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COPPER, GOLD, CORRUPTION, AND NO ARBITRAL RELIEF: A RECENT PAKISTAN SUPREME COURT CALLS INTO QUESTION THE DOCTRINE OF SEPARABILITY

By  
Sara E. Myirski\*

I. INTRODUCTION

In *Maulana Abdul Haque Baloch et al. v. Government of Balochistan through Security Industry and Mineral Development et al.*, the Pakistan Supreme Court held that a joint venture agreement and its arbitration clause made between a local development authority and an international exploration company was invalid on public policy grounds. This article will discuss the complex background of the case, the court's holding, the arbitration proceeding that occurred notwithstanding the court's hearing on the merits of the contract validity, and the implications for the separability doctrine in future joint venture agreements.

II. BACKGROUND OF THE CHAGAI HILLS EXPLORATION JOINT VENTURE AGREEMENT

In July 1993, Balochistan Development Authority ("BDA"), a statutory corporation, entered into a Joint Venture Agreement called "the Chagai Hills Exploration Joint Venture Agreement" ("CHEJVA") with BHP Minerals Intermediate Exploration Inc. ("First Miners"), a United States Company.<sup>1</sup> As part of the agreement, CHEJVA included a provision stating that the applicable law would be Pakistani law and that arbitration would resolve any disputes arising between the parties.<sup>2</sup>

The CHEJVA involved the exploration and mining of minerals, specifically, copper and gold in the Reko Diq area.<sup>3</sup> Reko Diq (previously known as "Koh-e-Dalil") is a small town in a desert area in District Chagai, Balochistan, which is seventy kilometers northwest of Naukundi close to Pakistan's border with Iran and Afghanistan.<sup>4</sup> Reko Diq

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<sup>1</sup> *Maulana Abdul Haque Baloch et al. v. Gov't of Balochistan through Sec'y Indus. and Mineral Development et al.*, (2013) (SC) (Pak.), available at [http://www.supremecourt.gov.pk/web/user\\_files/File/C.P.796of2007-dt-10-5-2013.pdf](http://www.supremecourt.gov.pk/web/user_files/File/C.P.796of2007-dt-10-5-2013.pdf) (due to the complex nature of the case and the numerous suits that were consolidated to formulate the opinion, the title of the first listed case was selected to represent the entirety of the opinion) [hereinafter *Maulana Abdul Haque Baloch*].

<sup>2</sup> *See id.* at 12.

<sup>3</sup> *See id.* at 4.

<sup>4</sup> *See id.* at 10-11.

is known for its vast gold and copper reserves.<sup>5</sup> The Reko Diq is believed to be the world's fifth largest goldmine.<sup>6</sup>

In March 2000, the government of Balochistan and its agents (collectively "the Government of Balochistan"), and the First Miners signed the first Addendum to the CHEJVA.<sup>7</sup> The Addendum defined the terms used in CHEJVA and clarified the role of the First Miners' appointment as the Province of Balochistan's agent.<sup>8</sup>

In May 2000, the First Miners entered into an Option Agreement with Mincor Resources, a company from Western Australia.<sup>9</sup> The Agreement established an exploration alliance so that Mincor would have the right to explore, develop, exploit, and acquire mineral resources on exploration licenses held by the First Miners and its partner, the Government of Balochistan, or on exploration licenses to be acquired by either party in the region.<sup>10</sup> The Mincor Option also gave the sole and exclusive right to Mincor, or its nominee, to enter into Alliance with BHP to explore copper and gold in the region.<sup>11</sup> Mincor nominated the Tethyan Copper Company ("TCC" or "Second Miners"), an Australian company, under that provision.<sup>12</sup>

In April 2006, the Government of Balochistan, the First Miners, and the Second Miners entered into a Novation Agreement.<sup>13</sup> The agreement substituted the First Miners with the Second Miners as a party to CHEJVA on the terms set out in the Novation Agreement.<sup>14</sup> It further provided that the Second Miners assumed the First Miners' rights and responsibilities under CHEJVA.<sup>15</sup>

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<sup>5</sup> *Location of Reko Diq*, BOARD OF INVESTMENT, PRIME MINISTER'S OFFICE GOVERNMENT OF PAKISTAN, <http://tribune.com.pk/story/563097/tcc-gives-up-reko-diq-rights/>; Tethyan Copper Company, *Reko Diq Location*, <http://www.tethyan.com/TheRekoDiqProject/RekoDiqResource.aspx>.

