Bangladeshi courts at odds in respect of its powers in relation to arbitrations seated outside of Bangladesh

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A. Introduction

Bangladeshi courts have come to conflicting decisions in respect of the scope of its powers over arbitration seated outside of Bangladesh. The controversy appears to have stemmed from the meaning and application of s.3 of the Bangladeshi Arbitration Act 2001 (AA 2001)[1] which deals with the "Scope" of the Act. These decisions have left the law in a state of flux and have caused confusion for the international business community, who are users of the arbitral process, as they are now left without an opportunity to successfully invoke the Bangladeshi courts in respect of arbitration being conducted outside of Bangladesh. The effect of this is most prominent in relation to interim remedies where the Bangladeshi courts are unable to grant any relief to arbitration users, even to protect and/or support the foreign arbitral process.

The two decisions, *HRC Shipping Ltd.* (HRC)[2] and *STX Corporation Ltd.* (STX),[3] both from different Benches of the Bangladeshi High Court, dealt with the role of Bangladeshi courts in arbitrations seated outside of Bangladesh. In both these cases, the Bangladeshi courts have reached decisions starkly different to one another. These judgments leave a lurking danger for the international community as they may see themselves in a situation where they have successfully contested or are contesting an expensive international arbitration, but have access to no assets of the losing party, as they have been transferred or sold before the award is enforced in Bangladesh.

Following the *STX* case, the arbitration parties will have no opportunity to successfully seek the Bangladeshi courts' help in preserving the assets of the losing party, so that it can meet its obligations under the arbitral award. In short, the ruling in the *STX* case has confirmed that the Bangladeshi courts are unable to issue any interim relief, even to support the arbitral process, as a result of the wording of s.3 of the AA 2001. The cases and the Bangladeshi courts' ruling are considered next.

B. HRC Shipping Ltd.

The *HRC* case arose out a dispute in relation to the shipment of goods under a charter agreement. Under the relevant agreement, *HRC* shipped certain cargo in 53 containers to Sri Lanka from Bangladesh. However, much of the said cargo was dropped into the sea and washed away when the ship was hit by a tsunami, while berthing at its destination port. *HRC* submitted that the loss was not only due to the tsunami but also due to the negligence of the ship's crew. As a result, *HRC* claimed compensation and damages, through the Bangladeshi courts, by instituting an Admiralty Suit (the Suit). However, since the charter agreement contained an arbitration clause, the Defendant Nos 5 and 6 commenced arbitral proceedings in London and applied for the Suit to be stayed under s.10 of the AA 2001.[4]

The issue before the Bangladeshi High Court in the Suit was whether it should stay the local proceedings in favour of the arbitration in London. The Defendant Nos.5 and 6 argued that s.10 of the AA 2001 requires the Suit to be stayed in favour of arbitration, whereas *HRC* argued that the AA 2001 is only applicable to arbitration proceedings seated in Bangladesh. Since the arbitration proceedings were taking place in London, s.3 of the AA 2001 did not allow the court to stay the proceedings in favour of a foreign arbitration, seated outside of Bangladesh.

Upon hearing submissions from both the parties, the court first considered the content of s.10 of the AA 2001. It concluded that this provision requires the courts in Bangladesh to stay the local proceedings in favour of arbitration unless it finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration. The court noted that this was in contrast to the previous arbitration legislation, the Arbitration Act 1940, which gave the local courts a discretionary power as to whether a stay should be granted or not.

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[1] Section 3 of the AA 2001 states: "Scope—(1) This Act shall apply where the place of Arbitration is in Bangladesh; (2) Notwithstanding anything contained in sub-section (1) of this section, the provisions of ss 45, 46 and 47 shall also apply to the arbitration if the place of that arbitration is outside Bangladesh; (3) This Act shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration; (4) Where any arbitration agreement is entered into before or after the commencement of this Act, the provisions thereof shall apply to the arbitration proceedings in Bangladesh relating to the dispute arising out of that agreement."

[2] *HRC Shipping Ltd. v M.V. X-Press Manaslu and Others* [unreported]. This case has been recently reported in 1 LCLR [2012], Vol.2, pp.207–22.

[3] *STX Corporation Ltd. v Meghna Group of Industries Limited and others,* Arbitration Application No.16 of 2009 [unreported]. This case has been recently reported in 1 LCLR [2012] Vol.2, pp.159–178.

[4] Section 10 of the AA 2001 states: "10. Arbitrability of the dispute—(1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filing a written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration. (2) Thereupon, the Court shall, if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration …."

