets of another person, the beneficiary. Whereby the real benefit, profit and advantage of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust. For instance, a person entitled to receive something in a will, even if it is under the possession of a trustee, would be a beneficiary under such will. In Muhammad Kalim Khan v Muhammad Farouk Khan, it is affirmed that the legal ownership of trust splits into trustee and beneficiary where trustee is not entitled to any benefits thus accumulated from the assets of trust.

A trust can be created by any person eligible to enter into a contract and also by the legal authority of a competent court on any transferrable property over which the author of the trust has dispossessing power as mentioned in the provisions of Trust Act, 1882.

Universal trust corresponds to the idea that in case of loans or insolvency, the creditors get nothing from the assets of trust as they do not belong to the trustee but exist for the benefit of the beneficiary.

In the case of universal trust, the creditors do not get anything back from the assets of trust. This means when the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are invulnerable and therefore taken away from the debtor-trustee's bankrupt estate. Therefore, trusts may allow beneficiaries to protect assets from creditors.

A person is insolvent if he stops paying debts due to inability or lack of resources to pay debts or is insolvent within the meaning of Provincial Insolvency Act, 1920. There are two possible remedies to this case. He can either make a private arrangement with his creditors or he may let the Bankruptcy Court administer his estate and distribute the assets for the benefit of creditors. Any person eligible to contract can take protection from the Provincial Insolvency Act, 1920. This Act is not applicable to minors, people of unsound mind, judicial persons and to corporate bodies. Pakistan's insolvency law in general is based on England's insolvency law. Provincial Insolvency Act, 1920 is applicable in Pakistan which has its jurisdiction over entire Pakistan except the Karachi Division.

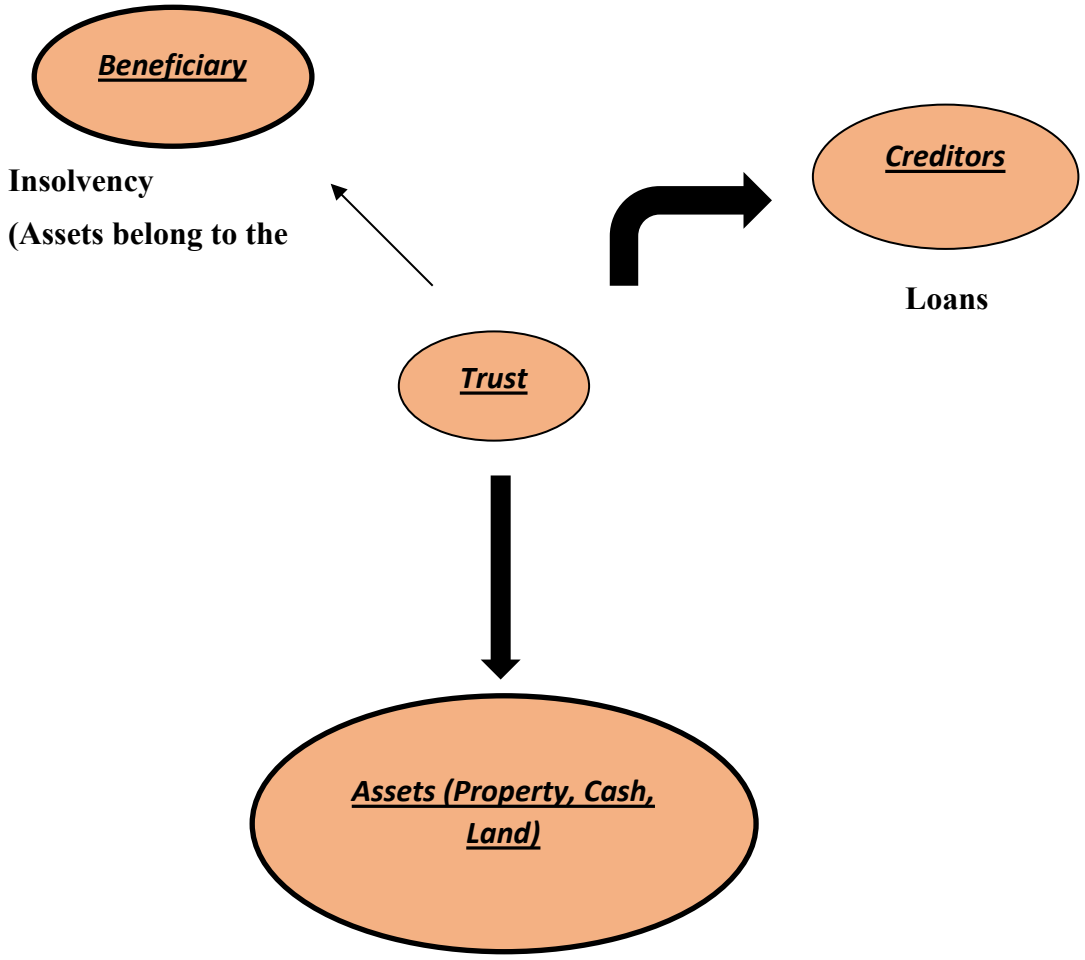
According to section 4 of Provincial Insolvency Act, 1920, the court has the discretionary power to decide all questions related to insolvency. Firstly, the court deems necessary to decide to serve complete justice to distribute property in any case. Secondly, decisions regarding insolvency would be binding for all purposes. Lastly, if the court does not deem it necessary to decide any question in regards to subsection 1, but has a reason believe that the debtor has an interest in any property, the court can condition the debtor to as it may think without further inquiry.

Moreover, according to section 47 of the Provincial Insolvency Act, 1920, a secured creditor cannot claim any preferential treatment in distribution of assets of insolvent. Secured creditor if he has not relinquished his security is entitled to adjustment of security. He can make claim in respect of such balance amount of debt which remains unsatisfied after realization of security.

This law also regulates the bankruptcy proceedings. This involves the taking of possession by the trustee of the property of the bankrupt actually or constructively in his possession at time of filing of petition in bankruptcy, the distribution of the proceeds received from such property, ratably, among bankrupt's creditors whose claims have been filed and allowed, and the discharge of bankrupt from liability for the unpaid balance of such claims. Bankruptcy (in the sense of proceedings taken under the bankruptcy law) is either voluntary or involuntary; the former where the proceeding is initiated by the debtor's own position to be adjudged a bankrupt and have the benefit of the law, the latter where he is forced into bankruptcy on the petition of a sufficient number of his creditors.

There are certain powers accrued to the liquidators in times of insolvency. These powers are stated in certain provisions of the Companies Act, 2017. For our purposes the relevant provision is Section 337 which states the liquidator has the power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors.

To conclude, Pakistan has a universal trust for all assets. Trust assets are protected for the beneficiary in case of insolvency and bankruptcy. The creditors do not get anything back.



Zeenia Waheed 19090012

Reham Kundi 19090090

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In Pakistan the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True			False	Can't say
	X			

Comment:

This statement is partly true because in Pakistan, there is personal liability on directors for deepening insolvency, however, there are rules requiring directors to file for insolvency.

Companies usually face insolvency during the course of the business. Insolvency is the situation where the company is unable to pay debts they owe to creditors, the balance -sheet of the company is insolvent, or some or half of the proportion of the capital has been lost. Insolvency can be caused for various reasons, such as:

- **Lack of expertise in commercial operations**: without any expertise or skills, conducting business will increase risk of insolvency.
- **Lack of knowledge of business practices:** This means that without proper knowledge of basics of business practices, conducting business will lead to insolvency. For example: without being aware of contractual obligations one enters into a contract.
- **Viable:** To be feasible and working successfully, some businesses require capital and time depending on the nature of the business.
- **Excessive expenditure, usually while trying to build business:** To start a well-established business, spending money excessively can be fatal to the further development of the business.
- **Failure of clients to pay money owing or to follow through on business projects:** This is one of the most common of all reasons for business insolvency, in which the failing of another business causes a dragging down of own business leading to insolvency.
- **Competition:** While conducting business, the owners should keep a check on market competition because sometimes underrating the competition may lead to insolvency.
- **Impractical business ventures:** Very common, high risk ventures generally include costs to businesses which put the business in debt.
- **Financial management:** For a successful business, financial management is one the key factors. Businesses can be disrupted by bad financial management.
- **Credit situations:** Another main reason of the business insolvency can be borrowing money by relying on future revenue, which in the case of unsuccessful results leads to business insolvency.

Insolvency leads to a liability to file in countries like France, Chile, Belgium, Italy, Taiwan, Russia, even Saudi Arabia, but not Britain, the U.S., Japan or China. Germany has reconsidered this duty. There is a duty to file for insolvency proceedings in these countries.

However, in a country like Pakistan there is personal liability on directors in cases where the company become insolvent. Section 180 of the Companies Act, 2017, places liability on directors of the company with respect to any damage, negligence, breach of duty or breach of trust for which the director may be guilty to the company. The duty of the director is to make sure of the fact that the company runs efficiently, in that

case they would not face the problem of insolvency. Hence, the director will be deemed guilty. Section 212 of the Companies Act, 2017, also claims that in case of breach of fiduciary duty, a petition will be filed in the court against the director. Therefore, if the director is involved in deepening insolvency, then he will be held personally liable for the breach of his duty.

We do not agree with the second part where the statement states that the director does not have the duty to file for insolvency. In Pakistan, the director is responsible to file for insolvency. This is evident in the case *Takaful Pakistan Limited*, 2014 CLD, 615: the court applied section 34 of Securities and Exchange Commission (Insurance) Rules, 2002 read with Part B of Annexure II-- Accounting Regulations, Regulation. No.16(1)(a) and stated that besides running the day to day business of the company, the directors of the company also have some fiduciary duties, imposed on them by statutes, to which they must comply, because in case of breach of such duties they will be punishable by fine or imprisonment. They are assessed at a higher standard of culpability, therefore they should remain more vigilant and must perform their duties with due care and prudence. The court also held that according to section 34 of Insurance Ordinance, 2000 read with Regulation. 16 (1) (a) of the Accounting Regulation; directors are supposed to be well aware of their legal obligation as stated in the statute.