<sup>6</sup> Maulana Abdul Haque Baloch at 10-11.

<sup>7</sup> *See id.* at 12-13. To avoid confusion, the specific signatory groups including Governor of Balochistan, on behalf of the Province of Balochistan, the BDA (a statutory corporation) were consolidated into the government of Balochistan and its agents, or "the Government of Balochistan."

<sup>8</sup> *See id.*

<sup>9</sup> *See id.* at 13.

<sup>10</sup> *See id.*

<sup>11</sup> Maulana Abdul Haque Baloch at 13.

<sup>12</sup> *See id.* at 14.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.* at 15.

<sup>15</sup> *See id.*

The Second Miners enjoyed their rights for exploration and prospecting for several years.<sup>16</sup> However, in 2011, the Government of Balochistan refused to grant an exploration license to the Second Miners.<sup>17</sup> The Second Miners challenged the refusal, citing the exploration and feasibility studies that had already been completed.<sup>18</sup>

### III. THE PAKISTAN SUPREME COURT PROCEEDING AND SUBSEQUENT ARBITRATION FILINGS

In 2006, numerous third parties challenged the legality of the CHEJVA in the High Court of Balochistan.<sup>19</sup> The challengers argued that the CHEJVA was executed contrary to the provisions of relevant Pakistani statutes, that the parties failed to properly register the CHEJVA, and that the Government of Balochistan improperly relaxed local legislation to execute the CHEJVA and its Addendum.<sup>20</sup> The High Court dismissed the challenge and found the CHEJVA to be legal and valid.<sup>21</sup> Although the High Court dismissed the case, the court granted permission to appeal to the Supreme Court.<sup>22</sup> Subsequently, the challengers filed their petition directly before the Pakistan Supreme Court, questioning the validity of the grant of licenses to the First Miners and the Second Miners.<sup>23</sup>

The Second Miners defended the validity of the CHEJVA by arguing that the challengers' purported grievances were with the First Miners, the original signatory to the CHEJVA in 1993.<sup>24</sup> Additionally, the Second Miners argued that the validity of CHEJVA had no impact on the validity of the Novation Agreement.<sup>25</sup> The Second Miners argued

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<sup>16</sup> Maulana Abdul Haque Baloch at 49.

<sup>17</sup> *See id.* at 78-79. "TCC had completed the exploration work including drilling within the extended period wherein substantial discoveries of gold, copper, etc., were made and had also completed the Feasibility Study and submitted it to GOB, containing a study to ascertain the commercial feasibility of the mining of the resource, treatment of ore obtained in mining operation, expected optimum return, life of the mine, mineable reserves and grade and the results of geological and geophysical investigations etc. After the above discovery by TCC, the present litigation attracted general focus and also publicity. TCC asserted its right under CHEJVA and BMR 2002 to be considered for and be granted the mining lease with or without the joint venture partner."

<sup>18</sup> Maulana Abdul Haque Baloch at 78-89.

<sup>19</sup> *See id.* at 16. The petition filed is referred to as a Constitutional Petition.

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> Maulana Abdul Haque Baloch at 17.

