Arbitrability of Criminal Matters: Putting Things in Perspective

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ARTICLE DETAILS

ABSTRACT

Arbitrability is one of the most contentious and widely discussed issues of arbitration. The aim of taking up this topic in this paper is to establish that the exclusion of a subject matter from the domain of arbitrator’s consideration does not mean the exclusion of each and every aspect of that subject matter. Rather some aspects of a non-arbitrable subject matter may be allowed for arbitrator’s judgment. To prove this point, the arbitrability of criminal matters is discussed to manifest that some issues springing from criminal matters may also be submitted to arbitration.

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DOI: 10.47067/real.v5i2.204

1. Introduction

Parties have the autonomy to submit their dispute to arbitrators by excluding the jurisdiction of the court and arbitrators have the autonomy to resolve the disputes submitted to them. However, national laws put limitations on these autonomies by excluding certain disputes from the jurisdiction of arbitrator. In this way, the concept of arbitrability entails the matters which can or cannot be decided by the arbitrator. Normally, a state declares only those matters inarbitrable about which it is concerned and to which it attaches significance. For instance, each state desires to protect their economic and social interest. However, the scope of arbitrability also reflects the magnitude of trust that is reposed in arbitration by a state.

Article 2060 of French Code of Civil Procedure creates exception to this arbitrability like divorce and criminal matters declaring them in arbitrable. Unlike French law wherein Article 2059 of the Code of Civil Procedure declares every dispute arbitrable, which parties “may freely dispose,” in Pakistani law, there is no provision dealing specifically with the arbitrability. Therefore, the concept of arbitrability and the arbitrable matters are extracted from Pakistani jurisprudence. (Non)arbitrable matters are divided into three categories. First category includes the matters which are arbitrable like performance, frustration, repudiation, rescission of contract. Second, the matters from criminal, family,
and intra-corporate law are declared non-arbitrable. Third category includes bribery, corruption, illegality, misrepresentation and fraud. The view of Pakistani courts on the third category is a bit divergent. Although the prevailing view holds these matters nonarbitrable, there are some judgments declaring them arbitrable. This will become clear from the discussion that arbitrable nature of a matter is decided on the basis of public policy, that is, the matters that are considered of public policy are declared nonarbitrable.

The second section discusses the matters that arbitrable that is followed by third section on bribery, corruption, illegality, misrepresentation, fraud. The fourth section discusses the arbitrability of intra-corporate disputes and family and criminal matters to find out if some aspects of criminal matter may be declared arbitrable.

2. Arbitrability of Frustration, Termination, Rescission of Main Contract

The questions if the main contract is terminated, repudiated, rescinded or frustrated can be decided by arbitrator (Muhammad Azam, 1977; Water and Development Authority, 1977; Lahore Stock Exchange Limited, 1990; Port Qasim Authority, 1997; Sezai Turkes Feyzi Akkaya Construction Company, Lahore v. Crescent Services, Lahor, 1997). This may be due to the reason that these matters are not of public policy nature. However, arbitrator will have power to decide these matters if arbitration agreement is widely worded by conferring such power on the arbitrator (Lahore Stock Exchange Limited, 1990; Port Qasim Authority, 1997).

3. Arbitrability of Bribery Corruption, Illegality, Misrepresentation, Fraud

Bribery, corruption, illegality, misrepresentation and fraud are considered the matters of public policy and hence are declared non-arbitrable. This would be the case even if there is prima facie case of misrepresentation and fraud (Sir E. Haroon Jaffar, 1956; Haji Soomar, 1981). For this stance, Pakistani courts have reasoned that the determination of these issues involves complex legal points which cannot be left to arbitrators. In arbitrability of these matters were also held by the Supreme Court in HUBCO case and Reko Diq case.