Insolvency can lead up to winding up. On the ground of insolvency, court can order a company to wind up. The case for insolvency can be filed by the company in the court, the creditor of the company, the directors, or a member of the company can file the case. In restricted circumstances, the Secretary of State for Business, Innovation and Skills or the Official Receiver may present the petition.

Khola Sajid (19090071)

Maham Jamali(19090076)

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void.

Q5 Pakistan permits a company to grant financial assistance for the purchase of its own shares.

True			False	Can't say
		X		

Comment:

Section 86 of the Companies Act, 2017 (Hereafter referred as Section 86) prohibits the purchase or grant of financial assistance by a company to purchase its own shares. However, in Section 88 of the Companies Act, 2017 which was originally inserted by the Finance Act, 1999 and was substituted by the Companies (Amendment) Ordinance, 2009, an exception has been created to Section 86. The exception is that notwithstanding anything contained in the Companies Act, 2017, a listed company can purchase its own shares via a special resolution and other requirements specified in the Section.

Discussion:

Under normal circumstances, no company shall have the power to buy its own shares or the shares if the holding company. Also, no company limited by shares, other than a private company shall give any financial assistance for the purpose of purchase of the shares in that company. A purchase by a company of its own shares is *ultra vires.*[12] If there is any article in company's Article of Association for the option to buy its own shares, it is also *ultra vires.*[13] Moreover, a surrender of shares by a shareholder and acceptance of such surrender by the company releasing liability of the shareholder is equivalent to purchase of its own shares by the company and is therefore illegal and void.[14] Moreover, in case of violation of section 86, any person involved in violation of the aforementioned article could be fined up to Rs. 10,000, if it is related to a listed company and Rs. 2000 if related to any other company. The reason behind prohibition of its own shares would be to prevent the company to raise the stock value of its shares by purchasing them as this would not be a true reflection of the value of the company. Therefore purchasing of its own shares and raising any financial assistance in this regard is prohibited.

There is one exception to the rule stated above and that is mentioned in Section 88 of the Companies Act, 2017.

The notwithstanding clause means that this law will override any other section mentioned in this Act including Section 86. Section 88 thus allows Limited Companies to purchase its own shares subject to certain restrictions. These restrictions include requirement of special resolution to authorize the shares, providing a justification of sale, a source of funding, maintenance of register, mode of purchase (through tender system), effect on financial position etc. These conditions are listed in Sub-Sections of 88. In case of default in compliance with the provisions, the company may be liable to a fine which may extend to 1 million and any defaulters may face imprisonment of up to 6 months.[15]

The rule was applied in the case of *Sherman Securities Ltd V Joint Director Securities and Exchange Commission of Pakistan.* The facts leading to the case are that from 1-3-2005 till 31-03-05, the appellant carried out 231 trades in the shares of oil and gas development company(OGDC), Pakistan Oil Fields Limited(POL), Pakistan Petroleum Limited (PPL), Pakistan State Pil Limited (PSO) and Pakistan Telecommunication Company Limited (PTCL) through the Karachi Automated Trading System at Karachi Stock Exchange on behalf of its 4 clients. In the course of these trades, the appellant purchased and sold 210, 700 shares of OGDC, 200 shares of POL, 260800 shares of PPL, 11300 shares of PSO and 3500 shares of PTCL on behalf of the aforementioned clients. Each of these trades was declared null and void because of the effect that there was no change in the beneficial ownership of the shares as they did not give the actual impression of the trade being carried out and the company was assisting the stock broker to buy their own shares which was declared to be void.

Conclusion:

Concluding all, the statement that Pakistani law permits a company to grant financial assistance for the purchase of its own shares is not completely true. Section 86 prohibits the company to purchase its own

[12] AIR 1921 All. 135 (DB)
[13] 16 Ind. Cas. 49(Bom.)
[14] Mahmood Shaukat, Company Law Fifth Edition page 193
[15] Companies Act, 2017 S. 88

shares or grant financial assistance for that purpose. However, the statement is not completely false either as limited companies are an exception to the aforementioned rule as per Section 88 of the Companies Act, 2017.

Salman Tahir (19090004)

Abdul Hadi Sheikh (19090063)

Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in Pakistan is open and has few restrictions.

True			False	Can't say
	X			

Comment:

Introduction:

Under the Acquisition Ordinance 2002, any person acquiring either directly or indirectly voting shares in a listed company which entitles such person to more than 10% voting shares in a listed company is required to disclose his shareholding to such company and to the relevant stock exchange. In the case of an acquisition of 25% or more voting shares (but less than 51%) or control of a listed company, in addition to the disclosure in the manner mentioned above, the acquirer is obliged to follow the procedure laid down in the Acquisition Ordinance for such acquisition. Hence, the public takeover regime is although open but there are few strict restrictions that must be fulfilled anytime the takeover takes place.

Discussion:

The corporate sector in Pakistan is regulated by the Securities and Exchange Commission of Pakistan ("SEC"). SEC was established through the Securities and Exchange Commission of Pakistan Act, 1997 (the "SEC Act") which contains detailed provisions relating to the constitution, structure, powers and functions of the SEC. The Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 ("Acquisition Ordinance") lays down the procedure for acquisition of voting shares and takeovers of listed companies. The Acquisition Ordinance was promulgated with a view to protecting the minority shareholders and to boost investor confidence, as well as to help check market abuse and provide a transparent and efficient system for substantial acquisition of voting shares and takeovers of listed companies. For an

acquisition of shares of a listed company, a number of notices, undertakings, and disclosures are required to be made to the stock Exchanges, SECP, and the target company. Firstly, for an acquisition of 1 0 percent or more voting shares of a listed company, disclosure to the stock exchange and target company must be made. A person intending to acquire voting shares of a company beyond 25 percent is required to make a public announcement of intention in the newspaper. The draft of the public announcement of intention has to be filed with the SECP and stock exchange at least two working days before issuance in the newspapers. Prior to the acquisition of 25 per cent of voting shares or control the acquirer must make a public offer. The public announcement of an offer has to be made within 180 days of the making of the public announcement. A person who has more than 25 percent of the voting shares of a target company but less than 51 percent of the voting shares or control of the target company is required to make a public announcement of intention before acquiring any additional shares or control. The draft of the public announcement has to be filed with the SECP at least two working days before its issuance. The acquirer is required to furnish security for the performance of its obligations under the public offer. Such security can be in the form of a deposit of cash or securities or can take the form of a bank guarantee. The manager to the offer has to file a due diligence certificate with the SECP prior to the public offer. Public announcements of an offer are required to be filed with the SECP along with the supporting documents specified in Schedule VII of the Takeover Regulations.

Conclusion:

In conclusion, the statement that the public takeover regime in Pakistan is open and has few restrictions is partly true. The law of Pakistan has certain restrictions over public takeover, the Takeover Ordinance and Takeover Regulations contain detailed provisions in relation to acquisition of shares of a listed company which are mentioned above.

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Aiza Imran (17020015)

Altamush Saeed (19090015)

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

Q7 In Pakistan, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

True			False	Can't say
	X			

Comment:

It is not uncommon for parties who have negotiated and decided the crucial terms of a proposed relationship to enter into a preliminary written agreement of sorts beforehand; keeping in mind the intention of recording their agreement in a more formalized way eventually. This agreement falls under a variety of names including 'memorandum of understanding', 'MoU' or 'heads of terms. However regardless of the name given to the agreement, the key question to be pondered upon with regards to these arrangements is whether there is an actual agreement binding the parties involved or whether neither party is bound unless a more formal agreement is entered into. Arrangements of this type can generally be categorized as being one of the three types, and whether or not the arrangement can be classified as having any 'legal value' is contingent upon which category the arrangement falls into. (Yeung, 2012)

In most cases, the ***name of the arrangement*** does not act as a determinant for its legal value but rather, the ***terms and wording*** of the arrangement play a greater part. The first category, is where the parties have for all intents and purposes, finalized all the terms of their agreement and ***intend to be bound by it*** as soon as possible but will formalize those terms in a manner that is more precise (but not any different in effect). Such an arrangement will exist if it is clear that the parties intended it to be binding, with terms clear enough to be legally enforceable. If the parties expressly declare that the terms are ***'not-binding'*** or ***'subject to contract'***, the parties ***will usually not be bound***, unless concrete evidence to the contrary is visible; this includes constructing the heads of terms/memorandum of understanding with ***definitive contractual terms*** such as ***'agree'*** or ***'shall/must'***, instead of ***less binding terms*** such as ***'aim at'*** or ***'intend'***. If the agreement falls into this category with the former set of words incorporated into the agreement, then the parties involved will be bound by it even if no formal agreement at a later date is ever signed, and even if the agreement itself is only referred to as 'MoU' or 'heads of terms'. (Yeung, 2012)

In cases concerning the status of MoUs or Heads of Terms, the Court has referred to ***Article 12*** of the ***Special Relief Act*** while ruling judgement on the legal status of the document, declaring it to be binding or not. Such a case was Pak-Arab Fertilizers limited v. Dawood Hercules Corporation Limited, where the court held that the agreement for specific performance which entailed a Memorandum of Understanding was legally binding. The facts of the case were that the plaintiff (purchaser) sought to buy the entire shareholding

of the defendants. The defendants agreed and resultantly Memorandum of Understanding was executed and plaintiff also paid certain amount of money to the defendants. The defendants later on refused, returned the amount of money and said that the Memorandum of Understanding was not a pre-requisite in reaching to a conclusion that the agreement was made. Therefore, the plaintiff sued the defendants arguing that the Memorandum of Understanding was enforceable and hence the contract was established. This falls into the first category due to the court holding that while a MoU is not always binding, in this case since the ***content or wording*** of the MoU was such, and the ***intentions of both parties*** involved were in the affirmative, it was taken as a document on the basis of which further agreement could be made. The court held that the ***language*** of such a document described its status.