<sup>24</sup> *See id.*

<sup>25</sup> *See id.* at 106-07.

that the intent and effect of the Novation Agreement was to effectively terminate and replace the original CHEJVA.<sup>26</sup> The Second Miners, therefore, argued that each agreement, including the CHEJVA, the Addendum, the Option Agreement, and the Novation Agreement should be considered separate contracts and be evaluated for their legality separately.<sup>27</sup> The Second Miners also sought specific performance of the contract and damages caused by the Government of Balochistan's failure to renew licenses necessary to carry out the contract in 2011.<sup>28</sup>

Soon after arguing its case before the Supreme Court, the Second Miners filed for two arbitration proceedings against the Government of Pakistan, pursuant to the contract.<sup>29</sup> The Second Miners brought their first claim before the International Chamber of Commerce ("ICC"), pursuant to the original CHEJVA agreement.<sup>30</sup> The Second Miners brought the second claim to the International Centre for Settlement of Investment Disputes ("ICSID"), pursuant to the Australia-Pakistan bilateral investment treaty ("BIT") related to the exploration. The miners sought monetary damages after the Government of Balochistan declared their claims to develop the area in dispute invalid and refused to grant a mining lease.<sup>31</sup> By denying the mining lease, the Government of Balochistan terminated the Second Miners' ability to explore and prospect the land, effectively preventing further development and profitability.

Since the start of the Second Miners' involvement in the project in 2006, the company invested more than \$260 million on exploration and technical studies in the Reko Diq area.<sup>32</sup> According to the Second Miners, the project, if successful, would have been able to produce 200,000 tons of copper and 250,000 ounces of gold per year.<sup>33</sup>

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<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> Maulana Abdul Haque Baloch at 123-24.

<sup>29</sup> Alex Macdonald, *Tethyan Drops Pakistan Project, Will Seek Damages*, WALL ST. J. (May 8, 2013, 3:46 p.m.), [available at http://online.wsj.com/news/articles/SB10001424127887324244304578471132363025400](http://online.wsj.com/news/articles/SB10001424127887324244304578471132363025400).

<sup>30</sup> *See* Press Release, Barrick Gold Corp., Fourth Quarter and Year-End Report for 2012 (2012), <http://www.barrick.com/files/quarterly-reports/2012/Barrick-2012-Year-End-Report.pdf> (noting that a merits hearing before the ICC is tentatively set for March of 2014). *See also* Maulana Abdul Haque Baloch at 73.

<sup>31</sup> Maulana Abdul Haque Baloch at 74, 123-24. *See also* Tethyan Copper Co., Pty. Ltd. v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, ¶¶ 55-67 (Dec. 13, 2012) *available at* [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752\\_En&caseId=C1980](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2752_En&caseId=C1980) [hereinafter *Tethyan Copper Co.*].

<sup>32</sup> Macdonald, *supra* note 25; *see also* *Reko Diq Location*, TETHYAN COPPER COMPANY, <http://www.tethyan.com/TheRekoDiqProject/RekoDiqResource.aspx>.

<sup>33</sup> *Reko Diq Resource*, TETHYAN COPPER COMPANY, <http://www.tethyan.com/TheRekoDiqProject/RekoDiqResource.aspx>.

Sources estimate the total revenue from mining operations could have reached three trillion dollars.<sup>34</sup>

The Supreme Court directed the Government of Pakistan to request that each tribunal stay the arbitral proceedings until the court reached its decision.<sup>35</sup> Despite the request from the Government of Pakistan, who was a party to both arbitral proceedings, neither arbitral tribunal heeded the Court's request to stay the arbitral proceedings.<sup>36</sup>

#### IV. THE PAKISTAN SUPREME COURT HOLDING

The Supreme Court issued its ruling, holding that the CHEJVA was void on a number of public policy grounds.<sup>37</sup> The Supreme Court, in so holding, established that the CHEJVA had essentially never come into being as a recognizable contract. The court reasoned the agreement was void in part based on evidence of corruption in making and executing CHEJVA.<sup>38</sup> The court stated that because CHEJVA was void, all of the subsequent agreements were void, including the Addendum, the Option Agreement, and the Novation Agreement.<sup>39</sup> Ultimately, the court determined that the CHEJVA and all subsequent transfers of interests were "illegal transactions entered into by concerned parties at their sole risk and cost."<sup>40</sup>

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<sup>34</sup> *TCC Gives Up Reko Diq Sites*, THE EXPRESS TRIBUNE (June 14, 2013), available at <http://tribune.com.pk/story/563097/tcc-gives-up-reko-diq-rights/>.