4. Arbitrability of Intra-Corporate, Family and Criminal Disputes

4.1 Intra-Corporate Disputes

The exploration of Pakistani perspective on this topic reveals that the disputes excluded by parties from the scope of arbitration agreement or omitted to include them in arbitration agreement may be declared inarbitrable. In Pfaff case, Pfaff, a foreign sewing machine company initiated a new joint-venture with the name of Kayser-sartaj Co. Ltd (“Kayser” hereinafter) which was also a sewing machine company and was registered under Companies Act 1913 in Pakistan. The paragraph 2 of the Memorandum of Kayser spoke about the business that it was supposed to carry out which later became the subject matter of dispute. The objectives of this enterprise was:

To Manufacture, import, export, purchase, sell, or otherwise deal in, products which at present are or in future will be manufactured by Messrs G. M. Pfaff A. G. of Kaiserslautern/Federal Republic of Germany and/or by Messrs Critzner-Kayser A. G. of Karlsruhe-Dulach/Federal Republic of Germany, and/or by Messrs Sartaj Industries Ltd., of Lahore/Pakistan, or of one of their subsidiary companies according to separate contracts of technical co-operation, if any, to be concluded between the company and said enterprises.
180. Whenever any dispute arises between the company, on the one hand, and any of the shareholders, their executors, administrators or assigns, on the other hand, touching the true intent or construction, or the incidence or consequences of these presents, or of the Memorandum of Association, or touching anything then or thereafter done, executed, omitted or suffered in pursuance of these present or of the Memorandum of Association or touching any breach or alleged breach or otherwise relating to the promises or to these presents or to any statute affecting the company, including the fixing of the fair value of the shares of the company every such disputes shall be finally settled under the rules of conciliation and arbitration of the international chamber of commerce by one or more arbitrators appointed in accordance with the rules.

181. The cost of and incidental to any such reference and award shall be as per the rates of the international chamber of commerce for such cases and the parties will have to abide by these rules.

182. The submission to arbitration shall be subject as to, the mode and consequence of the reference and in all other respects, to the rules of Conciliation and Arbitration of the International Chamber of Commerce.

Kayser was however not granted the permission to put the trade mark “Pfaff” on its machines which was already being affixed exclusively on machines generated by Pfaff and was registered in Pakistan by Pfaff. Nevertheless, Kayser generated the machines with trade mark “Pfaff” on them, and thus purportedly committed trade mark infringement. Pfaff filed a suit under section 21 of Trade Mark Act 1940 and sections 54 and 55 of Specific Relief Act 1877 contending that Kayser had no right to tack trade mark “Pfaff” on his machine and thereby prayed for damages and permanent injunctions for restraining Kayser from generating, selling, stocking the machines with that trade mark. Trial court imparted the injunctions but later vacated these injunctions. The revocation of injunctions resulted on the application of Kayser wherein it contested that the combined effect of arbitration clause in its Articles of Association and section 34 of the 1940 Act mandated the court to stay its proceedings and vacate the injunctions owing to the reason that the arbitration clause bound the Pfaff Company for its being the shareholder of Kayser.

Such verdict was appealed to the Punjab High Court before whom it was argued that the dispute did not fall in the purview of arbitration clause and hence was not arbitrable. Punjab High Court stated that clause 2 of Memorandum provided that Kayser would, inter alia, “manufacturer, import, export, purchase, sell, or otherwise deal in, products which at present are or in future will be manufactured” by Pfaff and any other company mentioned in that clause. Court then held that the controversy in hand related to the sale of products asserted to have been manufactured by Pfaff after they were assembled into sewing machines. This action, as was held by Punjab High Court, therefore related to the business activity of Kayser and disputes regarding this action fell in the Article 180 (Arbitration) of Articles of Association which governed the “dispute arises between the company, on the one hand, and any of the shareholders, their executors, administrators or assigns, on the other hand, touching the true intent or construction, or the incidence or consequences. . . of the Memorandum of Association” etc. In this way Punjab High Court held that the dispute was arbitrable and came in the purview of arbitration clause.

