

*Hubco v. WAPDA: Pakistan Top  
Court Rejects Modern Arbitration*

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THE  
AMERICAN  
REVIEW OF  
INTERNATIONAL  
ARBITRATION

2000/Vol. 11 No. 3

## ARBITRAL & JUDICIAL DECISIONS

### *HUBCO v. WAPDA*: PAKISTAN TOP COURT REJECTS MODERN ARBITRATION

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#### I. INTRODUCTION - THE LEGAL BACKDROP

During the global festivities that accompanied the fortieth anniversary of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1998, practitioners from around the world congratulated each other on its astounding success. With over 120 jurisdictions as signatories, the New York Convention is undoubtedly the most successful treaty of its kind. Arbitration is established as the mode of choice for the resolution of international commercial disputes. However, in our enthusiasm we must not forget that there remains a great deal to be done. Nowhere is this more evident than in a decision of the Pakistan Supreme Court released in June of last year.<sup>1</sup>

Amid headlines screaming "ICC Incompetent to Hear Corruption Case," the Court refused to uphold an arbitration clause agreeing to ICC arbitration in London. The judgment shows all too clearly that the efficacy of the arbitration process still very much depends on the attitude of the courts of the parties involved. Not only does this decision point out the isolation of the Pakistani courts from the rest of the global legal community, it also threatens any remaining confidence that foreign investors might have had in the crumbling Pakistani legal system.

The system itself dates from the days when India was a British colony. After independence from Britain and division from India in 1947, Pakistan retained its English common-law heritage. In the matter of arbitration however, it has not kept up with recent developments in Britain or the rest of the trading world. Its current arbitration law was enacted in 1940 and is based on the 1940 English version current at that time. Despite many false starts, Pakistan has yet to ratify the New York Convention.<sup>2</sup>

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<sup>1</sup> *Hubco v. Pakistan WAPDA*, Civil Appeals No 1398/99 and 1399/99, dated June 14, 2000.

<sup>2</sup> It did, however, later ratify the ICSID Convention.

## II. THE HISTORY AND POLITICS OF THE CASE

The Hub Power Company Limited ("Hubco") is a World Bank financed project, and one of the largest companies listed on the Karachi Stock Exchange. Britain's National Power holds a 25% stake in the company.<sup>3</sup> On August 3, 1992, Hubco and the Water and Power Development Authority of Pakistan ("WAPDA") under the government of Prime Minister Nawaz Sharif, entered into a group of three project contracts, worth US\$1.8 billion, and collectively referred to as the Power Project Agreement ("PPA"). These comprised an Implementation Agreement guaranteeing the performance of the PPA, a Fuel supply agreement and a Power Purchase Agreement. Under the PPA, Hubco was to design, finance, insure, build, operate and maintain a power facility, the entire output of which would be bought by WAPDA under the Power Purchase Agreement.

On the same day, the Government of Pakistan issued a Sovereign Guarantee, undertaking to pay the amount due under the PPA.

Following prolonged negotiations between Hubco and the Benazir Bhutto government after elections in 1993, three amendments were subsequently made to the PPA.<sup>4</sup> The parties executed a Supplemental Deed to the PPA on November 16, 1993. On February 24, 1994 and on October 17, 1994 respectively, a First Amendment and Second Amendment were executed. The effect of the amendments was to increase the amount payable by WAPDA to Hubco under the PPA, and to transform the PPA from a Build-Operate-Transfer deal ("BOT") into a Build-Operate-Own deal ("BOO"). These three amendments are later referred to as the "Tainted Amendments."

The power plant was built and the PPA was performed for about two years. Then the government changed again. Nawaz Sharif, in power once more, initiated legal action to attack the three amendments signed under the Bhutto regime.