The case has also cited the excerpt from another case which says that:

"In such circumstances, where a document which is relied upon as a contract, contemplates the execution of another document, it is really a question of construction of the document whether the execution of the later document is a condition of the terms of the bargain or is merely an expression of desire on the part of the parties as to the manner in which the agreed transaction is to take place. If the execution of later contract is found to be a condition of the term of the bargain then no contract comes into existence until the later agreement is executed between the parties, but if the execution of the later agreement is held to be only an expression of desire on the part of the parties to state the manner in which the agreed transaction is to go through, then the non-execution of later document agreement may be ignored and the transaction as evidenced by the original document may be given effect of a binding contract."

Hence court declared that since MoU contains all the terms and conditions necessary for the agreement hence its binding nature cannot be overridden by any later agreement.

The second category refers to agreements where the parties may have agreed on the entire list of terms of their negotiated relationship and declared it to be altered only through mutual agreement, but have made performance of the terms contingent on ***signing a formal document.*** This category is relatively rare but the MoU signed between the Islamic Republic of Pakistan and the Hashemite Kingdom of Jordan for the export of mangos can be one such example; which states that the 'MoU may be amended or modified at any time, in writing, through mutual consent of the parties. This MoU shall ***enter into force*** on the ***date of this signature***' (Pakistan & Jordan 2008)

The third and last category includes arrangements where the ***agreement is not intend to be bound*** unless the formal contract is executed and the agreement itself will be composed of words such as ***'subject to contract'***, ***'non-binding***' or ***'subject to formal contract'***. This is found to be the most common category with agreements falling into this category being those that are often used to plan out the involved parties preliminary intentions with regards to the proposed future agreement and to aid in them in working out commercial details so that any preparation and finalization of any later formal development agreement rooted in those general terms can move forward smoothly. It is inherently also a sign of commitment by both parties to go along with the proposed project (even though it is not legally binding on them to do so). (Yeung, 2012) A case in point would be the MoU signed between Local Government and Community Development Department (LG & CDD) and M/S Urban Sector Planning and Management Services Unit (Pvt. Ltd) and Australian Sector of Excellence in Local Government (ACELG), which ***explicitly states*** that 'By signing this MoU ***neither party aims to enter into*** a legally binding relationship or to be bound by this MoU and the parties only ***intend*** for this MoU to provide a framework to outline their major activities' (Unit & For Local Government).

Furthermore, another case in point where the intention of the parties played a crucial role in deciding whether or not the MoU or Heads of Terms, was legally binding, is M. Saleem Sheikh v State Bank of Pakistan. The Banking Supervision Department noticed irregularities in the functioning of the bank based on a MoU signed between the employees' directors and a U.S based firm called Inter Link Equity Capital, where the directors were using their position for personal enrichment by negotiating sales of their own shares

at more than three times the price paid to other employees. The petitioner argued that though the MoU was not an enforceable contract, the ***intention*** of the directors with which they signed the MoU could not be overlooked and so circumstances had to be considered.

In conclusion, we would like to say that we have declared the statement given in the question to be Green, as in partly true only, because while if the words are sufficiently clear it might be enough to establish rights and obligations between the parties, whether the given provision is binding depends on the interpretation of the agreement; where in case of doubt, the courts will try to understand the parties' intentions based on the written agreement as a whole. The words or phrases expressly stated undoubtedly play a crucial role in determining the degree of how much the contract binds the two parties, hence we have not considered the statement False, but since other factors are also considered, we have not rendered it completely true either.

Word Count of Answer: 1350 Words

Word Count Including Qs/Works Cited: 1539 Words

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17020249 Alisha Sethi

19090073 Nehan Zehra

19090084 Rabia Zafar

Termination clauses

Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In Pakistan, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True			False	Can't say
	X			

Comment:

Parties to a contract are usually allowed to terminate the agreement that exists between them upon the occurrence of an event that is specifically stipulated in the Termination Clause of the said contract, no matter how trivial it may seem, if due process of termination is followed.

The **Contract Act of 1872** governs all agreements between companies. The terms and conditions provided in Sale of Goods and Loan Agreements also fall under its ambit. Specific conditions of the contract, however, are subject to the discretion of the individual parties. Which is why majority of the litigation that occurs with respect to the termination of these contracts is decided upon precedents of case law. Terminations are often contingent upon the occurrence of events specified within termination clauses. These events could include the breach of contract by one of the parties, breach of one of the terms of the contract and it may even be for convenience of both or one of the parties.

All scenarios that would permit termination have been agreed upon by both parties when they entered into the contract. The termination clause envisages these possibilities. In **Witribe LTD v. Telecard LTD (2010) CLD 500** where circumstances that could lead to either or both parties wanting to end the agreement were laid out over the subsections of clause 4.8 of the Joint Venture Agreement. Interestingly, the respondents could claim termination by relying on one subsection (4.8.2) and not another (4.8.3). This is because the basis on which subsection (4.8.2) was violated was clearly defined in the subsection (4.8.2) to be a violation i.e. if the closing date of the agreement was extended beyond 120 days, the contract would not hold. However, whether sub-section (4.8.3) was violated or not was not as clear. Sub-section (4.8.3) said that on ground of failure of PTA to issue the required permission for transfer of licenses agreement will be terminated. However, at no point did PTA refuse to transfer licenses; failure occurred due to disputes raised by the respondent with regards to the payment of the amount that was asked of it. If the sub-section (4.8.3) had listed down a price at which PTA were to issue approval for the transfer of licenses to claimant and they had not done so, sub-section (4.8.3) had also been sufficient grounds for valid termination. Therefore, every time the alleged act of violation of agreement defies defined criteria in the clause, the contract termination will stand. The violation of sub-section (4.8.3) in this case, could be as likely to be argued as the failure on part of the claimant because they did not agree to an amount and hence, led to the failure of PTA in issuing approval, as much as on part of PTA.

However the law may seldom interfere in such matters. From **Muhammad Yasin v. Pakistan Railways (2007) YLR 1659**, we learn that no matter the cause of termination, the only time the court concerned would deny termination is if the appropriate process (as stipulated by the termination clause) had not been followed by the terminating party. In the current case there was a clear breach of a vending license that would ordinarily result in an order to terminate as per clause 12(b) of the agreement. However the court found that since the other party in breach had not been notified of the action being taken to terminate the contract, that the termination would not be valid.

Mariam Ahmad

Nageen Rizwan

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In Pakistan, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True			False	Can't say
	X			

Comment:

In Pakistan, the exclusion clause falls under the purview of either Sales of Goods Act and when related to Consumers goods it falls under the Consumers Protection Act. Every province and the Capital, has its own Act which controls the limitation of liabilities that arises due to provision of unrequired or extra goods and/or services. The interesting point is that only two provinces, Punjab and Sindh, have updated their consumer protection act and included the part of exclusion clause in 2005 and 2015 respectively, whereas KPK, Baluchistan, and most surprisingly Capital, have not dealt with exclusion clauses by updating their Act. Furthermore, the companies are declared to be legal person who have the capability to form their own contract as per Companies Act, 2017.

Consumer is defined in the Punjab Consumers Act 2006 as:

"Consumer" means a person or entity who–

(i) Buys or obtains on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose; or

(ii) Hires any services for a consideration and includes any beneficiary of such services."[16]

Furthermore, according to the aforementioned Act, in the case of provision of faulty goods and services, the damages rendered by faulty goods and services are the responsibilities of supplier. Moreover, it deals with the exclusion clause with these words, "The liability of a person by virtue of this Part to a person who has suffered damage shall not be limited or excluded by the terms of any contract or by any notice."[17] It clarifies that one cannot contract out of liabilities in the case of a sale of goods contract.

As far as Exclusion form Implied conditions is concerned, Section 62 of the Sales of Good Act states:

"Exclusion of implied terms and conditions.---Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract."[18]

Taking above 2 acts in due consideration it can be held that if the transaction of the company involved a consumer able good, i.e. which is not going to be reused for commercial purposes again, then, in that case, the company cannot exclude its liability. However, if during the course of sale, there is any implied duty which is arising during the course of transaction and afterwards, it can be declared to be not binding by express provision in the contract. This needs to be agreed by both the parties with free consent. This rule was highlighted in the case of *Municipal Committee Lailpur v. Burma Shell Oil Storage and Distribution*

[16] The Punjab Consumers Protection(Ordinance) Act, 2005, Sec. 2
[17] The Punjab Consumers Protection(Ordinance) Act, 2005, Sec. 12
[18] The Sales of Goods Act, 1930, Sec. 62

Company Limited, where the issue regarded the implied exclusion clause inserted in the sale of petroleum. The court held that s.62 only provided for explicit cases which was absent in the issue at hand.[19]

Concluding all of the above, in the issue at hand, it can be safely stated that an exclusion clause of a company entering into transaction will be binding only in the case where it has been expressly mentioned in the contract and that still cannot apply to the consumer able goods.

Naam Pata

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The Pakistani courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Pakistani public policy and mandatory statutes.

