

Arbitrability of Corruption Claims in Pakistan

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Although the Supreme Court of Pakistan held that a corruption claim cannot be referred to arbitration tribunal on grounds of public policy, the pending litigation in Riqo Diq case may require the Court to revisit its earlier ruling.

The courts in Pakistan have mostly been suspicious in their approach towards international arbitration and alternative dispute resolution. However, there is a noticeable shift in the approach of courts towards recognition and enforcement of international arbitration as reflected by decisions in *Flame Maritime Limited v Hassan Ali Rice Export*, 2006 CLD 697 and *Islamic Republic of Iran Shipping Lines v Hassan Ali & Co. Cotton (Pvt). Ltd.*, 2006 CLD 153. At the same time, the recent promulgation of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 has further strengthened the status of enforcement of international arbitral awards in Pakistan.

In the rocky political climate of Pakistan, international arbitration and investment law face continuous challenges. As the governments change, the new regime routinely makes allegations of corruption in investment contracts against their predecessors in power and foreign investors. Many of these allegations, one can expect, are correct since Pakistan stands at 134th on Corruption Perceptions Index (CPI). Due to prevalent corruption, the foreign investors may feel obliged to take benefit of under the table deals and bribe government officials to obtain contracts. In the case of an investment dispute, one of the critical questions is whether corruption claims can be adjudicated by Pakistani courts or international arbitration tribunals, the latter being preferred by foreign investors.

In Pakistan, the leading precedent for arbitrability of corruption claim is *HUBCO v WAPDA*, PLD 2000 SC 841 where the Supreme Court of Pakistan with a 3-2 majority decided that disputes where there is prima facie evidence of corruption cannot be referred to arbitration because public policy requires judicial probe into allegations of corruption. The Court gave weight to the argument that a legally binding contract did not come into existence because of alleged criminal acts in formation of contract. Although the case was widely criticized by legal practitioners and scholars, one does not need to move beyond the minority opinion to find the problem with the Court's judgment.

The minority in *HUBCO* held that arbitration clause is separable and independent from the rest of the contract. The arbitration tribunal, therefore, has the power under the arbitration agreement to decide whether the main contract is valid or invalid because of fraud or misrepresentation in terms of law of the arbitration agreement. The minority approach in *HUBCO* is reflective of holding of United States Supreme Court judgment in *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) that "where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." While the courts in Pakistan may be apprehensive about deferring corruption-related claims to international arbitration tribunals due the local significance of these issues, the arbitration tribunals have shown a noticeable slant towards rejecting contracts obtained by corruption as against international public policy. Although the decisions of Arbitration Tribunals are not binding precedents for other tribunals, they hold persuasive value and can be read to understand the trends in international investment arbitrations.

In *World Duty Free Co. Ltd. v Republic of Kenya*, ICSID Case No. ARB/00/7 (2006), the ICSID Tribunal held that a claimant has no right to seek enforcement of a contract obtained by bribe because investors are bound to honor international and domestic law in the host states where they invest. The tribunal categorically stated that "claims based on contracts of corruption or on contracts obtained by

corruption cannot be upheld by this Arbitral Tribunal.” While holding that bribery is contradictory to transnational public policy, the Tribunal held that investors must comply with an “objective minimum standard of conduct” even if corruption is widespread in the host state.

The decision of Tribunal in *World Duty Free* can ease the concerns of domestic Courts that international arbitration cases can take care of corrupt practices and international investors cannot get any benefit from engaging in corruption and fraud.

As things stand at present, the ruling of the Supreme Court in *HUBCO* holds the field in Pakistan. However, the Court may have to review the issue in the pending litigation in Riqo Diq case between Tethyan Copper Company (TCC) and Government of Balochistan. The Government of Balochistan rejected the application by TCC, a joint venture between Chile’s Antofagasta and Canada’s Barrick Gold Corp, to mine copper and gold at the Riqo Diq project. While the matter is pending before the Supreme Court of Pakistan and there were allegations of massive corruption and fraud, TCC initiated international arbitration proceedings. In this backdrop, Supreme Court of Pakistan has been moved against TCC’s effort to “frustrate the laws of the land through international arbitration.”

In all probability, the Supreme Court of Pakistan will have to revisit the *HUBCO* case while deciding over the application to stay international arbitration initiated by TCC. The Supreme Court may strengthen the majority decision in *HUBCO* and retain the authority over disputes involving corruption. On the other hand, the Court may yield to the international trend and refer the matter to arbitration tribunal with confidence that there is a strong transnational policy against bribery and corruption and the investor will be not be able to derive any undue benefit out of invoking that arbitration clause. In any case, the international investors must remain vary that there is little they can benefit out of engaging in fraud and corruption in host states.

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