## III. THE LEGAL PROCEEDINGS

In May of 1998 a petition was filed in the Lahore High Court calling into question the validity of the Second Amendment, asserting that it was without consideration, unauthorized, illegal and fraudulent. There followed a plethora of proceedings in the Sindh and Lahore Courts, with each party accusing the other, both in the courts and in the press, of unfair practices, vexatious actions and dishonorable conduct. The Lahore High Court enjoined Hubco from repatriating the proceeds of the PPA and referred the question to a larger

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<sup>3</sup> S. McDonald, *Hubco Says Could be Forced to Walk Away*, THE FINANCIAL EXPRESS, Bombay, Jan. 16, 1999.

<sup>4</sup> *SC Restrains Hubco from International Arbitration*, THE INTERNATIONAL NEWS, Islamabad, June 15, 2000.

Bench. That court, remarking that WAPDA was paying 761 million rupees<sup>5</sup> more per month to Hubco than it was paying to another power company for similar technology, established a price of 1.5 rupees per KWH and ordered WAPDA to pay that rate to Hubco. Hubco applied for leave to appeal both orders. Those cases were left pending, with the repatriation of funds injunction remaining in place, while the High Court was asked to decide whether the appeal would be heard.

The PPA contained an arbitration clause. The operative parts are quoted below:

15.1 Government Law [sic]

The rights and obligations of the Parties under or pursuant to this Agreement shall be governed and construed according to the laws of *England*.<sup>6</sup>

15.2 Disputes Procedure

If any dispute or difference of any kind whatsoever (the "Dispute") shall arise between WAPDA "the Respondent's [sic] and the Company in connection with or arising out of this Agreement, the Parties shall attempt to settle such Dispute in the first instances within forty five (45) Days by discussions between the Company and WAPDA.

15.4 Arbitration

15.4(a) If the Dispute cannot be settled within forty five (45) days by discussions...then the Dispute shall be finally settled under the provisions of Sections 15.4 to 15.7.

15.4(c) Unless and until the GOP has implemented the Convention<sup>7</sup>...any Dispute shall be finally settled by arbitration in London, England under the rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") by one or more arbitrators assented [sic] in accordance with the ICC Rules.

15.4(d) No arbitrator appointed pursuant to ...Section 15.4(c) ...shall be a national of the jurisdiction of either party to this Agreement or of the jurisdiction of any of the Initial Shareholders nor shall any such arbitrator be an employee or agent or former employee or agent of any such person. ...

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<sup>5</sup> Approximately 25 rupees to US\$1.

<sup>6</sup> Minority judgment p. 11 (author's emphasis).

<sup>7</sup> The "Convention" refers to the ICSID Convention, mentioned in Article 15.4 (b) of the PPA. Pakistan had not ratified the ICSID Convention, so Art. 15.4(b) was inoperative, leaving 15.4 (c) as the dispute resolution clause.

15.4(e) The language of any arbitration ... shall be English.<sup>8</sup>

On July 9, 1998, Hubco filed a Request for Arbitration with the ICC Court of International Arbitration, with the method of calculating the price of electricity as the key issue to be determined.

On October 11, 1998, WAPDA wrote to Hubco that WAPDA considered the three amendments (the "Tainted Amendments"), to be illegal, fraudulent, collusive, without consideration, malafide and designed to cause wrongful loss to WAPDA and the government of Pakistan with consequential wrongful gain to Hubco. The letter threatened a lawsuit, alleging a criminal conspiracy, and claimed that the Tainted Amendments were void *ab initio*. The letter further alleged a fundamental breach of the contractual obligations and demanded reimbursement of 16 billion rupees that it alleged were overpaid, plus interest at 18%.<sup>9</sup>

Hubco filed suit in the High Court of Sindh to enjoin WAPDA from seeking resolution of the Dispute through any forum other than the ICC arbitration proceedings. That court granted an order enjoining WAPDA from giving effect to their letter of October 11.

WAPDA sued in the Lahore Court on January 16, 1999 for over 17 billion rupees, which it alleged, had been paid pursuant to the void Tainted Amendments, and for a permanent injunction restraining Hubco from pursuing the ICC arbitration. The Lahore court granted an interim injunction.