True			False	Can't say
		X		

Comment:

In a contract of loan or sale of goods between two sophisticated companies, and both the companies being Pakistani companies and the contract between the two companies having Pakistani jurisdiction, the court cannot apply a foreign law. However, if even one of the companies is a foreign company and specifies in the

[19] Municipal committee Lailpur v. Burma shell oil storage and distribution company limited 1984 SCMR 80 Supreme Court

contract about having foreign jurisdiction, it can apply foreign law. In specific circumstances, court looks at the following things;

- **The arbitration clause**: Arbitration clause is a part of the contract which determines the method of arbitration both the parties agree upon.
- **Governing law:** The contract specifies the statues and acts which will apply to the particular contract. If both the companies in the contract are local Pakistani companies and have no connection with foreign jurisdiction then the contract of loan or sales of good which takes place between these companies is subject to Contract Act[20] and Sales of Goods Act[21] and the court will not apply any foreign law. In case of a contract between two multinational companies or a local company with an international company the contract will specify the law of one country and the law is generally that of the country the contract is taking place. However this is not a restriction.

If an international or multinational company goes into a contract with a Pakistani company and the governing law mentioned in the contract is a foreign law, then the court has a discretion to apply the foreign jurisdiction as far as it does not violate the public policy and mandatory statues of Pakistani law.

For example; if a foreign company wants to sign a contract of sale of goods with a Pakistani company and specifies US law as a governing law of the contract the court while taking a decision can apply or ask the arbitrator to apply the US law but if the good that is being sold is alcohol (as the US law does not illegalize the sale of alcohol) then Pakistani court will not apply a foreign jurisdiction as it violates the Pakistan public policy and alcohol is illegal in Pakistan.

Also as precedent in *Light Industries Ltd. Vs. Messrs ZSK*[22] the court dealt with the exclusive jurisdiction issue. The defendant appointed plaintiff as his agent exclusively representing the territory of Pakistan for the products manufactured by him. In terms of agreement, defendant was required to put at the disposal of the plaintiff the products needed to be sold. He was entitled to fixed commission on sale services and accessories. The plaintiff filed suit for recovery of his alleged commission which plaintiff is entitled to receive in terms of the contract between the plaintiff and the defendant. Justice Khilji Arif Hussain in Karachi High Court held that the clause (2) of the contract provided that contractual agreement was subject to German Law and clause (3) of the agency agreement specifically provided that for the fulfillment of all the obligations of the contract the exclusive jurisdiction is at Krefeld (Germany). The plaintiff was advised to approach for the adjudication of his claim before the court at Krefeld as the court having no knowledge of German law was unable to take a decision according to it.

Hence the court will apply a foreign law if and only if the contract has specified a foreign law in governing law clause and even such application will not contradict the mandatory statues and Pakistan public policy. If the contract has no connection with foreign law it cannot be applied.

Kainat Saeed (19090047)

Nubira Khan (19090028)

Foreign jurisdiction clauses

Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

[20] Contract Act 1872
[21] Sales of Good Act 1930
[22] Light Industries Ltd. Vs. Messrs ZSK STICKMASCHINEN GmbH 2007 CLD 1324

Q11 The Pakistani courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True			False	Can't say
	X			

Comment:

Pursuant to Section 28 of the Contract Act, 1872, Contracts which curtail parties from enforcing their rights by way of usual legal proceedings are void to that extent. An exception to this exists in cases where parties agree to settle disputes among themselves by way of arbitration. The judiciary in Pakistan has held that Contracts which include foreign jurisdiction clauses are covered within that exception. The primary authority on this is the *M. A. Chowdhru v. Mitsui O.S.K Lines Ltd* (PLD 1970 SC 373) case in which the Supreme Court decided to stay the proceedings of a suit filed by the Plaintiff on grounds of a foreign jurisdiction clause. In the case of *Sajid Plastic Factory v. MSC Bahamas* (PLD 2017 Sindh 396), the Sindh High Court ruled in the same way relying on the *Mitsui* case. In the *Sajid Plastic Factory* case, the evidence was partially in Pakistan and partially in the Bahamas. Despite this, the Sindh High Court stayed the proceedings on grounds of a foreign jurisdiction clause in the agreement between the parties in favor of the English courts. However, in such cases, Pakistani Courts will not, per the ruling in the *Sajid Plastic Factory* and *Mitsui* cases, completely defer to the jurisdictions of foreign cases by returning the Plaint. Instead, the proceedings will only be stayed by the courts. Furthermore, the Courts would decide to stay proceedings before themselves on grounds of foreign jurisdiction clauses based on the circumstances of the case before them. This means that a party may resist an application to stay proceedings.

As a result, it can be concluded that Pakistani courts will generally uphold foreign jurisdiction clauses, but may not do so if parties are able to successfully resist an application to stay proceedings.

Arbitration recognition

Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In Pakistan, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Pakistani courts.

True			False	Can't say
	X			

Comment:

In Pakistan, arbitration is governed by the Arbitration Act 1940, which deals with domestic arbitration. Foreign arbitration however, was introduced in the Arbitration (Protocol & Convention) Act, 1937, which

was based on The Hague Convention. Article 4(1) of this Act states that "a foreign award shall, subject to the provisions of this Act, be enforceable in Pakistan"[23], while Article 4(2) further states that "any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made" [24]. Pakistan also signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention. This Convention laid out rules concerning the recognition, acceptance, and enforcement of awards made "in the territory of a State other than the State where the recognition and enforcement of such awards are sought"[25].

However, Pakistan failed to ratify the Convention or incorporate it until 2005, when it was enforced through a Presidential Ordinance that would automatically lapse at the end of each four-month period. This Ordinance was then re-promulgated several times between 2005 and 2011 before it was officially passed by the Parliament as the Recognition and Enforcement (Arbitration Agreements and Foreign Awards) Act of 2011, replacing the now repealed Arbitration (Protocol and Convention) Act of 1937. This Act recognized and enforced the principles laid out in the New York Convention of 1937. As per section 6 of this Act, "unless the Court, pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognize and enforce the award in the same manner as a judgment or order of a court in Pakistan"[26]. Section 7 then states that these refusals would be made "in accordance with Article V of the (New York) Convention".

The history and current status of the legislation governing arbitration in Pakistan clearly shows that the Pakistani Courts are generally accepting of any foreign arbitral award. This has been reflected in various judgments arising from the Pakistani judiciary, many of which show a high degree of deference accorded to arbitration clauses in general and foreign arbitration clauses in particular. As Justice Ajmal Mian wrote in his concurring opinion in the 1993 Supreme Court case, *Eckhardt and Co. GmbH vs. Muhammad Hanif*:

> I may observe that while dealing with...foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honored… The rule that the Court should not lightly release the parties from their bargain, that follows from the sanctity which the Court attaches to contracts, must be applied with more vigour to a contract containing a foreign arbitration clause[27].

Despite this general adherence to enforcing and recognizing foreign arbitral awards, there have been several high profile cases in which the Pakistani Courts have made highly criticized decisions to intervene in the process and refuse foreign arbitral awards. One such case was *Hub Power Company Ltd. vs. Pakistan WAPDA*. The majority opinion in this case observed that the allegations of corruption, if proven to be true, would render the contract documents between the two parties to be void. However, international criticism levied at this judgement focused on how the arbitration agreement itself had not been violated, and not been subjected to any allegations of corruption or bribery. Critics also noted that the only proper time for the Courts to intervene would have been upon receiving a foreign award for the purposes of recognition or enforcement.

Keeping the above mentioned legislation and judicial precedent in mind, it can be stated that two contracting parties may generally be able to submit contract disputes to a foreign arbitral tribunal, provided that such an arbitral agreement already exists either as a clause in the contract or as a separate ancillary agreement. However, it cannot be claimed that these disputes can be submitted to a foreign arbitral tribunal to the exclusion of the Pakistani Courts. Any and all foreign tribunal awards must be recognized and enforced by the Pakistani Courts, as per the New York Convention and the Recognition and Enforcement (Arbitration Agreements and Foreign Awards) Act of 2011. In these cases, the Courts for the most part respect and

[23] The Arbitration (Protocol and Convention) Act, 1937. Article 4(1) <http://www.wipo.int/edocs/lexdocs/laws/en/pk/pk065en.pdf>
[24] The Arbitration (Protocol and Convention) Act, 1937. Article 4(2) <http://www.wipo.int/edocs/lexdocs/laws/en/pk/pk065en.pdf>
[25] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards <http://www.newyorkconvention.org/english>
[26] Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011. Section 6. <http://www.na.gov.pk/uploads/documents/1311664767_452.pdf>
[27] *Eckhardt & Co. GmbH vs. Muhammad Hanif* (1993) PLD SC 42, 52.

uphold these awards that have been made. However, in certain circumstances, they may refuse to enforce these awards, as is what happened in several high profile cases including *Hub Power Company Ltd. vs. Pakistan WAPDA* and *SGS Societe Generate de Surveillance S.A. v. Islamic Republic of Pakistan.*

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Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In Pakistan, class actions where the class is bound if they do not opt out are generally not allowed.

True			False	Can't say
		X		

Comment:

Class action lawsuits refer to the particular category of lawsuits where one class of people is aggrieved by another party and the aggrieved party, having similar interests or having undergone similar harm, bring forth a lawsuit as a single group or class. This group or class is represented by a particular person who sues the party that has caused harm to this group. The defendant or defendants are held jointly, severally or jointly and severally liable. Any person who has been harmed can join the suit. These suits are publicly announced to increase awareness about the lawsuit so people can join the suit and bring their claims to the court. Usually, in many jurisdictions people are allowed to opt out because either they have no interest in the lawsuit or they want to file a separate claim in the court. In Pakistan, class action suits are called "Representative suits". If there is a large number of people who have a similar claim, they may join together as plaintiffs. This would represent the entire class of people and the court would deal with them as one. This allows for quick adjudication to a large class of people with similar interest in a single suit.