<sup>35</sup> See *Tethyan Copper Co.* at ¶ 85. "As regards the Tribunal's jurisdiction, Respondent makes the following arguments: (i) the matters in dispute are before the Supreme Court of Pakistan, which will state the law of Pakistan definitively with respect to the interpretation of the CHEJVA and the application of the relevant legislation."

<sup>36</sup> *Tethyan Copper Co.* at ¶ 130. "Further, the Tribunal is satisfied that its prima facie jurisdiction is not affected by the separate proceedings before the Supreme Court of Pakistan to decide on matters relating to the interpretation of the CHEJVA under Pakistani law and the application of the relevant legislation. The reasons why such proceedings prima facie cannot affect the Tribunal's jurisdiction over the present dispute are twofold: Firstly, the subject matter of the proceedings before the Supreme Court of Pakistan is distinct from that of the present arbitration, which deals primarily with an allegation of a breach of Respondent's obligations under the Australia-Pakistan Treaty and general international law, and not with the interpretation of the CHEJVA under Pakistani law. Secondly, the parties to the proceedings before the Supreme Court of Pakistan differ from those in the present proceedings." Note that at the time this article was written, January 2014, the ICC arbitration decision was pending and therefore unavailable.

<sup>37</sup> Maulana Abdul Haque Baloch at 59-60, 123-49.

<sup>38</sup> See *id.* at 49.

<sup>39</sup> See *id.* at 49. "CHEJVA having been found and declared to be a void agreement in the earlier part of this judgment, there was no room left for BHP to build the superstructure on its basis, namely, Addendum No.1, Option Agreement, Mincor Option, Alliance Agreement, Novation Agreement, or the subsequent share-purchase agreements. Consequently, the transfers of interest from BHP to Mincor NL to TCC...all were illegal transactions entered into by the concerned parties at their sole risk and cost, and are so declared hereby."

<sup>40</sup> See *id.*

In voiding the CHEJVA, the Supreme Court also held that the arbitration clauses in the original contract and subsequent agreements were void.<sup>41</sup> The court reasoned that the CHEJVA expressly stated that Pakistani law was the applicable law governing the contract.<sup>42</sup> Therefore, the court determined that Pakistani courts, rather than international arbitral tribunals, were the appropriate forum for deciding the contract's legality.<sup>43</sup> In so holding, the court relied upon various reasons, including a qualifier to the separability doctrine and the presence of corruption in the execution of CHEJVA.<sup>44</sup>

Primarily, the court discussed the separability provisions in the New York Convention.<sup>45</sup> The separability doctrine is an international law doctrine that allows agreements to arbitrate to be valid, notwithstanding the underlying contract's validity.<sup>46</sup> Under certain circumstances, however, a court may hold that the separability doctrine is inapplicable. For example, the New York Convention, of which Pakistan is a signatory, states that arbitration clauses are invalid if the underlying contracts are void.<sup>47</sup> That is, a court may determine that the entire contract is void, or never came into existence. Once a court finds a void contract, the separability doctrine is inapplicable. In the case of the CHEJVA, the challengers' claims questioned the validity of CHEJVA on the underlying contract in the case.<sup>48</sup> The court held that the parties could not arbitrate a claim for the validity of CHEJVA because the proper forum for deciding the matter was the judiciary.<sup>49</sup>

Additionally, the court reasoned that it had jurisdiction under the UN Convention Against Corruption.<sup>50</sup> During the proceedings, the challengers offered evidence of

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<sup>41</sup> *See id.* at 59-60, 123-49.

<sup>42</sup> Maulana Abdul Haque Baloch at 128.

<sup>43</sup> *See id.* at 123-49.

<sup>44</sup> Maulana Abdul Haque Baloch at 123-49.