Matter was then appealed to Supreme Court of Pakistan, which overturned the judgment on the grounds that High Court had totally misconceived the scope of Articles of Association and Memorandum of Association vis-à-vis its shareholders. Supreme Court first gave the general principles and then
applied those principles on the case to declare the dispute inarbitrable. Supreme Court pointed out that as per section 21(1) of Companies Act 1913, after registration of company, a company and its members would be bound by the terms of Memorandum and Articles of Company like they had signed each term individually. Section 21(1) of Companies Act 1913 says that “the Memorandum and Articles shall, when registered, bind the Company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and 1:gal representatives, to observe all the provisions of the Memorandum and of the Article subject to the provisions of this Act”. For that reason the arbitration clause in Articles of Association was binding on the company and its shareholders. Supreme Court then qualified this principle by saying that it did not follow from this principle that all kinds of differences emerging between the company and its shareholder, without any regard to their nature, must also fall within the ambit of section 21(1) just because the dispute was related to a matter which was enshrined in objectives of the company as delineated in its Memorandum. Supreme Court reasoned that the Memorandum only enlisted the objectives of the formation of company and it was not rare for Memorandum to catalogue almost all conceivably possible objectives so that when company in future partook on any of them, the vires of such decision of company should not be challenged from its shareholders. It held that memorandum which was a covenant between company and its shareholders to the effect that company would not engage in business except given in its memorandum, was different from Articles which dealt with the powers of a company and determined the rights and obligation of company and its shareholders. In this way, Supreme Court worded that, Articles of Association was also a contract between the company and its shareholders but only with regard to rights possessed as a shareholder and not in relation to rights which a shareholder possessed apart from this membership. In other words, it enunciated that, the contractual force of Articles of Association was confined to such clauses contained in it which were applicable to the relationship of company vis-à-vis shareholder. It then concluded that Articles of Association did neither give the company nor its shareholder any special contractual right beyond those which sprung as normal rights of shareholder. So, the rights which a shareholder might possess against the company but in a capacity other than or different from that of a member would not be the subject matter of contract enshrined in the Articles. Supreme Court in this regard referred approvingly to the following old judgments.

In Hickman case, Astbury, J said that “no right merely purporting to be given by an Article to a person, whether a member or not, in a capacity other than that of a member, as for instance solicitor, promoter, director, can be enforced against the company.” Such a conclusion was upheld in Beattie case, wherein the contractual force ceded to Articles of Association was confined to those stipulation in Articles that were applicable only to the relation of shareholders in their capacity as members and did not cover the provisions which governed the relationship between shareholders and the directors of company as such. This principle emerged from the facts wherein shareholder launched court proceedings against private limited company and one of its directors by challenging the validity of the remittance made to that director as remuneration. The court refused to stay those proceedings on the ground that the dispute did not fall within the purview of arbitration clause laid down in the Articles of Association because the subject matter of the suit was a dispute between the company and the said director in his capacity as director and that the suit did not concern the enforcement of rights which were enjoyed by all the shareholders in common.

Supreme Court also approvingly referred to London Sack & Bag case, wherein Dixon & Lugton commenced court proceedings against London Sack & Bag Co claiming damages on the account that the goods were not according to the description. Both of them were members of the United Kingdom Jute Goods Association Ltd whose rules contained an arbitration clause providing that all controversi
emanating from the transaction relating to trade would be resolved through arbitration. Relying on this clause, London Sack & Bag Co sought stay of court’s proceedings contending that arbitration clause was binding on all members because of the occurrence of trade dispute. Court declined to stay its proceedings on the basis that Articles of Association would not be attracted for the rights, becoming a ground to bring actions, which had actually emerged completely outside the company relationship. This would be the case with business transaction between its members because “they do not constitute a contract between the members inter se for all purposes but are only a contract between the company and its members and the members inter se in respect of the rights and liabilities of members as members, which can, under the Articles be enforced by or against the members only through the company.”