This is governed, in Pakistan, by Civil Procedure code 1908 (CPC) Order I. Order I Rule 1 states,

"All persons may be joined in one suit as defendants where— (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and (b) if separate suits were brought against such persons, any common question of law or fact would arise."

Similarly, defendants can be joined together under Order I of CPC for similar acts or transactions that might have given rise to common question of fact or law. Rule 6 allows for plaintiffs to join together on similar contracts. CPC Order I Rule 8 states that, any persons who are interested in suing can come together and elect a member to sue or be sued on behalf of others with the permission of the court and can publicly advertise in newspapers to gain more participation. The Supreme Court in *Raja Ali Shan v. Messrs Essem Hotels Limited and others*[28] laid down the conditions for filing a representative suit; that the people who are filing suit should be numerous, they all must have the same interest in the suit, they must have the permission of the court under CPC Order I Rule 8, and notice should be given to all people that

[28] *Raja Ali Shan v. Messrs Essem Hotels Limited,* 2007 SCMR 741.

it seeks to represent. The same was also affirmed by the Peshawar High Court in *Mian Said Hakim v. Abdar Khan*[29]. Any person can opt in a suit if the court deems fit that said person will be allowed to join the suit as plaintiff or defendant. Opting in a suit is allowed in Pakistan if a party has common ground to sue either as plaintiff or be sued as defendant.

Opting out of a law suit is allowed if there is an application for misjoinder but can only happen if the person claims misjoinder as soon as it comes to his attention. If the person does not claim misjoinder, the court assumes that he has waived that right. A member from the group can also drop the suit before the judgment is reached as per Order XXIII Rule I of the CPC, titled 'withdrawal of suit by plaintiff'. The court can join several suits together if they are deemed to constitute the same issue and consequently issue notice to the parties involved. The representative suit is not mandatory and a party can pursue the case independently even if that party has common interest with others. The only time the members of the group cannot opt out is after the judgement is given by the court.

Muhammad Abdullah, Mohammad Khan

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In Pakistan nationals and local corporations are entitled to own land absolutely.

True			False	Can't say
X				

Comment:

Article 23 of the Constitution of Pakistan states that every person has the right to acquire, hold and dispose of property in any part of Pakistan subject to restrictions placed.

[29] *Mian Said Hakim v. Abdar Khan, 2017 YLR 107 Pesh.*

As per the General Clauses Act, a property can be divided into two categories, immovable property and movable property. The immovable property includes land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. [30] Hence, land comes under the definition of property.

Therefore, unless an explicit restriction has been imposed by law, every citizen has an absolute right to own and sell land in Pakistan. The absolute right to own and sell a land under Article 23, however, is limited to citizens and not corporate entities.

Furthermore, Section 5 of Transfer of Property Act 1882, lays down the provisions regarding transfer of ownership of a property. It defines Transfer of Property as an act in which a living person or a person on behalf of someone, conveys property, in present or in future, to one or more other living persons, or to himself. The act explicitly states that a living person includes incorporated companies.

Moreover, Section 7 of the same Act grants every person competent to contract and entitled to transferable property, the right to transfer property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Hence, the Pakistani Laws grant citizens explicitly an absolute right to own and sell land under Article 23 of the Constitution. Although this right is not extended to corporations however there are no explicit restrictions on the rights of incorporations to absolutely sale or purchase land. Moreover, Section 5 of the Transfer of Property Act allows both citizens and corporations to transfer property and there are no restrictions on the transfer of absolute rights of ownership.

Therefore, citizens and local corporations, who are competent to contract, have the right to own and sell land absolutely within Pakistan unless explicitly prohibited by law.

Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in Pakistan is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True			False	Can't say
	X			

Comment:

Our statement claims that most land in Pakistan is registered in a "land register" which records most major interest in land. These include ownership, mortgages, and longer-term leases amongst other things. This

[30] Section 3, General Clauses Act 1897.

claim, in our opinion, is partly true, i.e. green on the spectrum. Land records are kept not simply to identify owners, but for taxpaying purposes, too. Every province has its very own Land Revenue Act that asks for the creation of the Record of Rights, for instance section 39 of the Sindh Land Revenue Act, 1967.

It is material to note that the above claim refers to "immovable property" rather than moveable property. According to **the Registration Act, 1908**, immovable property consists of land and buildings, benefits to be derived out of land and things attached to the earth, or permanently fastened to anything attached to the earth, hereditary allowances, rights to ways, lights, ferries and fisheries. Immovable property does not, however, include, standing timber, crops or grass, fruit upon trees, or machinery that is embedded in or attached to the earth when it is dealt with apart from the land.

Generally, a proper land record is essential for tax paying purposes and to record private ownerships (as mentioned above). In order to do this, a detailed survey of the lands to know the exact detail of land belonging to each owner of land in each village is required. This includes details such as how much land is cultivatable, how much is not, and how much is held for the common purposes of the village. Keeping in view these requirements, a comprehensive Record of Rights is prepared in Pakistan after carrying out a Settlement Operation of the land after every 25 years. Moreover, a Jama Bandi is prepared every 4 years, and a Register of Mutations is maintained as well that accounts for any changes in the ownership of land between the preparation of an existing and new Jama Bandi. According to Section 30 of the Punjab Land Revenue Rules, 1968, there are a number of documents that are a part of the Record of Rights, some of which have been mentioned at the bottom of this page.[31]

The very basis of a Record of Rights is the "Settlement Operation". This is a vast operation that is carried out by top officials by mapping out various plots of lands in a number of villages to establish peoples' rights pertaining to land, and to access and apportion the total land revenue in the villages. In practice, however, according to a **UN Habitat Guide**, most areas in Pakistan are subject to the Settlement Operation but some areas are unsettled, and, in these areas, the land administration is not very regular.

While in theory, a Record of Rights is prepared with an aim to record most major interests in land, in practice, this is subject to a number of problems and inaccuracies. For example, according to the Transfer of Property Act, 1882, an oral or a verbal agreement can be made for the transfer of land to take place. Sometimes, though, no transfer process is followed and this creates complications if a party to the transaction departs from the commitment. This is evidence of the fact that interests in land (transfers, in this case) may not always be recorded.

Furthermore, some transfers of land have to be registered under the Registration Act, 1908, whereas others do not, again lending room to the fact most land interests may not always be recorded. Moreover, documenting of rural land transfers is not compulsory in Pakistan.

Another problem that occurs is that the Registration Act, 1908, envisages the registration of documents and not the registration of titles. A registrar recording a transaction merely records it and does not guarantee its validity. Additionally, Rule 135 of the Registration Rules, 1929, affirms the aforementioned by establishing that it is not the concern of a registrar to guarantee validity of titles. Furthermore, courts in Pakistan maintain that registration of documents do not ensure title but only serve as evidence of a title, which can be considered and scrutinized in court.

In addition, Pakistani Law recognizes that a person mentioned in the Record of Rights may not be the actual owner of the land. The property may well have been purchased by one person, known as the *benamidar,* in the name of the owner on record, the *benami*.

A final problem regarding the land records in Pakistan relates to their accessibility. Whilst land records have now been computerized in Punjab, as per the efforts of the Punjab Land Records Authority (PLRA)

[31] Preliminary Proceeding (Form II), Genealogical Tree (Form III), Index Survey (Form IV), Alphabetical Index of Owners (Form V), Haqdaran Nakhlistan (Form VIII), Statement of Rights (Form IX).

established by Board of Revenue via the Government of Punjab. The same, however, cannot be said for other provinces where most land records are hand written and manually maintained by *Patwaris*. This is particularly true for land records pertaining to rural areas and villages.

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Land development restrictions

Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In Pakistan, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True			False	Can't say
		X		

Comment:

In Pakistan, The Land Acquisition Act, 1894 (hereinafter; The Act, 1894) principally governs the use of land and its commercial development. Part VII of the said statute lays down provisions pertaining to the use of land by companies and Article 40 of the same asserts that consent for the use of land by a company can only be acquired if the Executive District Officer Revenue is satisfied that that Company "…is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose." This Article was upheld in *Chiniot Co-operative Housing Society Ltd. v. Government of Punjab*[32] in which preference was given to, the existing public purpose the land was to be used for rather than using it for a new scheme, in the following words, "Land, already having been arranged for residential purposes, could not be taken back to the disadvantage of such needy people to accommodate the members of LDA [Lahore Development Authority] scheme."

[32] 2016 PLD 293 Lahore High Court Lahore

Furthermore, Article 41 of The Act, 1894 states that on the contentment of the Executive District Officer Revenue that the acquired land is indeed to be used for the purposes listed in Article 40 the Company is to enter into an agreement with the Provincial Government. In accordance with this Agreement the Company is to provide the Provincial Government with details relating to "the transfer… of the land to the Company" and "the terms on which the land shall be held by the Company" amongst other things. Thus, a closer look at the Articles discussed in the preceding paragraphs highlights the extensive control exercised by the government concerning the use of land and its acquisition by companies.

Moreover, while The Land Acquisition Act, 1894 provides a general overview of the commercial use of land a glance at provincial statutes is essential to fully understand the use of land and its commercialization in Pakistan. To this end the Punjab Land Use Rules, 2009 (hereinafter; 2009, Rules) are considered. Rule 1 provides that the City District Government or Tehsil Municipal Administration classify lands into different categories and decide which lands are to be used commercially. In furtherance of this, Rule 17 of the 2009, Rules states that when land cannot be classified due to any ambiguity the matter of classification is referred to the Government. Moreover, Rule 8 provides a list of valid uses of commercial areas including the construction of office spaces and multi-storey buildings. In addition to this, Rule 18 asserts that permission for a permissible use of land is only granted once the District Planning and Design Committee approves such a use.

