

Corruption Defence to Challenge Tribunal’s Jurisdiction Rejected

9 August 2021

On 6 July 2021, the Pakistani Province of Balochistan (“**Balochistan**”) suffered a significant setback in its attempts to have an ICC partial arbitration award annulled in England after the High Court decided that Balochistan cannot rely on an allegation of corruption because it failed to raise the argument during the arbitration.

Balochistan, which borders Iran and Afghanistan, argued before the English High Court¹ that Tethyan Copper (“**Tethyan**”) had bribed local officials to obtain “illegitimate benefits” in relation to its mining project in the province. Balochistan argued that the ICC tribunal did not have jurisdiction to issue the award since the relevant underlying contracts requiring arbitration of disputes were void due to corruption.

The High Court held that Balochistan was precluded from raising the corruption allegation in the English annulment proceedings because it had failed to raise it before the ICC Tribunal. The court also held that, in arguing that corruption had occurred, Balochistan was seeking to impermissibly challenge the merits determinations of the ICC Tribunal which had ruled that Balochistan was not entitled to re-argue that issue (it having been determined against Balochistan in a separate ICSID arbitration).

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

LONDON

James Brady

T: +44 20 7614 2364

jbrady@cgsh.com

J. Cameron Murphy

T: +44 20 7614 2396

cmurphy@cgsh.com

Marina Zarubin

T: +44 20 7614 2286

mzarubin@cgsh.com

Pablo Mateos Rodríguez

T: +44 20 7614 2367

pmateosrodriguez@cgsh.com

Leonor Vulpe Albari

T: +44 20 7614 2244

lvulpealbari@cgsh.com

London Office

2 London Wall Place
London EC2Y 5AU, England

T: +44 20 7614 2200

F: +44 20 7600 1698

¹ *Province of Balochistan v Tethyan Copper Company Pty Ltd*, [2021] EWHC 1884 (Comm) (“**Balochistan v Tethyan**”).



Background to the English proceedings

The dispute between Tethyan and Balochistan arises out of a Joint Venture Agreement dating back to 1993 (“**JVA**”) under which Tethyan had the right to assess the economic viability of mining mineral deposits in the Reko Diq area. The Reko Diq area is rich in various mineral deposits and thought to be home to the world’s fifth largest goldmine.

In 2011, following the discovery of large gold and copper deposits, Tethyan applied for a mining lease, which was denied by Balochistan.

Pakistani Supreme Court decision

Following an administrative appeal which Balochistan rejected, Tethyan’s subsidiary commenced proceedings before the Pakistani courts challenging the denial of the lease. In 2013, the Supreme Court of Pakistan decided that the JVA was void² because Balochistan had exceeded its powers by signing it, and the JVA itself was contrary to public policy.

ICSID arbitration

In 2011, Tethyan initiated an ICSID arbitration against Pakistan pursuant to the Australia-Pakistan Bilateral Investment Treaty (“**BIT**”) claiming *inter alia* that the denial of the mining lease constituted expropriation under the BIT. In 2015, Pakistan objected to the jurisdiction of the ICSID Tribunal based on alleged corruption by Tethyan relating to the JVA.

In its 2017 decision on jurisdiction and liability, the ICSID Tribunal rejected Pakistan’s corruption-based objection for lack of evidence, and found that Pakistan had breached the BIT.

In its 2019 decision on quantum, the ICSID Tribunal awarded Tethyan \$5.9 billion in damages (“**ICSID Award**”), believed to be the second largest award in ICSID history.³

Pakistan is currently challenging the ICSID Award in annulment proceedings, arguing *inter alia* that the ICSID Tribunal lacked jurisdiction to issue the

award. Tethyan, for its part, is seeking enforcement of the ICSID Award in the US.

ICC arbitration

In parallel, in 2011, Tethyan filed an ICC arbitration against Balochistan pursuant to the arbitration clause in the JVA, claiming that the denial of the mining lease constituted a breach of contract.

At an early stage of the ICC arbitration, Balochistan, without presenting evidence, alluded to the possibility that the JVA was tainted by corruption, which it argued would go to the jurisdiction of the tribunal. The ICC Tribunal noted that there had not been “any formal challenge to the Tribunal’s jurisdiction by the Government”.⁴

In 2014, the ICC Tribunal upheld its jurisdiction to hear Tethyan’s claims after bifurcating the proceedings to address jurisdiction first (“**ICC Jurisdiction Decision**”). The parties agreed that the ICC Jurisdiction Decision would be incorporated into a partial or final award at a later date. The ICC Tribunal made no ruling on the question of corruption because no arguments or evidence had been put before it on this issue.

The following year, Balochistan informed the ICC Tribunal of the existence of alleged “new evidence” of corruption surrounding procurement of the JVA.⁵ Importantly, Balochistan did not rely on corruption as an issue going to the jurisdiction of the ICC Tribunal, but rather as an issue going to the merits of the claims.

