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Pakistani Court Interference in Arbitration Proceedings - Yet Again!

Umer Akram Chaudhry (Legaleidescope) · Monday, February 27th, 2012

It appears that the Supreme Court of Pakistan is gradually paying attention to developments in International Arbitration and to the negative remarks the Court received in the past for its hostility towards international arbitration proceedings. Without any stretch, the Supreme Court of Pakistan is widely quoted around the world as the case in point for interference by domestic courts in arbitration proceedings. As the Supreme Court may be trying to take a round turn in the changing legal landscape, old habits are hard to die. There is strong unease amongst the judges as the Court still wants to keep some level of control in how the arbitration proceedings in foreign lands are conducted. This may be because the Court has not changed much - both intellectually, regarding evaluation of feedback from the wider international audience on its rulings relating to business matters, and in terms of judges adorning the Bench - since the judgments in *HUBCO v WAPDA* (2000) and *SGS v Federation of Pakistan* (2002) were delivered by the Court.

In the recent case of *Riqo Diq*, the Supreme Court again could not restrain itself from entertaining an application to interfere in the international arbitration proceedings. The dispute arose when the Government of Balochistan refused to grant lease to Tethyan Copper Company (TCC) to mine copper at Riqo Diq in Balochistan. The matter was pending before the Supreme Court when Tethyan Copper Company Australia (TTCA) initiated two arbitration proceedings against the Government of Balochistan at International Council for Commercial Arbitration (ICCA) and International Center for Settlement of Investment Disputes (ICSID). One of the parties before the Supreme Court filed an application for contempt of court against TCC and requested the Court to stay the arbitration on the ground that TCC intends to "frustrate the laws of the land through international arbitration."

The three-member bench of the Supreme Court, headed by the Chief Justice of Pakistan, delivered the [order on the application to stay the arbitration proceedings](#) on February 7, 2012. In a fairly straight forward order, the Court directed the

Government of Balochistan... to make a request to the ICC and ICSID... not to take further steps and extend the period for nomination of the Arbitrator, so that in the meantime this Court, which is already seized of

the matter since the year 2007... may dispose of the same finally.

The ruling of the Court merits a few observations.

Firstly, the Supreme Court's order is a slight departure from the earlier rulings where the Court restrained the party that had initiated arbitration to pursue or participate in international arbitration proceedings on the ground that the international forum lacked jurisdiction. The international tribunals squarely rejected the Court's attempts to limit their jurisdiction and to frustrate arbitration proceedings. In *SGS v Pakistan* (2002), the Arbitration Tribunal confronted a judgment from the Supreme Court of Pakistan restraining a Claimant from appearing in arbitration proceedings conducted under the ICSID Convention. The Tribunal thwarted the Court's attempt to restrict the Tribunal's jurisdiction and passed a procedural order stating that "although the Supreme Court Judgment... is final as a matter of the law of Pakistan, as a matter of international law, it does not in any way bind this Tribunal."

The Supreme Court's February 7th order is positive in so far as the Court implicitly recognized the jurisdiction of the international tribunals and exercised discretion. Not only the Court made no comment about the forums' jurisdiction, it did not enjoin anyone from pursuing international arbitration. It's is, however, not clear whether the Court passed the order "as a matter of international law" or because of the procedural reason that TCCA, the claimant in arbitration proceedings, is not directly arrayed as a party before the Supreme Court. In any case, asking a party to make a request to the arbitration tribunals to temporarily halt the proceedings is qualitatively different from restraining a Claimant before the arbitration tribunal to pursue the proceedings.

Secondly, on a critical note, it's highly unclear what the Supreme Court wants to achieve by asking the arbitration tribunals through the Government of Balochistan "not to take further steps." If the Court's intention behind February 7th order is to deliver a final ruling in the *Riqo Diq* dispute, then there is a clear misunderstanding as far as international arbitration law is concerned. As the Tribunal in *SGS v Pakistan* (2002) pointed out in the procedural order, finality in domestic law is different from finality in international law. The Supreme Court may give an order which will be considered final under the law of Pakistan, but that will not cause any International Tribunal to dither in making its own finding. International Tribunals in the past have strongly resisted the efforts of the domestic courts to encroach on their authority to give a final ruling. Some tribunals have even enjoined parties from pursuing certain claims in domestic courts in search of favorable results. (*Tokios Tokelless v Ukraine*, Procedural Order No. 1 (2003)). In *Amco v Indonesia* (1984), the Tribunal stated:

an international tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that parties—rightly or wrongly—feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international tribunal such a procedure could be rendered meaningless.

What then does the Supreme Court aims to achieve by “finally” disposing the matter? The Court’s determination will have no bearing on the outcome of international arbitrations initiated by TCCA at ICCA and ICSID. The Supreme Court, it seems, has failed to take into account the recent trends in International Law and the fact that the State of Pakistan may have a bear the financial and economic brunt of Court’s misdirected interference in international arbitration proceedings.


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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

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