The 2009, Rules also levy a fee for the "conversion of land use" under Rule 60. According to this rule a 5% fee is charged on land, which is worth less than one million rupees and 20% when the land is worth more than ten million rupees and is being converted to commercial use.

The Rules and Articles provided above show that while permits for the commercial use of land may be obtained easily subject to a nominal conversion fee the Provincial Government reserves extensive power and control over the use of land. This is reflected by the rules laid down in the 2009, Rules which range from defining uses of land to asserting that even valid and permissible uses of land have to be approved by the District Planning and Design Committee before implementation. This indicates that matters pertaining to the use of land, commercial and otherwise in Pakistan are predominantly controlled and governed by statutes. That is, even if permits are cheap and easy to obtain they cannot be acquired without scrutiny and approval of the relevant authorities.

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Other indicators

Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Q17 In Pakistan, there are few controls on hiring and firing employees or on the terms of employment.

True			False	Can't say
			X	

Comment:

There is a plethora of legislation governing hiring, firing and employment terms in Pakistan. Previously, labour laws were a federal subject, but after the 18th Amendment, they fall within the ambit of the provinces.[33]

The major legislations governing labour laws in Pakistan are:

a) The Industrial and Commercial Employment Standing Order Ordinance, 1968, hereinafter mentioned as "1968 Ordinance."

b) Workmen's Compensation Act, 1923

c) Minimum Wage Ordinance, 1961

d) Punjab Industrial Relations Act, 2010

e) Punjab Shops and Establishments Ordinance 1969

The laws in Pakistan classify workers into various categories such as permanent employees, apprentices, probationaries, etc. and employees are awarded different protections in employment depending on their status.

The 1968 Ordinance lays down terms governing the hiring of employees and applies to commercial and industrial establishments with more than 20 workers. Workplaces with less than 20 employees are regulated by a master-servant relationship as ruled by the courts in Muhammad Rasheed v H. Ohashi Chief.[34]

With regards to hiring, the law states that the terms and conditions of services are to be given in writing. Whereas, in relation to firing, the law identifies that terminations can either be based on the employees' misconduct or for reasons other than that. For terminations without misconduct, the employer is bound by law to explicitly provide a reason, a notice of a month prior to termination as well as one month's wage in lieu of notice to the employee. Moreover, this law also states that in cases of retrenchment, the last employees hired shall be the first to go. If a worker feels he/she is aggrieved, he/she can challenge the termination under Punjab Industrial Relations Act 2010.

However, for terminations due to misconduct of the employee, different conditions apply. As defined in the 1968 Ordinance, misconduct can include theft, fraud, go-slow, habitual tardiness etc. The statute states that an employer must give an explicit reasoning for termination in writing within one month of the occurrence of misconduct; however, the employer is not bound to pay any compensation.[35]

In addition to the hiring and firing of employees, different statutes also regulate other terms of employment. The 1968 Ordinance governs the terms of employment of commercial and business establishments. It mentions that workers are entitled to different kinds of leaves such as annual leave, sick leave and festival

[33] Government of Pakistan, '18th Amendment, Constitution of Pakistan' (2009).
[34] Muhammad Rasheed v H. Ohashi Chief, 2016 PLC 147.
[35] Iftikhar Ahmad, 'Labour And Employment Law: A Profile On Pakistan'.

leave. It also grants workers the right to be insured against death and injuries as well as entitlement to bonus. Likewise, The Factories Act, 1934 lays down terms of employment for factory workers. Similarly, the Workmen's Compensation Act, 1923 also governs the employer's liability in case of injury in the course of employment. In addition, the Punjab Shops and Establishments Ordinance also contains provisions relating to terms of employment such as hours and conditions of work of employees in shops and commercial, industrial and other establishments. They provide employees with the right to leave and govern matters regarding wage such as the right to double the amount of ordinary wage in case of working overtime. Moreover, the Minimum Wage Ordinance, 1961 regulates the minimum wage for employees of different industries. It also prescribes punishments for employers who fail to comply with the provisions of this law.

Punjab Industrial Relations Act, 2010 also governs matters relating to creation of Trade Unions and relations between workmen and employers. Additionally, it deals with unfair labour practices such as discrimination, or compulsion to join or not join trade unions.

It is untrue to state that Pakistan has few controls pertaining to hiring and firing or terms of employment. Different statutes provide comprehensive regulations that employers are mandated to adhere to in their daily practices. Moreover, detailed procedures and requirements are present for both hiring and firing of employees, dealing with both, occasions of misconduct and otherwise. The law also grants different statutory rights such as the right to leave, right to double the amount of ordinary wage in overtime work, right to insurance etc. to employees within their contracted terms. Thus, Pakistan has extensive laws in Pakistan covering the aspects of hiring, firing and employment terms.

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Environmental restrictions

Q18 In Pakistan the rules governing the environment and liability for clean-up are very light and relaxed.

True			False	Can't say
	X			

Comment:

Pakistan is in the belt of developing countries that require a significant amount of technological advancements in order to stimulate and sustain growth. Different on-going projects are taking place, with many more planned in the coming years. The government has been inclined towards promoting urbanization; sprawling industrial ventures in the last couple of decades. This mission of development on the other hand has damaged the environment to a great extent. The cutting down of trees, closure of canals, spread of poisonous gases in the urban areas, and placement of brick kilns as well as chemical pipes in rural vicinities, have polluted the country at a massive scale. As aforementioned the government has kept its eyes closed on this issue under the label of 'need for development', which has had its trickle-down effect on the judiciary as well. Different issues regarding the degradation of environment have been brought up over the years, in which judges have had a mixed opinion regarding the unrest caused by urbanization and technology-oriented programs.

The environment has a direct impact on the health and well-being of an individual, and it is the state's responsibility to ensure that every citizen enjoys a healthy lifestyle. The section 9 of the constitution of Pakistan 1973[36] states;

"No person shall be deprived of life or liberty save in accordance with law"

The constitution itself safeguards the public from exposure to hazardous and injurious conditions, which could adversely affect them. Pollution, thus, is said to be an issue of 'public interest litigation' and can be challenged under article 184(3) of the Supreme Court. Notwithstanding this clause, over the years, the national assembly as well as the provincial has formulated various other statues, laws and ordinances.

i. Pakistan Environmental Protection Act, 1997

ii. The Sindh Environmental Protection Act, 2014

iii. The Punjab Environmental Protection Act, 1997

iv. The Balochistan Environmental Protection Act, 2012

v. The Khyber Pakhtunkhwa Environmental Protection Act, 2014

Throughout the years, different law-making bodies have chartered rules and regulations in order to protect the environment, fulfilling the need of laws for every case and condition. Other dictums such as Pakistan Environmental Protection Ordinance 1983, National Conservation Strategy 1992 and National Environmental Action Plan 2001 have been brought into writing but their implementation have been under serious question. Courts have tried to find middle grounds or have shown suppleness while applying these laws, which have adversely pertained the mere cause of forming these laws. Enough to say is that there is no need for new laws but the need for the application of the existing laws does remain.

To determine whether the above-mentioned environmental laws in Pakistan are flexible, we can assess the claim with respect to case law, as the final implementations of the law lie in the hands of the judicial system. In the popular case of Lahore Development Authority v. Ms. Imrana Tiwana (2015)[37], LDA challenged the decision of the Lahore High Court with respect to their project of "the Signal Free Corridor Project". The Project involved constructing two underpasses and 7 U-turns and 5 overhead pedestrian bridges in the respective parts of Lahore. However, their construction involved the cutting down of a large number of trees which would impact the environment adversely. In the ruling the Supreme Court overturned the decision of the High Court, and went in favour of urban development.

In the landmark case of Ms. Shehla Zia v. WAPDA[38], PLD 1994 SC 693, the court had to decide between the construction of a high-voltage station grid for developmental purposes or the protection of the residents health that was under probable risk. However, even though the courts did not give a "definitive" ruling in their judgment, their propositions to set up a commission to take precautionary measures and find alternative locations can be perceived as consent towards the development of the grid. The courts here did not seem to entirely neglect the environmental risks associated with the construction of the grid but merely cushioned the risk of probable harm.

In Ali Steel Industry v. Government of Khyber Pakhtunkhwa, 2016[39] the petitioner's mill was involved in the processing of iron and scrape, which used a large transformer for its furnace. The transformer later exploded, which caused mass worker casualties. The residents of the vicinity also complained that the constructed mill was in a densely populated residential area which polluted the environment and posed threats to the health and lives of the people. However, the court in Khyber Pakhtunkhwa upheld the environmental laws protecting and ensuring the quality of life of all citizens in the vicinity.

[36] (The Constitution of The Islamic Republic of Pakistan 222)
[37] (*Lahore Development Authority V Ms. Imrana Tiwana*)
[38] (*Ms. Shehla Zia V WAPDA*)
[39] (*Ali Steel Industries V Government Of Khyber Pakhtunkhwa*)

Lastly, in another case, Lahore Bachao Tehrik v. Dr. Iqbal Muhammad Chauhan[40], the Supreme Court of Pakistan again ruled in favour of urbanization. The case involved the widening of the road at Canal Bank, which would entail the cutting down of trees on the sides of the canal as well as the green belt area of Lahore. These would have serious repercussions with respect to the environment. However, the Court held that the cutting of trees would be of no hazard but to disallow the widening would be of public inconvenience due to congestion costs.

Overall, majority courts show a very clear inclination of being supportive of urbanization and development even if it is at the cost of the environment. However, they try and balance out the rights of the citizens and the environmental issues by ordering the set-up of commissions, or for the government to take certain measures to protect the environment. This at times amounts to a simple "sugar coating" of the issue, whereas in reality their goal is towards urbanization and development of the country. Therefore, the claim that in Pakistan the rules governing the environment and liability for clean-up are light and relaxed is true to a great extent.

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Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In Pakistan foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.