Various other motions were filed and at one point Hubco consented not to proceed with the ICC arbitration for a month. At that point an interim order of the Lahore High court enjoined Hubco from proceeding with the ICC arbitration. Following various other motions, Hubco again consented not to proceed with the arbitration before June 7, 1999. On that date a further injunction issued, and Hubco appealed. WAPDA initiated contempt of court proceedings against Hubco.

In June of 2000 Hubco filed a second request for ICC arbitration, claiming that WAPDA had not paid it some 1.4 billion rupees in General Sales Tax, since August of 1999.<sup>10</sup>

The Pakistan Supreme Court heard two appeals, #1398 filed by Hubco and #1399 filed by WAPDA, over a period of four months, handing down its decision on June 14, 2000. The Hubco appeal concerned the injunctions preventing the first ICC arbitration from proceeding. The WAPDA appeal asked that Hubco be restrained from invoking the arbitration clause in the Power Purchase Agreement.

Eight months prior to the release of the Supreme Court decision, the Sharif government had been ousted by the military, led by General Pervez

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<sup>8</sup> Judgment of the Supreme Court of Pakistan in Civil Appeals # 1398 and #1399 of 1999, at pp. 12-14.

<sup>9</sup> *Id.* at p.6

<sup>10</sup> *Hubco requests for arbitration with ICC*, DAWN, Islamabad, June 9, 2000.

Musharraf, amid charges of corruption.<sup>11</sup> At that time, each judge of the Pakistani Supreme Court was required to swear an oath of allegiance to the new military regime.

#### IV. THE SUPREME COURT DECISION OF JUNE 14, 2000

In a decision as surprising for its form as for its content, the Pakistan Supreme Court found in favor of WAPDA and against Hubco in both actions concerning the first ICC arbitration.

The dissenting opinion, written by Mr. Justice Muhammad Bashir Jehangiri, Acting Chief Justice, and also signed by Mr. Justice Abdur Rehman Khan, formed the bulk of the decision, at 44 pages. In the judgment, this minority opinion preceded the majority opinion, written by Mr. Justice Ahmad, with Nisar J and Sheikh J concurring. The majority decision, which enunciates the law in Pakistan, was just five pages long.

##### A. *The Majority*

After referring to the facts as set out in the minority opinion, Ahmad, J began the majority decision by stating that the only question to be answered was that set out in the order granting leave to appeal:

Whether the nature of the dispute and the question of mala fide, fraud, illegalities and the legal incompetence raised preclude resolution of the matter through arbitration as a matter of public policy and as such the dispute between the parties is not arbitrable and cannot legitimately be subject matter of ICC arbitration?...<sup>12</sup>

He then restated the issue:

The main question falling for determination according to our view, was that if an agreement prima facie had been obtained through fraud or bribe *would it not then be sufficient to take it out of the pale of the arbitrability as distinguished from a commercial dispute* raised under a valid agreement, therefore we have heard learned counsel for the parties as to whether there was prima facie material and circumstances brought on the record in support of these allegations, as mere allegations were not sufficient in order to come to the conclusion, whether the dispute between the parties is arbitrable or not.<sup>13</sup>

The only dispositive provision contained in the majority decision appears at page 2 of the decision, wherein the majority decided that certain "salient

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<sup>11</sup> Musharraf remains Chief Executive of Pakistan at the time of writing this article.

<sup>12</sup> Majority judgment, p. 1.

<sup>13</sup> *Id.* at p.1- 2 (Author's emphasis).

features and circumstances” had persuaded the majority to hold that the “dispute is not arbitrable [and] as such should be decided by a Court of law as a matter of public policy.” The majority then recited these “salient features and circumstances,” as follows:

(a) The original price of \$1275 million was raised to \$1500 million, despite WAPDA’s objections. This also meant that CPP (the fixed component of the calculation to determine the tariff payable for electric power by WAPDA to HUBCO) was increased.

