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The Nature of Pre-Arbitration Procedural Requirements in Pakistan: Mandatory or Optional?

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Pre-arbitration procedural requirements come into operation before the commencement of arbitration proceedings where parties have agreed on a multi-tiered dispute resolution mechanism. They are especially common in construction and engineering contracts. The Islamabad High Court (IHC) in Pakistan has addressed issues related to the nature of these requirements and consequences of non-compliance in its recent judgment Pak. U.K. Association (Pvt.) Ltd. v. Hashemite Kingdom of Jordan [2017 CLC 599].

A contract (the "Contract") was entered into between the parties for certain works to be executed by the Pak. U.K. Association (Pvt.) Ltd. (the "Applicant") at the Jordanian Embassy and the Jordanian Ambassador's residence in the Diplomatic Enclave, Islamabad. The Hashemite Kingdom of Jordan appointed an Engineer to oversee the works.

Clause 67.1 of the Contract provided that any dispute arising in connection with or out of the Contract was to be referred firstly to the Engineer for his decision. If either party was aggrieved by the Engineer's decision, or if the Engineer failed to give a notice of his decision within a certain time period, Clause 67.3 of the Contract provided that either party could refer the dispute to arbitration under Pakistan's primary arbitration legislation, the Arbitration Act, 1940 (the "Arbitration Act").

Section 20 of the Arbitration Act provides for the intervention of a court to compel arbitration where a party to an arbitration agreement refuses to take steps necessary to initiate arbitration proceedings. The Applicant filed an application under Section 20 of the Arbitration Act with the IHC, seeking to initiate arbitration proceedings without first referring the dispute to the Engineer, as provided for in the Contract. It argued that there was a suspicion of bias against the Engineer, which disqualified him from adjudicating upon the dispute.

The IHC expressed the view that if parties have agreed on certain conditions that precede the operation of an arbitration clause, such conditions precedent need to be fulfilled before the arbitration clause can be invoked. The Court noted that in construction or engineering contracts which provide for a multi-tiered dispute resolution process, an aggrieved party's right to refer contractual disputes to arbitration is pre-conditioned with a reference of such disputes, prior to the commencement of arbitration, to the dispute resolution mechanism agreed upon by the parties.

The IHC placed reliance on the well-settled principles of contract law in common law jurisdictions

that a court cannot rewrite an agreement between the parties, or exempt a party from complying with contractual obligations. The case was decided on the premise that the contractual requirement to refer a dispute firstly to the Engineer can be dispensed with only in those situations where a reference to the Engineer cannot be made because he has resigned or has been disengaged by the employer, or where he has refused to entertain the dispute.

On the issue of bias, the IHC concluded that a pre-condition to the invocation of an arbitration clause cannot be dispensed with on the ground of bias, unless the court is satisfied that a substantial miscarriage of justice will take place. Consequently, a party cannot be relieved from approaching an agreed upon forum simply because the forum might decide against it.

The Supreme Court of India has similarly held in International Airport Authority v. K.D. Bali [AIR 1988 SC 1099] that where the Chief Engineer of a party has unilaterally appointed an arbitrator under the parties' arbitration agreement, a mere apprehension in the mind of the other party, without any tangible evidence of bias, could not constitute a ground for the arbitrator's removal.

The IHC ultimately held that an application under Section 20 of the Arbitration Act is to be dismissed as premature without the fulfilment of a contractually agreed upon pre-condition.

The principle of mandatory compliance with pre-arbitration procedural requirements has been discussed by Pakistani courts in prior cases. In Board of Intermediate and Secondary Education, Multan v. Fine Star & Company, Engineers and Contractors [1993 SCMR 530], the Supreme Court of Pakistan dismissed an application under Section 20 of the Arbitration Act because the applicant had failed to approach the Chairman of the appellant Board for his decision on the dispute, as provided for in the applicable dispute resolution clause. The Sindh High Court followed this decision in Hanover Contractors v. Pakistan Defence Officers Housing Authority [2002 CLC 1880] and the Lahore High Court in WAPDA v. S.H. Haq Noor and Company [2008 MLD 1606], with both courts holding that a pre-condition contained in a dispute resolution clause is binding upon the parties.

The IHC decision and the prior decisions of Pakistani courts cited above show that Pakistani courts have opted to follow the precedents established by the courts of other common law jurisdictions. In Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd [2014 EWHC 2104 (Comm)], the English High Court has held that it is in the public interest to enforce conditions precedent to arbitration agreements, since commercial entities expect courts to enforce obligations that they have entered into freely. In International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd [2013 SGCA 55], the Singapore Court of Appeal determined that preconditions for arbitration must be fulfilled where the parties have clearly contracted for a specific set of dispute resolution procedures. In United Group Rail Services Limited v. Rail Corporation New South Wales [2009 NSWCA 177], the New South Wales Court of Appeal in Australia found a dispute resolution clause in an engineering contract, which required senior representatives of the parties to undertake "good faith negotiations" prior to commencing arbitration, to be valid and enforceable.

The IHC's decision in Pak. U.K. Association (Pvt.) Ltd. v. Hashemite Kingdom of Jordan has implications on the admissibility of arbitration proceedings seated in Pakistan, and also on the enforceability of arbitral awards in Pakistan.

In relation to the admissibility of arbitration proceedings seated in Pakistan, it can be ascertained from this decision that a failure to perform a pre-arbitration procedural requirement will render the

initiation of an arbitration proceeding inadmissible, meaning that any arbitral tribunal asked to conduct such a proceeding would have to decline jurisdiction.

Moreover, if an arbitration was seated in Pakistan, any award made by an arbitral tribunal lacking jurisdiction could be set aside by Pakistani courts. This is based on the conclusion that an arbitral tribunal that hears a case, despite a pre-condition for arbitration not being met, exceeds the parties' arbitration agreement, and, therefore, lacks jurisdiction.

As for the issue of enforceability of arbitral awards in Pakistan, it follows from this decision that if a pre-arbitration procedural requirement forms a condition precedent to the arbitration agreement and remains unfulfilled, any award given on the merits of a dispute based on such an arbitration agreement would be unenforceable.

Notwithstanding the above implications, the IHC's decision has left certain key issues unaddressed. For example, the Court has failed to decide

1. whether it is possible to fulfil a pre-arbitration procedural requirement after an arbitration proceeding has already been initiated, and, thereby, retrospectively rectify the previous non-compliance; and
2. whether a new arbitration proceeding in respect of the same dispute can be initiated once an application under Section 20 of the Arbitration Act has been dismissed as premature.

While the answers to the above issues depend upon the facts and circumstances of each individual case, it should be possible, as a matter of procedural efficiency, to retrospectively fulfil a pre-arbitration procedural requirement after the commencement of an arbitration. It should also be possible to initiate a new arbitration proceeding once an application under Section 20 of the Arbitration Act has been dismissed as premature, since such a dismissal would not invalidate the arbitration agreement itself, and would also not constitute a decision given on the merits of the claim for the purposes of *res judicata* and issue estoppel.

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