True			False	Can't say
X				

Comment:

Yes, in Pakistan foreigner are allowed to own and control local companies as stated in the Companies Act, 2017 and also the Foreign Private Investment (Promotion & Protection) Act 1976, section 3 states;

[40] (*Lahore Bachao Tehrik V Dr. Muhammad Iqbal Chauhan*)

"The Federal Government may, consistent with the national interest, for the promotion of foreign private investment, authorise such investment in any industrial undertaking:

Which does not exist in Pakistan and the establishment of which, in the opinion of the Federal Government is desirable; or which is not being carried on in Pakistan on a scale adequate to the economic and social needs

of the country; or which will contribute to;

Resources of Pakistan; The discovery, mobilisation or better utilisation of the national resources; the strengthening of the balance of payments of Pakistan; The economic development of the country in any other manner."

Furthermore according to the Investment Policy 2013, except four types of industries including Arms and ammunition; High explosive; Radio-Active Substances; Security Printing, Currency and Mint and manufacturing of alcohol except for the industrial alcohol, foreigners are permitted to own and operate companies in Pakistan.

Previously there was minimum investment requirement, of USD 150,000, but to attract foreign investment, in Investment Policy 2013, this amount is no longer applicable. Moreover, in this policy, foreign equity up to 100% is allowed and it also ensures equal treatment of foreign and local investors. Relating to the taxes, the current requirement of taxation is set at 35% of the net income. However, Pakistan has signed double taxation treaties with 52 other countries which permit foreign investors to have the freedom of claiming the tax credit in their country of origin concerning the corporate taxes paid in Pakistan.

As per SECP Instruction No.4 of 2011, if a particular company has foreign shareholders then it is essential to obtain an NOC (no objection certificate) to incorporate the company. However, this was causing inconveniences in the administrational procedures as it took up a lot of time to get through this process. Therefore, the Pakistan Board of Investment had altered the rule in which they issue foreigner directors a Certificate of Incorporation to operate their businesses without any such delays on the condition that if their security clearance does not go through they will be replaced by others. This is an explicit portrayal of the support provided by the local authorities to encourage foreign investments by reducing the delays and increasing administrational efficiency to its utmost.

In short, according to the Companies Act, 2017, foreign investment policy 2013, Pakistan board of investment and Security Exchange Commission Pakistan, foreigners are highly encouraged to invest in Pakistani industries by providing them certain incentives. Thus, foreigners can own and control local companies outside protected industries like media, defence and banks.

Amnah Liaqat

Daniyal Anwer

Ahmad Noshad

Exchange controls

Q20 In Pakistan, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True			False	Can't say
		X		

Comment:

As per our research we will rate this question as yellow as this is partly false. There is an act which was passed by legislation is known as "Foreign exchange regulation act 1947". Therefore it is completely false to say that Pakistan has no exchange controls. However this question is not completely false as there are some exceptions which will be elaborated later on.

In order to answer this question there are two essential definitions which need to be discussed. These are foreign currency and foreign exchange. Foreign exchange regulation act 1947 provides interpretation in article 2 for both of these terms. "Foreign currency means any currency other than Pakistani currency" and "Foreign exchange means foreign currency and includes any instrument drawn, accepted, made or issued under clause (8) of section 17 of the State Bank of Pakistan Act, 1956, all deposits, credits and balance payable in any foreign currency, and any drafts, traveller's cheques, letters of credit and bills of exchange, expressed or drawn in Pakistan currency but payable in any foreign currency;".

The act does not explicitly say that business can have foreign bank deposits accounts in foreign currency however article 1 clearly states that "authorized dealers can, without prior approval from state bank, open foreign currency accounts with them of the followings:

a) Pakistan Nationals resident in or outside Pakistan, including those having a dual nationality.

b) All foreign nationals, whether residing abroad or in Pakistan.

c) Joint Account in the names of residents and non-residents.

d) All diplomatic missions accredited to Pakistan, and their Diplomatic Officers.

e) All International Organizations in Pakistan.

f) Firms and companies established/incorporated and functioning in Pakistan, including those having foreign share-holdings except as outlined in sub-para (v) below.

g) Charitable Trusts, Foundations etc. which are exempted from income tax.

h) Branches of foreign firms and companies in Pakistan.

i) Non-resident Exchange Companies even if owned by a bank or financial institution.

j) All foreign firms/corporations, other than banks and financial institutions owned by Banks, incorporated and operating abroad provided these are owned by persons who are otherwise eligible to open foreign currency accounts."

Article 4 states "As an exception to the rules set out in paragraph 1(i) to (j) of this chapter, Authorized Dealers can accept foreign currency deposits from their overseas branches and foreign banks operating abroad, including financial institutions owned by them, provided the amount and period of maturity of such deposits is not less than those prescribed from time to time". Now if we look at (f), it says that firm and companies established or incorporated and functioning within in Pakistan including those who have foreign shareholding except outlined in para (v) can open a foreign currency account with authorized dealer. Therefore businesses may have foreign bank deposit accounts in foreign currency.

In accordance to article 5 businesses cannot borrow in foreign currency until and unless they are given approval from state bank. Article 5 states "(1) Save as may be provided in and in accordance with any

general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the State Bank, no person in, or resident in, Pakistan shall—

(a) make any payment to or for the credit of any person resident outside Pakistan;

(b) draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person resident outside Pakistan;

(c) make any payment to or for the credit of any person by order or on behalf of any person resident outside Pakistan;

(d) place any sum to the credit of any person resident outside Pakistan;

(e) make any payment to or for the credit of any person as consideration for or in association with—

  (i) the receipt by any person of a payment or the acquisition by any person of property outside Pakistan;

  (ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside Pakistan;

(f) draw, issue or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person as consideration for or in association with any matter referred to in clause (e).

Businesses may repatriate profits to foreign shareholders in foreign currency however there are certain requirements which need to be fulfilled. Article 16 states that "Authorized Dealers may allow remittance of dividends to non-resident shareholders without the prior approval of the State Bank. For this purpose, each company will designate an Authorized Dealer through whom it proposes to remit dividends to its non-resident shareholders. No Authorized Dealer will effect remittance of dividends under this authority unless it has been authorized by the State Bank to do so in respect of a particular company". Therefore businesses can repatriate profits/dividends to their foreign shareholders through an authorized dealer without prior approval or permission from state bank. However they need to advise the Director, Exchange Policy Department (Investment Division), State Bank of Pakistan, Karachi name of the bank in order to avail the option of no prior approval. Given that if all the clauses stated in article 16 are met, businesses can send back profits/dividends to their foreign shareholders.

Mahwish Naqvi 17020109

Syed Haider Hassan 19090027

Zeinab Choudhry 17020092

Alien ownership of land

Q21 In Pakistan, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True			False	Can't say
	X			

Comment:

The Companies Act, 2017 provides guidance upon this matter. Part XIV of the ordinance gives the procedure for foreign-controlled firms to operate in Pakistan. This part of the Act contains provisions as to establishment of places of business in Pakistan for the companies that are foreign based. The sections under this part of the Act do point towards requirement of registering the company with relevant authorities but there is no mention of acquiring a permit In order to acquire and operate property in Pakistan.

Section 434 of the Companies' Act, 2017 lays out the scope of the Act with regard to the foreign-controlled companies' activities regarding purchase and operations of property in Pakistan. Section 435 of the same Act lays out the entire procedure for foreign based companies to register themselves with the authorities in the country so that they are able to indulge in the process of purchasing or leasing a certain property.

The article makes it really clear that any foreign controlled company that wishes to operate in Pakistan does not need any special permit in order to make purchases regarding property. Only requirement is registering the company with authorities through a proper procedure mentioned in Section 436. Section 441 also implies that legal standing of a company is not affected by not complying with 435 and436. The company can still make contracts with other parties in Pakistan even if they have not completed all the requirements of registration process. This clause implies that there are no special provisions regarding foreign controlled companies which make their operations in Pakistan any different form the local companies and local persons, they are dealt in a similar way as the locals are in the eye of Pakistani law.

The only prohibitions or limitations that are placed on foreign controlled companies' operations in Pakistan are limited to specific sectors like defence, broadcasting and telecom sector. If a foreign investor comes to Pakistan and wishes to invest in above mentioned sectors than they are required to acquire permits. A recent example of such activity was when licenses for 3G services were issued in Pakistan. All the foreign controlled companies who already had the technology and were already providing services in other countries, were still required to acquire the license before they could introduce the service in Pakistan.

Asad Shabbir

Talha Sharif

Mian Ahmad Farooq

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In Pakistan, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True			False	Can't say
	X			

Comment:

The mere perusal of laws in Pakistan gives the impression of the equal treatment of the local and foreign interests. Following are some laws providing equal treatment:

1. The sections 8 and 9 of 'Foreign Private Investment (Promotion and Protection) Act, 1976'[41] provide for immunity against double taxation and equal treatment of industrial undertakings having foreign private investment and industrial undertakings having no such investment respectively.

2. 'The Protection of Economic Reforms Act 1992'[42], gives equal immunity to the foreign industrial or commercial enterprise established or owned in any form by a foreign or Pakistani investor from compulsorily acquisition by the government.

3. The preamble of 'The Board of Investment Ordinance, 2001'[43] provides for the establishment of the board of investment as an apex agency to promote, encourage and facilitate both local and foreign investment. It ensures equal treatment of both local and foreign investors by providing equal investment opportunities for each.

A fair example of equal treatment of foreign business by higher courts of Pakistan can be found in *Ch. Muhammad Younis v. The Islamic Republic of Pakistan*. In this case the highest bid was offered by a foreign bank and the petitioner offered second highest bid. Petitioner argued that the bank is a foreign bank so the bid shouldn't be awarded to it, but on the contrary, to the petitioner as he was a citizen of Pakistan. However, the court held that a foreign entity can only be debarred if he belongs to a country that is inimical to Pakistan, which was not the case. Therefore, the foreign bank was awarded the bid which is a fair example of equal treatment of foreign big business by a higher court of Pakistan.