(b) The debt/equity ratio was changed from 80% - 20% to 75% - 25%, placing an extra burden on WAPDA since it was paying a higher rate of interest for equity financing than for debt financing.

(c) A certain Schedule 6 provided for determination of the tariff by Experts, which would have kept the proceedings away from arbitration, was done away with in the tainted amendments.

(d) Prolonged negotiations between the parties came to a sudden end under mysterious circumstances, and the tainted amendments were executed soon after the installation of the new government after the 1993 elections.

In the minds of the majority, these circumstances raised a prima facie case of misuse of power by [a] public functionary.

In addition, Ahmad J noted that the amended Schedule 6 and other Schedules were not signed by WAPDA but only by its chief economist; that officers of WAPDA had resigned to join Hubco, one at “an exuberant [sic] salary”; and that an amendment to the financial provisions placed an added burden on WAPDA. In addition, the contract was converted from BOT to BOO without consideration, and the rate calculation factor was unreasonably raised without plausible reasons.<sup>14</sup>

With that, the learned judge concluded that there was prima facie evidence for a further judicial probe, since if proved, these allegations of corruption would render “these documents” [sic] void, so that “on account of these criminal acts disputed documents did not bring into existence any legally binding contract between the parties, therefore, the dispute primarily relates to very existence of a valid contract and not a dispute under such a contract.”<sup>15</sup>

Curiously, the majority judgment never called into question the validity of the initial PPA agreement, of which the arbitration agreement was part. There was thus no question of an invalid arbitration clause. In fact the Court stated: “The disputes between the parties are not commercial dispute [sic] arising from an undisputed legally valid contract...[but] on account of these criminal acts disputed documents [*Author: presumably the “tainted amendments”*] did not bring into existence any legally binding contract between the parties...the

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<sup>14</sup> *Id.* at p.2.

<sup>15</sup> *Id.* at p.5.

dispute primarily relates to very existence of a valid contract and not a dispute under such a contract.”<sup>16</sup>

This conclusion sits ill with the very broad scope of Articles 15(2) and 15(4) of the PPA dispute resolution provisions cited earlier.

Reduced to bare bones, the reasoning of the majority seems to be: “No matter what the parties agreed, if a prima facie case for corruption is made out, that is a criminal matter which according to Pakistani public policy is not arbitrable, but falls to the exclusive jurisdiction of the Pakistani courts.”

### *B. The Minority*

The dissenting opinion offers stark contrast with the majority decision. Jehangiri J reviewed the long and labored history of the case in great detail. He observed that “...there was no doubt that any dispute...will be within the ambit of the arbitration provisions...” but also that “...there was nothing in Clause 17.12 [which dealt with unlawful commissions, bribes, pay-offs, and kickbacks] to oust the jurisdiction of the Pakistan Courts.”<sup>17</sup> Nevertheless, Clause 17.12 did not expressly refer issues of fraud and corruption to the Pakistan Courts, as the Courts were never even mentioned.<sup>18</sup>

Jehangiri J cited Article 6(4) of the ICC Rules of Arbitration:

Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void, or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.

He then discussed the concept of separability, but observed that WAPDA had accepted the validity of the arbitration and original PPA, so there was no issue of separability in this case.<sup>19</sup> He referred to *Russell on Arbitration*: “Earlier case law showed that the public policy requirement that a contract which is void should not be enforced was superseded by the over-riding need to give effect to the parties’ wishes to have their disputes resolved by arbitration.”<sup>20</sup> He then discussed Pakistani cases, all of which led him to conclude that the arbitration clause was valid,<sup>21</sup> that the clause was broad enough to give

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<sup>16</sup> *Id.* at p.5.

<sup>17</sup> Minority judgment, p.30.

<sup>18</sup> *Id.* at p. 31.

<sup>19</sup> *Id.*

<sup>20</sup> RUSSELL ON CONTRACTS, (Sutton et al., eds.) cited at Minority judgment, pp. 31-32.