Turning to the case being dealt with it, Supreme Court extracted the general principle from the above narrated English authorities by saying that “the Articles of Association of a company deal only with the rights arising or connected with the relationship of the members of the company and the company as such and do not relate to the rights or liabilities which may have arisen as a result of independent or separate transactions such as trade relationships between the members of a company inter se or a member and the company.” Supreme Court further held that the infringement of trade mark by Kayser involved a capacity other than that of the member of company and therefore the dispute could not be said to have fallen in the ambit of arbitration clause incorporated in the Articles. Supreme Court further elaborated its conclusion by reasoning that disputes had nothing to do with Pfaff as its capacity of member of Kayser and that the right to use the company’s trade mark was entertained in a separate contract wherein no arbitration clause was present. So this transaction and the contract were completely different and was unconnected with the Articles of Association of Company (G. M. Pfaff, 1971)

It is noteworthy that the above English cases were decided under section 4 of the English Arbitration Act, 1889 and section 20 of the English Companies Act, 1929. Despite the fact that until now so much water has passed under the bridges and English law has seen so many developments, this approach developed under such old English statutes was applied by Pakistani Supreme Court. Along with this criticism, other concerning point might arise from judicial verdict holding that the powers given to courts under section 290 of Companies Ordinance 1984 are statutory and have to be exercised by court with regard to matters given therein. Therefore, the matters covered by this provision, like mismanagement or oppression of the company management, are not arbitrable (Pakistan Water and Power Development Authority, 2002. In these judgments court can be implied to have been asserting that the matters wherefor jurisdiction has been vested in court by any provision of Companies Ordinance 184 should mean to have made those matters inarbitrable.

4.2 Family Matters
Arbitrator cannot decide the matters of minors’ custody, dissolution of marriage and restitution of conjugal rights (Nadir Khan, 1990; Haji Muhammad, 1965; Razia Begum, 1961). However, the controversies concerning inheritance and division of property amongst the legal heirs of deceased may be submitted to the jurisdiction of arbitrator (Shamim Akhtar, 1977; Pir Omar Khayyam, 2014; Bibi Najm, 1998).

4.3 Criminal Matters
As submitted earlier, arbitrability is the limitation on autonomy of parties to submit certain matters to arbitrator and also on the power of arbitrator to adjudicate them. However, the declaration of a subject matter to be inarbitrable does not signify that every issue falling in the purview of that
subject matter would necessarily be non-arbitrable. In other words, the mere involvement of criminal law does not render every issue arising in relation thereto to be non-arbitrable as there are some aspects of crimes, even murder, which may be referred to arbitrator whose award on those issues should be enforced by the courts.

For instance, Pakistani law declares the matters of child custody, talaq and restoration of conjugal rights non arbitrable but arbitrator can assume jurisdiction over the issue so inheritance and distribution of deceased property amongst his legal heirs. Similar situation is there in France where Article 2060 the French Civil Code declares the ‘question of personal status and capacity’ and the issues relating to divorce or judicial separation to be nonarbitrable for both the domestic as well as international arbitration. Hence, it seems clear that validity of marriage, grant of divorce or establishments of paternity have been kept out of the domain of arbitration (Gaillard, 1999). Same is the case with English law wherein family matters are reserved for the exclusive jurisdiction of courts. However, the matters which do not involve public policy concern could be left for arbitration like discords on financial and property matters which pertain only to ‘inter-party reliefs’ (Lew, 2013).