The court in the *HRC* case held that s.3(1) of the AA 2001 had to be given an inconclusive interpretation and that it was delivering such judgment on the basis that the AA 2001 avowedly sought:

> "to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitration."[5]

The court noted that the AA 2001 was largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law and that the harmonisation and flexibility fostered by the UNCITRAL Model Law was also enshrined in the AA 2001.[6] The court relied on the decision in *M/s Strains Construction v Government of Bangladesh* ,[7] where it was held that:

> "The Salish Ain, 2001 *[AA 2001]*, repealing the earlier Arbitration Act, 1940, is prepared on that *[UNCITRAL]* model."[8]

Bearing this fact in mind and in spirit of the fair and efficient settlement of disputes through arbitration, the court ruled that s.3(1) is an inclusive provision rather than an exclusive one. It explained as follows:

> "It is evident that Section 3(1) provides that 2001 Act would apply where the place of arbitration is in Bangladesh. It does not state that it would not apply where the place of arbitration is not in Bangladesh. Neither does it state that the 2001 Act would 'only' apply if the place of arbitration is Bangladesh."[9]

In contrast, the Court noted that the UNCITRAL Model Law through arts 1(2) and 8 have an exclusive definition as it provides that proceedings will "only" be stayed if it is in the territory of a State. The court interpreted this omission to be an indication that the Bangladesh Parliament did not intend to restrict the application of the AA 2001 only to arbitration taking place in Bangladesh.

Moreover, the court noted that no distinction was made in the AA 2001 between "International Commercial Arbitration which takes place in Bangladesh and International Commercial Arbitration which takes place outside Bangladesh". The court relied heavily on the Indian case of *Bhatia v Bulk Trading*,[10] to elaborate on the point that the applicability of a national arbitration statute is not restricted to arbitration taking place in that State. The court in the *HRC* case relied on the *Bhatia* judgment to support its purposive interpretation of the arbitration legislation in Bangladesh, namely to ensure the fair and efficient settlement of disputes arising in international commercial arbitration.

In the *HRC* case, the court also noted the importance of this interpretation in relation to interim remedies. It held that, if such an interpretation was not given, it would inhibit applications from parties for interim relief in Bangladesh, even if the properties and assets of the parties may be in Bangladesh. This line of reasoning rested upon the Indian decision of *Olex Focas v Skoda Export*,[11] where it was held that the courts have the power to grant interim relief for arbitration seated abroad as:

> "There is always a time-lag between pronouncement of the award and its enforcement. If during that interregnum period, the property/funds in question are not saved, preserved or protected, then in some cases the award itself may become only a paper award or decree."[12]

In relation to arguments against the application to stay the Suit, the court observed that if such a stay was not possible:

> "then the provision for enforcement of foreign arbitral award will become redundant as prior to completion of the foreign proceedings, one of the party is free to obtain an order injuncting the foreign arbitration proceedings and as such there would not be any foreign arbitral award to enforce."[13]

In light of the above reasoning, the court in the *HRC* case stayed the Suit in favour of the arbitration seated outside of Bangladesh. It is clear from the reasoning that the court in the *HRC* case took a more purposive interpretation of s.3 of the AA 2001, bearing in mind that the AA 2001 was modelled largely on the UNCITRAL Model Law and acknowledging that such an interpretation was necessary in order to make interim remedies available to aggrieved parties arbitrating their disputes abroad, i.e. outside of Bangladesh.

Despite this approach, the court in the *STX* case came to the exact opposite decision on the very issue of providing interim remedies to parties arbitrating their disputes abroad, i.e. outside of Bangladesh.

C. STX Corporation Ltd.

The *STX* case arose out of a supply contract between *STX Corporation Ltd.*, a foreign company, and Meghna Group of Industries Limited in Bangladesh. The contract

[5] *HRC* Judgment, para.27.
[6] *HRC* Judgment, para.28.
[7] *M/s Strains Construction Company v Government of Bangladesh represented by Chief Engineer, Roads and Highways Departments* 22 BLD (HCD) 236.
[8] *HRC* Judgment, para.30 quoting the *M/s Strains Company* case.
[9] *HRC* Judgment, para.32.
[10] *Bhatia International v Bulk Trading SA* 2002 AIR (SC) 1432.
[11] *Olex Focas Pvt. Ltd v Skoda Export Co. Ltd.* 2000 AIR (Del) 171.
[12] *HRC* Judgment, paragraph the *Olex Focas* case.
[13] *HRC* Judgment, para.40.

contained an arbitration agreement under which any dispute in relation to the contract was to be resolved through arbitration in Singapore. Disputes arose under the contract and arbitration was commenced in Singapore.