In 2019, the ICC Tribunal issued a partial award (“**ICC Partial Award**”) in favour of Tethyan, which incorporated the ICC Jurisdiction Decision. Regarding Balochistan’s corruption argument, the ICC Tribunal found that the ICSID Tribunal’s findings on corruption in the ICSID Award (rejecting them for lack of evidence) had “preclusive effect” in the ICC arbitration so that Balochistan could not re-litigate the issue before the ICC Tribunal.⁶

² *Balochistan v Tethyan*, ¶ 19.

³ *Balochistan v Tethyan*, ¶ 23.

⁴ As quoted in *Balochistan v Tethyan*, ¶ 138.

⁵ *Balochistan v Tethyan*, ¶¶ 203-204.

⁶ *Balochistan v Tethyan*, ¶ 351.

ICC annulment proceedings in the English courts

Balochistan sought to have the ICC Partial Award annulled in the English courts under s. 67 of the English Arbitration Act 1996 (“1996 Act”), which allows a party to arbitral proceedings to challenge an award on the basis that the tribunal did not have substantive jurisdiction. Balochistan argued that the ICC Tribunal lacked jurisdiction because the JVA was void due to corruption.⁷

The High Court’s decision

Under s. 73(1) of the 1996 Act, parties are prevented from raising jurisdictional objections, including in annulment proceedings, if they took part in arbitral proceedings without having made the same objections before the arbitral tribunal.

The key legal question was whether it was sufficient for Balochistan to introduce during the arbitration broad allegations of corruption, or whether allegations of corruption had to have been expressly pleaded in detail as specific objections to the tribunal’s jurisdiction.⁸

The High Court held that while Balochistan did raise the issue of corruption in the ICC arbitration, it had challenged the jurisdiction of the Tribunal on the basis of a finding by the Pakistani Supreme Court that the JVA was void, and not specifically on the basis of corruption itself.

Importantly, the High Court’s analysis of the judgment of the Supreme Court of Pakistan showed that, while the Supreme Court did refer to allegations of corruption, it held the JVA was void due to breaches of local rules and regulations and not due to corruption.⁹

The High Court determined that alleging corruption surrounding the JVA based on the Supreme Court Decision before the ICC Tribunal was not the same as raising corruption as a separate jurisdictional objection in those proceedings.¹⁰ Ultimately, the

High Court held that s. 73 of the 1996 Act applied and Balochistan was precluded from relying on a new jurisdictional objection not specifically and explicitly raised before the ICC Tribunal.

The High Court said in passing that s. 73 of the 1996 Act would not have precluded Balochistan from raising the corruption objection had Balochistan shown that, at the time of the ICC proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the corruption objection,¹¹ which was not the case here.

Notably, the High Court confirmed that although Balochistan might have faced certain difficulties in investigating the corruption allegation, it knew of the corruption ground at the relevant time and chose not to raise it before the ICC Tribunal as a jurisdictional objection, which was fatal to its annulment challenge.¹²

This was also important to the High Court’s finding that Balochistan was prevented from raising the corruption allegation because of “waiver by election”.¹³ The High Court held that Balochistan made “a clear choice” not to argue before the ICC Tribunal that it lacked jurisdiction because the JVA was void due to corruption, and could not go back on that choice now to suit its interests in the annulment proceedings.¹⁴

Balochistan’s argument that it “did not take part” in the arbitral proceedings, which is also a requirement of s. 73, on the basis of an alleged “standstill agreement” with Tethyan also was rejected.¹⁵

Finally, the High Court agreed with Tethyan that Balochistan improperly sought to challenge the ICC Tribunal’s decision on the merits.¹⁶ Since the ICC Tribunal had decided, as noted above, that the ICSID Tribunal’s “dismissal of the corruption allegations on the merits had “preclusive effect” in the ICC arbitration”,¹⁷ it was not open to Balochistan to re-litigate this merits issue in the English courts.

⁷ *Balochistan v Tethyan*, ¶¶ 26-27.

⁸ *Balochistan v Tethyan*, ¶¶ 96-100.

⁹ *Balochistan v Tethyan*, ¶¶ 81, 91.

¹⁰ *Balochistan v Tethyan*, ¶ 239.

¹¹ *Balochistan v Tethyan*, ¶ 243.

¹² *Balochistan v Tethyan*, ¶ 265.

¹³ *Balochistan v Tethyan*, ¶¶ 267, 270.

¹⁴ *Balochistan v Tethyan*, ¶ 278.

¹⁵ *Balochistan v Tethyan*, ¶¶ 193, 199.

¹⁶ *Balochistan v Tethyan*, ¶ 362.

¹⁷ *Balochistan v Tethyan*, ¶ 351.

Conclusion

The High Court's decision further evidences England's reputation as an arbitration-friendly jurisdiction, whose courts are reluctant to interfere with arbitral awards or to indulge parties' attempts to avoid and overturn adverse decisions of arbitral tribunals.

Notably, the High Court did not focus on the question of whether or not corruption in fact had taken place; what mattered was what Balochistan had (and more importantly had not) argued before the ICC Tribunal. This further highlights that challenges to an arbitral tribunal's jurisdiction should be carefully and systematically considered, with all grounds on which jurisdiction may be challenged at the time raised so as not to fall afoul of the restrictions in s. 73 at a later stage.

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