Despite all these guarantees of fair treatment as awarded by the above mentioned laws, there is a continuous decline in the Foreign Direct Investment (FDI) in the recent years. The impartial treatment of foreign businesses by the higher courts of Pakistan is a major element leading to this decline of investment. Recent example of this unequal treatment can be found in *Rekodiq* case[44], in which Supreme Court of Pakistan held that the joint venture (agreement) signed by the respondent company Tethyan Copper Company (TCC) and Government of Baluchistan was illegal. Based on this, the Supreme Court didn't allow for arbitration as decided by the parties in their agreement. Owing to this decision, the government of Baluchistan succeeded in saving itself from the arbitration technique, which was not only damaging to the interests of the TCC but also in gross violation of exception of section 28 of contract Act 1872. Another case in this respect is that of

[41] Foreign Private Investment (Promotion and Protection) Act, 1976.
[42] The Protection of Economic Reforms Act 1992.
[43] The Board of Investment Ordinance, 2001.
[44] http://www.supremecourt.gov.pk/web/user_files/File/FINAL_RIKO_DIQ_CASE_DT250511.pdf

HUBCO v. WAPDA[45], in which the Supreme Court of Pakistan adopted a similar approach as in Rekodiq case and decided the case against the HUBCO instead of sending it to the relevant tribunal.[46]

The decisions of the higher courts of Pakistan in the above cases show their biased behaviour towards the treatment of foreign business interests. The inherent prejudice present among the courts safeguarding the national interest instead of the foreign investors who are more vulnerable to the laws of the host country. The approach adopted by the court in the above case is detrimental to the future foreign investment in Pakistan. These decisions have created an environment of uncertainty among the foreign investors. The future investors would be reluctant to invest in a country where there interests are not secured. Therefore, the need of the hour is to create an environment in which foreign investors have faith in the legal system of Pakistan by respecting the arbitration agreements.[47] In short, the laws of Pakistan provide equal treatment to both local and foreign investors but in some cases the higher courts of the country have deviated from the principle of equality enunciated in the statutes.

In view of the above discussion the answer to the given question is "**partially true**".

Hassan Abid (19090075)

Ali Abdul Rehman Khan (19090049)

Muhammad Usman Saeed (19090046)

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in Pakistan are not considered materially greater than in other comparable countries.

True			False	Can't say
	X			

Comment:

"The costs and delays of commercial litigation in the higher courts in Pakistan are not considered materially greater than in other comparable countries." The statement is partially true. However, there could be exceptional cases in which the statement does not fall.

With the cooperation of parties, High court litigation in Pakistan can be carried out in a reasonable time and even some special cases can proceed from issue of notice, appearance in courts to judgement within 18 to 24 months. However, commercial cases with complex nature can take more time (as up to 6 years), in which the defendants or claimants use their strategic actions to delay the time of court hearings and proceedings. **In Murree Brewery Company Limited through Chief Executive VS Province of Punjab Through Chief Secretary and 2 others,** the writ petition was filed in 2015 and the case was decided in 2016. Also in **Power Construction Corporation of China Ltd. Through Authorised Representative VS Pakistan Water and Power Development Authority through Chairman Wapda and 2 others,** Civil Petition No.2222 was filed in 2016 and the case was decided on 25th October, 2016. Recently, there has been a policy of national

[45] Hub Power Company Ltd. V Wapda. PLD 2000 SC 841
[46] http://courtingthelaw.com/2016/02/08/commentary/pakistans-case-with-arbitrability-2/
[47] http://www.jurist.org/sidebar/2012/01/rizwan-hussain-pakistani-arbitration.php

judicial in which the time frame for different acts have been specified, however its legitimacy is yet to be experienced. On the other hand, there are millions of cases still pending in Indian courts, in which a lot of these cases had been pending for decades. Most of these are of commercial nature because of their litigation as per defined up to 15 years. In **Taparia Overseas (P) Ltd. And Anr. Vs Union of India (Uoi) And Ors,** the case was being filed in 1987 and decided in 2003. Indian courts are now addressing the slow proceedings of those commercial cases with a distinctive significance by sanctioning the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Act). Moreover, through this Act, Indian courts are trying to create a high pace for their disposal in order to create an optimistic picture of Indian judiciary in the eyes of international organizations to pave the way for foreign investment. However, the situation in Bangladesh is quite the same. As according to a recently conducted seminar of Bangladesh international arbitration center (BIAC), 77% of the Civil cases are still pending in the Appellate Division and 27% of the Civil cases are pending in High court Division and over 66% of Civil cases are pending in District courts. In accordance to this, Bangladesh has the commercial litigation period of up to 12 years. In the past, the judicial proceedings were regulated by Arbitration act 1940. This resolution caused delays in these commercial cases, causing infuriating in the very basic principles of arbitration. To tackle this problem and accelerate the process of judicial proceedings the legislatures passed the 2001 act in order to modernize the 1940 act.

In Pakistan, the law accommodates the courts for deciding the costs at the closure of judicial proceedings, but in practice the court rarely award costs to either litigant. By comparison, courts in India have discretionary power to grant costs, miscellaneous costs etc. and so on in regard of expenditure incurred by either party. The court too has power to direct payment of compensatory costs against a party who is delaying proceedings or who knowingly raises false claim or defense. Certain High Courts (for instance, the High Court of Mumbai) have framed rules for costs grants, have topped most extreme costs at INR 25,000 (Roughly USD 550). However, the power of courts to grant costs is discretionary and courts might grant higher costs depending on facts and circumstances of cases.

In Pakistan, the costs and delays are not considered generally greater than other comparable countries like India and Bangladesh etc. but in Pakistan some commercial cases could be decided in six years, depending upon the complexity of commercial disputes, it means there also exists longer delays in Pakistani commercial disputes. According to Companies' Act, 2017, section 6 says that the final judgment should be declared within 90 days and also that the court would hear the appeal within 90 days of submission of appeal but it is usually not the case. Justice is only possible if your case is being heard and decided. It is minimum requirement of justice. However, in reality many people are looking for judgements of their cases, even if it goes against them. This is one of the main problems in delays of court cases. In Pakistan, to tackle the hindrances that delay the resolution of commercial, special commercial divisions should be created in High courts of Sindh and Punjab. These special court rooms would transform the role of courts in commercial affairs from a passive arena in which different litigants and their lawyers make major decisions to a pro-active institution that can assume responsibility of its cases and deliver satisfactory service. Pakistan, quite a while ago recognized a need to accord priority to the setting of commercial disputes. Article 184 of the Court Rules of Sindh, for instance, gives that commercial suits "shall be heard in priority to all other cases, appearing on the board on that day". However, Punjab had a successful experience with the divisional set-up in 1970s, amid which time both effectiveness and the disposal range in the Lahore High Court moved forward. The divisions were nullified in the mid of 1980s, however, for reasons extraneous to concern for effective and efficient judicial performance. In Pakistan, the "company judge" arrangement, envisioned by the Companies Act has failed. Therefore a clear compartmentalization of commercial litigation in terms of personnel is most desirable.

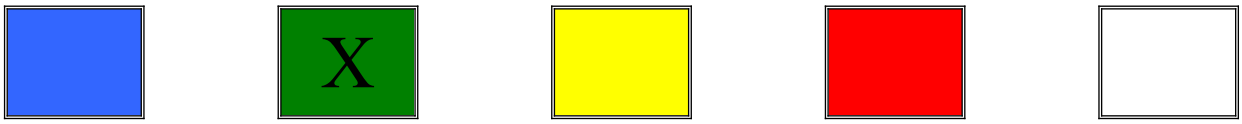
Ahmed Shoaib Atta, Muhammad Waleed Tariq, Danyal Shahzad

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown in this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True **False** **Can't say**



Profiles

The survey was carried out by the following students:

Umair Ahmad

Umair Ahmad is in the fourth year of his five year law program at Lahore University of Management Sciences. He is interested primarily in constitutional and commercial law. He actively participates in moot court competitions locally and globally. He is currently doing research on the Evolution of the role of the Preamble to Pakistan's Constitution. He spends his summer interning where he assists in drafting and research.

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Haris Irfan

Haris Irfan is a fourth year law student at Lahore University of Management Sciences. His area of interests includes company law, constitutional law and environmental law. He has worked at one of the top corporate law firms of the country and has worked on broad range of matters including mergers and acquisitions, procurement laws, energy laws and construction projects.

Haris is also a part of Street Law Pakistan and regularly teaches at schools for underprivileged children.

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Mahum Shahzad Laun

Mahum Shahzad Laun is a fourth year Law student at Lahore University of Management Sciences. Her areas of interest include constitutional law, competition law and gender studies. She has worked with a corporate law firm as well as interned with a law firm specialising in intellectual property and competition law.

She is also currently teaching Street Law, a programme for civic education, at a school for underprivileged children.

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Allen & Overy Global Law Intelligence Unit

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Philip Wood is one of the world's leading comparative lawyers and practitioners. He has written about 18 books on financial law. He was formerly a partner and head of the banking department of Allen & Overy. For many years he has been developing innovative and pioneering methodologies for assessing legal jurisdictions and has produced a book of maps of world financial law. His university textbook on the Law and Practice of International Finance has been translated into Chinese and a Japanese version is forthcoming.

Melissa Hunt is project director of the Intelligence Unit and is responsible for the management of the project. She carries out other work for the Intelligence Unit, including the preparation of tables covering rule of law and legal infrastructure risks in the jurisdictions of the world.

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