While the arbitration proceedings were pending, *STX* filed for an interim order in the Bangladeshi High Court against some of the Respondents under s.7A of the AA 2001[14] to restrain those Respondents from transferring or selling off their assets so as to prevent them from escaping from their obligations under the forthcoming arbitral award.

The main issue for the court was whether interim remedies could be provided in cases of foreign arbitration, seated outside of Bangladesh, under the AA 2001.

In this case, *STX* argued that the court should adopt a purposive approach towards interpreting the AA 2001. In support of its arguments, *STX* relied on several authorities from different parts of the world. In particular, *STX* referred to art.VI(4) of the European Convention on International Commercial Arbitration of 1961[15] and art.9 of the UNCITRAL Model Law,[16] in order to support the argument that the court has the power to order interim measures. *STX* also relied on authorities from various modern jurisdictions. In particular, *STX* referred to the judgment of the Third Circuit Court of Appeals in *Stephen Blumenthal v Merrill Lynch*, which held:

> "the pro-arbitration policies reflected in the … Supreme Court decisions are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through a preliminary injunction. Arbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute. A district court must ensure that the parties get what they bargained for—a meaningful arbitration of the dispute."[17]

In respect of Indian authorities, *STX* admitted that there were conflicting judgments as to whether interim relief could be granted in such a situation but emphasised that, in the *Bhatia* case, it was held that the court could order interim measures in such instances. *STX* also argued that Bangladesh had certain obligations under the New York Convention, to which it is a signatory, and that the court should be mindful of such obligations when considering s.3 of the AA 2001.

STX also scrutinised the *HRC* case where this issue had been considered and decided upon by the Bangladeshi High Court. In particular, *STX* argued that the judgment in the *HRC* case specifically stated that:

> "It is to be noted that the definition of international commercial arbitration makes no distinction between international commercial arbitration which takes place in Bangladesh and international commercial arbitration which takes place outside of Bangladesh. If the proposition of the plaintiff [that national court proceedings cannot be stayed for arbitration proceedings abroad] is correct then the provision for enforcement of foreign arbitral award will become redundant as prior to completion of the foreign proceedings, one of the party is free to obtain an order injuncting the foreign arbitration proceedings and as such there would not be any foreign arbitral award-to-enforce ….".[18]

Given this line of reasoning and that a narrow construction of s.3 of the AA 2001 would be opposed to the public policy of facilitating commerce, *STX* submitted that the court should adopt the findings in the *HRC* case.

In contrast, the Respondents contended that the court should literally interpret the AA 2001 and that subss.(1) and (2) of s.3, when read in conjunction, make it clear that, in respect of arbitration held outside of Bangladesh, the AA 2001 will not be applicable. In particular, the Respondents relied on *M/s. Stratus Construction Company v Government of Bangladesh*,[19] where it was held that:

> "a Court of law … cannot create new right or remedy or give itself a jurisdiction which is not given in the Act itself."[20]

The Respondents also cited *Unicol Bangladesh v Maxwell*,[21] *Uzbekistan Airways v Air Spain Limited*,[22] and *Canada Shipping v TT Katikaayu*,[23] in order to support their arguments that the AA 2001 did not grant the necessary powers to the court to order injunctions in relation to arbitration held outside of Bangladesh as the statute only applied to proceedings in Bangladesh. Following *STX*'s lead, the Respondent also raised the public policy of refusing to grant interim orders and emphasised that the purpose of arbitration is to settle disputes promptly and with minimum interference by the courts.

[14] Section 7A of the AA states: "7A. Powers of court and High Court Division to make interim orders: (1) Notwithstanding anything contained in Section 7, unless the parties agree otherwise, upon prayer of either parties, before or during continuance of the proceedings or until enforcement of the award under section 44 or 45 in the case of international commercial arbitration the High Court Division and in the case of other arbitrations the court may pass order in the following matters: … (c) To restrain any party to transfer certain property or pass injunction on transfer of such property which is intended to create impediment on the way of enforcement of award."
[15] Article VI(4) states: "4. A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court."
[16] Article 9 states: "Arbitration agreement and interim measures by court: It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."
[17] *Stephen Blumenthal v Merrill Lynch Pierce, Frenner & Smith Inc* , 910 F2d 1049 (2nd Cir 1990), Fed. Sec. L. Rep. P 95, 417.
[18] *HRC* Judgment, para.46.
[19] *M/s. Stratus Construction Company v Government of Bangladesh* 22 BLD (HCD) 2002.
[20] *Stratus Construction Company* Judgment, para.9.
[21] *Unicol Bangladesh v Maxwell* 56 DLR (AD) (2004).
[22] *Uzbekistan Airways v Air Spain Limited* 10 BLC (2005).
[23] *Canada Shipping v TT Katikaayu* 54 DLR (2002).