<sup>21</sup> *Hitachi v. Rupali* (PLD 1998 SCMR 1681); *Sezai Turkes Feyzi Akkaya Construction Company Lahore v. Crescent Services* ((1997 SCMR 1928); *Port Qasim Authority v. Al-Ghurair Limited Karachi* (PLD 1997 Kar 636); *Lahore Stock Exchange Limited v. Fredrick J Whyte Group* (PLD 1990 SC 48).

jurisdiction to arbitrators to decide the validity of the contract, and that the issue of whether terms of the agreement were legally enforceable was indeed an arbitrable issue.<sup>22</sup>

Citing the English Court of Appeal case of *Soleimany*,<sup>23</sup> the learned judge acknowledged that an exception could exist where the contract itself is for an illegal activity, for example a contract of co-operation between highwaymen, a contract for slavery, for drug trafficking or for the sale of alcohol in Pakistan. "The arrangement here is the provision of electricity to WAPDA. The PPA is a valid and entirely legal contract, and the arbitration agreement contained in it is certainly not contrary to public policy...[I]t is totally unclear how a valid contract can – itself – become contrary to public policy because of an allegation that a later amendment was the product of an illegal act."<sup>24</sup>

Jehangiri again referred to *Russell*, saying, "An issue as to whether a particular dispute falls within the wording of an arbitration clause, will therefore, be governed by the proper law of the arbitration agreement." He added that although English law governs the arbitration agreement, Pakistan law is "exactly the same."<sup>25</sup> He continued, "There is no doubt at all that fraud falls squarely within the formulation in Clause 15 of the PPA, and there are many examples where cases have been stayed in favour of arbitration notwithstanding that fraud and corruption have been alleged."

In the opinion of the minority, clearly the ICC arbitration should have been allowed to proceed, and if eventually enforcement of an award were sought in Pakistan, that would be the forum in which to challenge its validity on any ground permissible under any Pakistani Law.<sup>26</sup>

## V. COMMENTARY

As was mentioned earlier, Pakistan's legal system was inherited from its pre-independence status as a British colony. But where English arbitration law has evolved to meet the changing landscape of international trade, Pakistan's has stagnated in isolation. According to *Russell*, under old statutes, the court could revoke the authority of an arbitral tribunal to deal with claims involving issues of fraud and determine those claims itself. This has been repealed, and today under English law – the law of the Power Purchase Agreement – fraud can be within the scope of an arbitration agreement.<sup>27</sup>

The modern trend is illustrated by a decision in ICC case No. 5622 of 1988. In that case, the tribunal found the contract containing the arbitration clause null and void as being a contract to "traffic in influence." In deciding

<sup>22</sup> Minority judgment, p.34.

<sup>23</sup> [1999] 3 All ER 847.

<sup>24</sup> Minority judgment, p. 36.

<sup>25</sup> *Id.* at p. 41. *Cited:* Island Textile Mills Ltd, Karachi v. V/O Technoexpert & another (1979 CLCC 307).

<sup>26</sup> *Id.* at 44.

<sup>27</sup> RUSSELL at 63; Arbitration Act 1996 s. 109(2).

whether it had jurisdiction, it reviewed the approaches of other arbitral tribunals, noting a change in attitude by contrasting two decisions in similar cases.

In 1963, a single arbitrator had held a contract to be null and void because it had been drawn up to facilitate the bribing of Argentine officials. The arbitrator held, "...[T]here exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable... Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations... [A] case such as this...can have no countenance in any court...nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case."<sup>28</sup>

It is interesting to note that in declining to rule on the merits of the case, this arbitrator seemed also to suggest that a national court should do likewise. This was not a case of an arbitrator stepping aside in favor of a national court on public policy grounds. He simply found that the contract was void, therefore the arbitration clause contained in it was void, and there was thus no basis for his jurisdiction to decide the case.