<sup>45</sup> Maulana Abdul Haque Baloch at 138-39.

<sup>46</sup> *See generally* Janet A. Rosen, *Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence*, 17 *FORDHAM INT'L L.J.* 599 (1994).

<sup>47</sup> Maulana Abdul Haque Baloch at 129. *See also* Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, art. 2(3) (1970), available at <http://www.newyorkconvention.org/texts> [hereinafter *New York Convention*]. "The court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

<sup>48</sup> Maulana Abdul Haque Baloch at 138-39.

<sup>49</sup> *See id.* at 129.

<sup>50</sup> *See id.* at 129-30.

corruption in the formation of CHEJVA.<sup>51</sup> The court held that a court has the jurisdiction to invalidate a contract when there are allegations of corruption under Article 34 of the UN Convention Against Corruption.<sup>52</sup> The court reasoned that, under Article 34 of the UN Convention Against Corruption, each state party shall take measures in accordance with its domestic law to address corruption within contracts of the state.<sup>53</sup> The court further reasoned that under the same provision, state parties may consider corruption a relevant factor for nullifying a contract.<sup>54</sup>

Finally, the court noted that the parties that brought the action were not parties to the CHEJVA or any of the subsequent contracts.<sup>55</sup> The general rule is that non-signatories, or third parties to a contract, ordinarily cannot be forced into arbitration.<sup>56</sup> A contract and its arbitration clause bind only the signatory parties.<sup>57</sup> Under this principle, the court determined that the third party challengers could not be bound to the arbitration clause and the courts were the proper forum to determine the CHEJVA's validity.<sup>58</sup>

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<sup>51</sup> *See id.* at 129-30, 139.

<sup>52</sup> *See id.* at 129-30. "Article 34 of the UN Convention Against Corruption 2003 provides that with due regard to the right of third parties, acquired in good faith, each state party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. And, in this context, states parties may consider corruption relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action." *See also* A/RES/58/4, 43 I.L.M. 37 (2004), available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

<sup>53</sup> Maulana Abdul Haque Baloch at 129-30.

<sup>54</sup> *See id.*

<sup>55</sup> Maulana Abdul Haque Baloch at 134.

<sup>56</sup> *See generally* Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party – Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711 (2003). "Ordinarily, a party's ability or obligation to arbitrate an international dispute arises from its consent as a signatory to a contract that contains an arbitration clause."

<sup>57</sup> *Id.*

<sup>58</sup> Maulana Abdul Haque Baloch at 144.

## V. THE SEPARABILITY DOCTRINE AND THE PAKISTAN SUPREME COURT DECISION

### A. Separability

The separability doctrine reflects the principle that valid arbitration agreements are enforceable notwithstanding the validity of the underlying contract.<sup>59</sup> The operative rule mandates that courts assessing the validity of an arbitration agreement in a larger contract must treat the arbitration agreement as a separate contract entirely.<sup>60</sup> Accordingly, a finding that the arbitration agreement is valid divests the courts of decisional authority over any subject matter for which the agreement prescribes arbitration.<sup>61</sup> Under most arbitration agreements, the arbitrable subject matter includes any disputes arising out of the underlying contract. The separability doctrine is necessary to prevent courts from entertaining dilatory challenges to contract validity, which are designed for no reason other than evading the promise to arbitrate.<sup>62</sup> In this regard, separability effectuates the parties' intention to arbitrate by limiting judicial interference at the outset of arbitration, thereby preserving the integrity of the arbitral process.<sup>63</sup>

While separability is recognized by most international forums, the doctrine is not absolute.<sup>64</sup> A court may refuse to grant relief under an arbitral clause if it finds that the underlying contract is void or otherwise voidable.<sup>65</sup> A contract may be voidable if the contract is unenforceable as a matter of law or public policy.<sup>66</sup> In contrast, a contract may

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<sup>59</sup> See, e.g., Robert H. Smit, *Report: Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 21 (2002).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Smit, *supra* note 59, at 22. "The separability doctrine is also essential, as a practical matter, to preserve the autonomy and integrity of the arbitral process. Without separability, a party to an arbitration agreement would be able to avoid or delay arbitration merely by challenging, in court or in the arbitration, the contract in which the arbitration agreement is found. The doctrine serves to avoid court interference with substantive contract issues that were intended to be arbitrated."