Family Law Bar Association, Chartered Institute of Arbitrators, the Centre for Child and Family Law Reform and Resolution that is a group of family lawyers, which is formally known as Solicitors Family Law Association (SFLA), have jointly created Institute of Family Law Arbitrators (IFLA) aiming at arbitrating these sorts of disputes. Article 2.3 of IFLA Arbitration Rules confirms the non-arbitrability of disputes concerning (a) the liberty of individuals; (b) the status either of individuals or of their relationship; (c) the care or parenting of children; (d) bankruptcy or insolvency; (e) any person or organisation which is not a party to the arbitration. Similar approach is being followed in regard with insolvency law. Same is the situation in regards to the matters related to insolvency. Due to the effect which insolvency proceedings have on the third parties, they lie in the exclusive domain of French judge but arbitrator is not precluded from deciding the controversies relating to the issues of bankruptcy law.

This is in the jurisdiction of arbitrator to apply the provisions of public policy nature as laid down in Bankruptcy law, as for instance, once an arbitrator ruled that “shares held by de jure or de facto directors of a company in receivership are non-transferable as of the date on which the receivership procedure is opened.” Arbitrator’s award will be set aside only in case if the rules of domestic or international public policy of bankruptcy law are contravened. For instance, on the face of principle that “all proceedings against persons in bankruptcy shall be stayed . . . [which] concern both domestic and international public policy”, if arbitrator fails to bring arbitration proceedings to halt, it will amount to the disregard of public policy.

As to the criminal matters, they are also non-arbitrable in French and English law. Agreement to oust the English court’s jurisdiction over the criminal matters in favour of arbitration will not be enforced. Nevertheless, arbitral tribunal may make findings as to the criminal facets of contractual matters, like he may inquire into the allegation of a party that other party procured his signature by blackmail, although having its findings in positive, he cannot pronounce any sanction which can be awarded only by court in a separate proceeding. In this regard the powers of arbitrator are restricted to declaring a contract void (Lew, 2013). By employing this approach more robustly with reference to Pakistan, some aspects of criminal matters could be declared arbitrable. In Pakistan, while the criminal matters are not arbitrable, the contractual aspects of the criminal matters may be declared arbitrable. Schedule II (Tabular Statement of Offences) in Code of Criminal Procedure, 1898 cedes the details about offences with regard to warrants, bailability, compoundability, punishment and the courts in which they will be triable. Various categories of offences have been formulated with reference to their compoundability but two groups of offences will be discoursed here: offences which can be compounded without any prior permission from the court (Compoundable Offences) and those which
can be compounded only with prior permission from the court where the prosecution is pending.

In Pakistan Penal Code, the Compoundable Offences include murder (sections 302-324), offences harming organs of human body (sections 334-341), assault (section 352, 355 and 358), unlawful compulsory labour (section 374), criminal trespass (sections 447-450), dishonestly issuing a cheque (section 489F). 489-F of Pakistan Penal Code - Dishonestly issuing a cheque.

Whoever dishonestly issues a cheque towards re-payment of a loan or fulfilment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.

In this regard, the other relevant provisions pertain to the breach of contract to attend on and supply wants to helpless person (section 491), defamation (sections 499-504) and criminal intimidation if threat be to cause death or grievous hurt, etc (section 506).

The punishments for murder are death penalty, life imprisonment, and if the guardian of murdered waives the punishment and compounds, he can do so for blood money termed as Diyat or without taking such money. Despite the waiver or composition, court has authority to punish the murderer with life imprisonment under the principe of Fasad fil Arz. If court sanctions the composition on the basis of Diyat, it will prescribe the value of Diyat taking into consideration the financial position of offender. The value of DiyatI, however, should not be less than the value of thirty thousand six hundred and thirty grams of silver (section 302 to 324).

Likewise, in case of offence which ‘destroys or permanently impairs the functioning power or capacity of an organ of the body of another person, or causes permanent disfigurement’ the offender is punished with retribution which means that with the consultation of medical officer the same organ of offender in the same way will be amputated. However, if retribution is not possible then Arsh (financial compensation) will be imparted if the aggrieved person compounds to that effect. In spite of the fact that composition has been struck, court can also sentence imprisonment. The imprisonment or compensation, whichever chosen, will depend on the human organ impaired (sections 334 to 341). In the offences, wherein composition has been allowed for the guardian or offended person, court normally does not impart punishment if the option of composition has been exercised with or without opting for money.