Contrast this older decision, with a later award, in Case No. 3916 of 1983, which centered on a dispute between an intermediary and a company that had obtained a public contract through it. The tribunal stated, "It is well known that during the years in which the works took place in State A, corruption or at least the sale of influence were a constant practice. ...Clearly performance by claimant could only mean the use of its influence." In this case however, the tribunal entered into the merits of the case, found that it had jurisdiction, and then dismissed the claim for the illicit commission.<sup>29</sup>

The tribunal in Case No. 5622 preferred "this second solution which is admitted and recognized today by doctrine and jurisprudence...since it makes it possible to declare null and void all contracts which are illicit or contrary to morality." In opting in favor of its jurisdiction, the tribunal quoted Professor Pierre Lalive:

Since, as we know, international arbitration has become "the ordinary and normal means" to settle international commercial disputes, the function of the arbitrator is not any more...that of declaring that the request for arbitration filed by claimant is admissible or non-admissible according to the degree of contractual morality... *The protection of the superior interest of the international community seems much more to urge the arbitrator not to renounce jurisdiction over the merits of the case and examine whether the contract complies with transnational public policy.*<sup>30</sup>

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<sup>28</sup> Cited in Case No. 5622/88 of JEAN-JACQUES ARNALDEZ ET AL., ICC ARBITRAL AWARDS III 220, 233-34 (1997).

<sup>29</sup> *Id.* at 234-35.

<sup>30</sup> *Id.* at 235 (author's emphasis).

This award, given a dozen years ago, has been echoed in other awards and in state courts throughout the world.

In 1992 the *Westinghouse*<sup>31</sup> decision of an ICC tribunal considered separately the impact of bribery on the arbitration clause and on the contract itself. According to Professor Emmanuel Gaillard, "[t]his ruling is in keeping with the recent trend enlarging the scope of the arbitrability of disputes, particularly in international matters, which has simultaneously developed in Europe and in the USA, and which extends to matters involving ... fraud..." In the event, the tribunal did not find evidence of the corruption alleged.

In the 1993 case of *Hilmarton*,<sup>32</sup> a French company had obtained a contract for public works in Algeria using Hilmarton's services as an intermediary. The French company later refused to pay part of the contract price to Hilmarton, which instituted an ICC arbitration. The French company resisted, claiming that the contract was void because it violated Algerian laws against the use of intermediaries. The tribunal applied the mandatory Algerian law to declare the agreement void, depriving Hilmarton of its commission. Swiss courts later annulled the award, finding that the tribunal had wrongly applied the Algerian statute when the parties had chosen Swiss law for their agreement. However, the question of the tribunal's jurisdiction to hear the dispute involving illegal commissions was not the issue.

Professor Gaillard commented at the time, "...the arbitrator could have found the contract void had actual corruption been proven. The fact that a vast majority of legal systems condemn corruption would have provided a sound basis to ground the decision in truly international public policy."<sup>33</sup>

The common thread running through each of these decisions has been the commercial desire to adopt arbitration as the "one-stop shop" for the resolution of international disputes, and to avoid the delays and expense of involving state courts. Implicit in this attitude is the premise that international arbitrators are as well equipped as state judges to recognize the dangers of bribery and corruption, and are as eager as state judges to "promote high ethics in commercial transactions, both at a national and an international level, and to favour the growth of international trade in a context of fair competition."<sup>34</sup>

## VI. THE SEQUEL – CONSTITUTIONAL REVIEW

The Constitution of Pakistan contains an interesting provision at Article 188, which allows the Supreme Court to review its own decision. Thus it was

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<sup>31</sup> ICC Case No. 6401, 7(1) INT'L ARB. REP. 69, cited by Gaillard in *Issues of Corruption Before Tribunals*, N.Y.L.J., Oct. 5, 1995 p.3 at p.5.

<sup>32</sup> ICC Case No. 5623, 1993 REV. ARB. at 327, cited by Gaillard, *supra* note 31.