<sup>63</sup> *Id.*

<sup>64</sup> See generally Kirsten Weisenberger, *Arbitral & Judicial Decision: From Hostility to Harmony: Buckeye Marks a Milestone in the Acceptance of Arbitration in American Jurisprudence*, 16 AM. REV. INT'L ARB. 551 (2005).

<sup>65</sup> New York Convention, *supra* note 47, at art. 2(3). "The court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

<sup>66</sup> See, e.g., Smit, *supra* note 59, at 31. "Courts have had no trouble applying the separability doctrine to claims that a contract containing an arbitration clause is 'voidable' -- meaning the contract exists but is subject to rescission."

be determined void if the contract is invalid and, in the eyes of the court, never came into existence.<sup>67</sup>

*B. Maulana Abdul Haque Baloch and the Doctrine of Separability.*

The important holding of the Pakistan Supreme Court's ruling was the apparent disregard for the separability doctrine. In other proceedings, the courts of Pakistan have recognized and endorsed the separability doctrine.<sup>68</sup> The Supreme Court focused largely on the allegations of corruption and the fact that the challengers were not a party to the contract, rather than analyzing the dispute in light of separability.

While separability is important in arbitral proceedings, the doctrine is not absolute.<sup>69</sup> The New York Convention states that a court should submit a dispute to arbitration unless it finds that the agreement is void.<sup>70</sup> The Pakistani court relied on the language of the New York Convention in holding that the court had proper jurisdiction to determine the validity of CHEJVA.<sup>71</sup> It appears that the Pakistani court wanted to exercise its jurisdiction over the matter, rather than permitting the international arbitral tribunals to decide the issue. As a Pakistani contract involving Pakistani land, the court viewed the matter as internal. As such, the court sought to keep the matter within the domestic court.

Another unresolved component of this dispute is how the arbitrators will handle the disputes before them. As previously noted the Second Miners submitted two separate arbitration disputes, to ICC and to ICSID.<sup>72</sup> The dispute brought before the ICC has yet to be completed.<sup>73</sup> The arbitrators for ICSID have heard the Second Miners' case and dismissed the action.<sup>74</sup> The ICSID arbitrators recognized, however, situations in which the Second Miners would have a claim, including any "material changes" to the future

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<sup>67</sup> See, e.g., Smit, *supra* note 64 at 31-32.

<sup>68</sup> Hitachi Ltd v. Rupali Polyester 1998 SCMR 1618 (Pak.).

<sup>69</sup> See generally Weisenberger, *supra* note 60.

<sup>70</sup> See *supra* note 65 and accompanying text.

<sup>71</sup> Maulana Abdul Haque Baloch at 129. "[A]rticle 2(3) of the New York Convention, which is incorporated in Pakistan's domestic law as an act of Parliament in 2011, states that the court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

<sup>72</sup> Macdonald, *supra* note 25.

<sup>73</sup> See Press Release, *supra* note 30 (noting that a merits hearing before the ICC is tentatively set for March of 2014).

<sup>74</sup> Tethyan Copper Co. at ¶ 154.

work plan or a transfer of the government's interest to a third party.<sup>75</sup> The tribunal requested frequent updates in the future by both parties.<sup>76</sup>