On the other side, offences which are compoundable with a prior permission from the court before which the prosecution is pending, include dishonest misappropriation or conversion of moveable property (section 403), cheating by personation (section 416), cheating with knowledge that wrongful loss may ensure to person whose interest offender is bound to protect (section 418), mischief by injury to the works of irrigation or by wrongfully diverting water (v), house-trespass in order to commit offence punishable with imprisonment (section 450) using a false property mark (sections 481 & 482), counterfeiting a trade mark or property mark used by another (section 483), selling goods marked with a counterfeit trade mark or property mark (section 486) and marrying again during lifetime of husband or wife (section 494).
From the above description of offences, it is manifest that law entitles the offended or in certain cases, like murder, his guardian to compound the offence and when compounded, court will not mete out the punishment prescribed by Pakistan Penal Code. It should be considered that when offence is compounded and the punishment is waived, then this matter goes out of the domain of state’s exclusive authority to try the criminal matters because, in such situation, the offended or his guardians enjoys the right to decide as to whether he should or should not agree with the offender on the point as to the offence will be compounded in return for amount of money and that the amount of money will be determined by arbitrator appointed with mutual consent. This will be how things stand in murders or offences of body injuries wherein law expressly authorizes the composition in return for Diyat and Arsh. Decision as to whether or not to award punishment rests exclusively with the court, but when punishment is waived and the only thing to be decided is the ascertainment of amount of money to be paid from offender to offended, it is purely a private financial matter and there is no involvement of public policy. The decision of arbitrator should be enforced like an award who, while determining the amount of money in case of murder may take into account the financial position of murderer, the age and the financial expectancy of the deceased etc.

In all other matters mentioned above, law has not given expressly the alternative of monetary compensation but if we look at these matters, there is, along with other elements, an aspect of monetary loss, which became the basis for the declaration of these matters the offences to be punishable by imprisonment. In these matters, there is requirement of prior permission from court for their composition. It is submitted that in these matters the inflicted party can assert before the court that he is compounding with the offender on the condition that an agreement be concluded stipulating that arbitrator will be appointed consensually who will determine the monetary loss suffered and will award damages/compensation. In other words, court after accepting the composition from the party, should recognize and if needed enforce such agreement and subsequently decision on that issue from the arbitrator. Dishonouring of cheque may be an example in this respect which is an offence punishable with three years and if court allows the composition from the party, it should also accept if the party makes that composition contingent upon the agreement to appoint the arbitrator who will decide the amount of interest or amount of money on the basis of unjust enrichment.1 The arbitrable aspects of other offences lying in both the categories may be defined in this way.

5. Conclusion

Although not recognized by Pakistani courts, but the offences like murder are resolved by privately appointed persons which mechanism is named as Panchayat in the territories of Punjab Province and Jirga in Khyber Pakhtunkhaw province along with Federally as well as Provincially Administered Area. It has been observed that the derogation from their decisions is rare which are executed by social pressure. Although the arbitrator’s adjudication over the offences and their punishment cannot be allowed but the room for the adjudgment of the monetary and contractual side of offences and their recognition from the public are there in Pakistani legal regime and public, respectively.

1 Stay of suit on the basis of arbitration clause for the disputes in relation to purchase order was refused wherein defendant contended that the dispute with regard to dishonouring of cheques should be referred to arbitration. Court by rejecting such application said that the dishonouring of cheques is a cause of action independent of the purchase order and cannot be referred to arbitration. See, Nasir Ahmad v. Pakland Cement Limited, 2001 CLC 1156; Shell Pakistan Ltd. v. Aero Asia International (Pvt.) Ltd., PLD 2008 Karachi 429.
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