<sup>33</sup> Gaillard, *supra* note 31 at 7.

<sup>34</sup> ARNALDEZ ET AL., *supra* note 28 at 233, citing Winquist, *L' exaction et la corruption dans les transactions commerciales*, Report of ICC Council of Nov. 27, 1977.

that in July of 2000, a petition was filed requesting that the Supreme Court revisit the case and reverse its decision.

In its petition, Hubco noted that the majority decision specifically made reference to "the Judgement handed down by Jehangiri, J.," to the facts "elaborately given and discussed therein," and to the "complete absence of any dissent from or disagreement with the reasons, conclusions and findings of Jehangiri, ACJ."<sup>35</sup> They further contended the "unprecedentedly short Majority View" did not per se fulfill the requirements of law for a judgment. In Hubco's view, the "complete absence of any reasoning to support the conclusions renders the judgment arbitrary and discriminatory and is a denial of justice."<sup>36</sup>

Another basis of the petition for review was that the parties had agreed at the outset that the only issue to be ruled upon was "whether the nature of the dispute and the question of malafide, fraud, illegalities and legal incompetence raised preclude resolution of the matter through arbitration as a matter of public policy" so as to render the dispute inarbitrable by ICC arbitration. Counsel for Hubco had limited its submissions to that question. However, Counsel for WAPDA then filed extensive material and spent five days to establish a prima facie case of fraud, corruption and illegality. Hubco had then been obliged to respond on an issue which it contended, was immaterial. In its view, any decision on this issue was potentially prejudicial to one of the parties in the future determination of the disputes by a proper forum.

Would the Supreme Court agree to review the decision? The answer was expected in early October of 2000, but in September it appeared that the parties had settled their dispute. Perhaps that accounted for the delay, for the Supreme Court decision had still not been released by the end of November. The September negotiations were not in fact successful, but finally in early December the parties announced that they had indeed reached an accord. The question of review was rendered moot, so legal observers will never know what the Pakistan Court might have done.

## VII. DENOUEMENT

Although the settlement is doubtless a tremendous relief to the parties themselves, it leaves the state of the law in Pakistan in disarray. The decision, as it stands, has thrust Pakistan law squarely back into the 1950's, putting it at odds with modern arbitration rules and jurisprudence the world over.

And in fact, this may not be the end of the story. The settlement is subject to the acquittal of Hubco on charges of corruption and the final price of the

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<sup>35</sup> Hubco's Review Petition, p.3.

<sup>36</sup> *Id.* at p.13. Without expressly alleging it, Hubco appeared to imply that the first part of the judgment, the minority opinion, was actually originally meant to be the majority decision, and that the third judge signed the "wrong" opinion.

electricity has yet to be determined by arbitration.<sup>37</sup> WAPDA is involved in similar disputes with several other power producing companies in Pakistan,<sup>38</sup> all of whom are watching with interest as the saga continues to unfold.

For an impoverished country seeking both financial and technical assistance from outside investors, the repercussions can only be negative. Business operators need predictability. They need to be certain that their rights will be recognized if a legal problem arises. Arbitration has for decades been the accepted method for resolving international commercial disputes.

Foreign investors will be loath to count on arbitration clauses if they fear that mere allegations of corruption are enough to render the clause inoperative and place them before the Pakistan national courts. Investors who do not have confidence in the legal system of their host country will hesitate to accept the invitation. Those who do chance the venture will demand a substantial premium on their profits to compensate for the perception of additional risk.

Those who rule Pakistan, eager as they are to attract foreign investment and expertise, would do well to remember that actions taken with a political, protectionist short-term view will likely have severely negative political repercussions in the long term.

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<sup>37</sup> AUTHOR'S NOTE: Both these matters have now been resolved, and there are no outstanding issues between Hubco and the Government of Pakistan today.

<sup>38</sup> Private interview (January 2001) with counsel for one of the disputant companies.