It is not clear what relief, if any, will be available to the Second Miners following the Pakistan Supreme Court's holding. While the ICSID tribunal did not issue an award to the Second Miners, the tribunal contemplated situations in which the Second Miners may be issued an award. Even if the ICSID tribunal or the ICC tribunal were to grant the Second Miners an award, however, the Second Miners would have difficulty with enforcement. While an arbitral tribunal issues awards, a court must enforce those awards.<sup>77</sup> Given the Pakistan Supreme Court's ruling on the jurisdiction of the case, the court will likely refuse to recognize an award issued by the tribunal.<sup>78</sup> In fact, the court has stated that if the Second Miners submitted an enforcement of an arbitral award in Pakistan, the court would refuse to enforce the award on the same grounds as it invalidated CHEJVA in the litigation.<sup>79</sup>

The ability to find a court to enforce an arbitral award for the Second Miners may not stop at Pakistan's borders. If the Second Miners seek future relief, they may consider enforcement in another signatory country to the New York Convention. However, even if the Second Miners were to select another country to seek enforcement of an arbitral award, the Government of Pakistan would have a valid basis for the court to refuse enforcement. Specifically, the Government of Pakistan could argue, under the New York Convention, that the award was invalid because CHEJVA is invalid under the law.<sup>80</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* "The Tribunal therefore decides as follows: 1. Respondent shall immediately inform the Tribunal and Claimant of any change of its present intention (i) to implement the H4 Work Plan, (ii) not to expand its mining activities to H14 and/or H15 or to any other deposit within License EL-5 and (iii) not to give any rights in this regard to any third party. 2. Respondent shall further inform the Tribunal and Claimant, on a regular basis, about its specific plans and activities with respect to deposit H4. 3. The Tribunal remains seized of the matter and shall consider future applications by Claimant if the situation materially changes, in particular in case Respondent (i) materially deviates from the H4 Work Plan, (ii) expands its mining activities to deposits H14 and/or H15 or to any other deposit within License EL-5 or (iii) gives any rights in this regard to any third party. 4. Otherwise, the Request is dismissed."

<sup>77</sup> New York Convention, *supra* note 47, at art.5.

<sup>78</sup> Maulana Abdul Haque Baloch at 72-73. "However, any award rendered in the on-going arbitration proceedings may be brought before the Courts of Pakistan for enforcement, thereby providing an opportunity for judicial review of the same on available legal grounds. Thus, for instance, under Act IX of 2011 an award by an ICSID Tribunal may be questioned or challenged on the same grounds for the purposes of execution as a Judgment of the High Court. Similarly, under the Act XVII of 2011 enforcement of an award can be refused on all of the grounds set out in Article V of 1958 New York Convention which includes grounds of public policy."

<sup>79</sup> *See id.* and accompanying text.

<sup>80</sup> New York Convention, *supra* note 47, at art. 5.

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to

Even if the Second Miners sought enforcement outside of Pakistan, they would likely run into the same issues of enforceability under the New York Convention: that the underlying contract was void and thus enforcement should be refused.<sup>81</sup>

## VI. CONCLUSION

The recent controversy over the mining of Reko Diq presents novel issues for how courts can circumvent arbitration's most basic provisions. The Supreme Court of Pakistan invalidated a contract and its arbitration clause on public policy grounds. This case presents the practical limits to the separability doctrine. The case also serves as a reminder that courts may still maintain significant power regarding the execution of arbitral awards. Courts rarely refuse enforcement of an arbitral award, but in cases with similar facts to the Reko Diq dispute, parties may encounter difficulty.

Ultimately, a court can craft a way to invalidate joint venture agreements, even when traditional arbitration doctrines would hold the agreements enforceable. Courts can even refuse to hold amendments to a contract, such as changes in ownership as invalid because the court found the primary contract to be invalid. An arbitration clause may not prove to be the exclusive manner to resolve disputes between parties, especially in allegations of an invalid contract or corrupt dealings. The case surrounding the CHEVJA was an interesting and practical demonstration on the limits of separability. While separability may preserve some arbitration clauses, there may be no relief for contracts that were void or otherwise unenforceable for public policy reasons.

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them, under some incapacity, *or the said agreement is not valid under the law to which the parties have subjected it* or, failing any indication thereon, under the law of the country where the award was made” (emphasis added).

<sup>81</sup> *Id.*