After hearing the parties, the court started with a plain reading of s.3 of the AA 2001 and held that the legislature intended for the AA 2001 to apply only when the arbitration proceeding is in Bangladesh. The court held:

> "from a combined reading of sections 2(ga) [2(c)], 2(ta) [2(k)] and 3 of the Act it is apparent that the intention of the legislature is that the scope of the Act of 2001 is limited within the territory of Bangladesh, except that there is a scope to enforce an award passed in a foreign arbitration, pursuant to section 3(2) read with sections 45, 46 and 47 of the said Act of 2001."[24]

In relation to the interpretation of statutes, the court held that the literal construction of a statute is "the golden rule of construction" and that when words in a statute are clear and unambiguous, they should be construed according to their tenor and meaning, as it most clearly reflects the intention of the legislature. The court further explained that, while interim measures for foreign arbitration were provided for in other jurisdictions, until and unless the Parliament enacts such a provision explicitly in a statute, such measures cannot be granted in Bangladesh.

The court found the line of authorities relied on by the Respondents more convincing in relation to this particular issue, i.e the scope of the AA 2001. In the *Unicol* case, the Appellate Division of the Bangladesh Supreme Court held that:

> "the law as in Sections 3(1) and 3(4) of the Act … is limited in application as to the arbitration being held in Bangladesh, but not as to matter restraining a particular party from proceeding with arbitration in foreign country in respect of a contract signed in Bangladesh."[25]

Similarly, in *Uzbekistan Airways* case, the Appellate Division held that:

> "on a careful scrutiny of the scheme and the relevant provisions of the Act, both the Divisions have taken the view that Section 10 of the Act has no manner of application with regard to foreign arbitral proceeding… In that view of the matter, it appears that the scope of Section 10 of the Act is well settled and it has been decided more than once by the Appellate Division in the aforesaid two cases that Section 10 of the Act does not apply to foreign arbitral proceedings."[26]

Similarly, in *Canada Shipping*, where the arbitration was to be held in London, it was found that:

> "section 10 of this Act is not applicable and the application to stay the proceeding before this Court should not be entertained considering the facts that it involves arbitration proceeding in a foreign country and not in Bangladesh."

In respect of these cases, the court held that since the Appellate Division had categorically ruled on this issue, there was no further scope for the court to depart from their findings in light of the binding precedent rule enshrined in art.111 of the Constitution of the People's Republic of Bangladesh.[27] The court also considered the *HRC* and the *Bhatia* cases but showed due deference to the decisions of the Appellate Division.

The court also considered the Indian case of *Dozco India Pvt. Ltd. v Doosan Infracore Co. Ltd*,[28] where the contract expressly excluded national jurisdiction by stating that the Indian Arbitration Act 1996 shall not be applicable to any disputes arising out of the contract. The court drew an analogy and felt that, in the present case, the jurisdiction of the Bangladeshi courts was also ousted in a similar manner since the relevant contract stated that it would be governed by the laws of Singapore.

It is clear from the two cases discussed above that the Bangladeshi Courts have reached different interpretations of s.3 and the scope of the AA 2001. The *HRC* case decided that the Bangladeshi courts have the necessary powers in respect of foreign arbitration, seated outside of Bangladesh, whereas the *STX* case decided that the courts did not have similar powers in respect of arbitration outside of Bangladesh. This has caused some concern and confusion within the international community and lawyers as to whether users of arbitration are able to successfully invoke the Bangladeshi courts in order to seek remedies to support the arbitral process.

D. The issue of interim remedies

This issue is most important in the case of interim remedies as parties are unable to seek the protection of the national courts if the losing party decides to transfer or sell their assets in order to frustrate the whole arbitral process, the very issue in the *STX* case. The importance of interim remedies cannot be understated. Interim measures constitute a wide range of (provisional) measures that can be in the form of freezing assets, preserving evidence or property and so forth. The purpose of such remedies is generally to uphold and support the arbitral process and prevent any steps from being taken by the losing party which may cause irreparable harm to the process by making the enforcement of the award impossible.

While arbitral tribunals can order interim relief, it is an accepted fact that there may be a number of situations where only national courts can effectively address the

[24] *STX* Judgment, para.22.
[25] *Unicol* Judgment, para.15.
[26] *Uzbekistan Airways* Judgment, para.5.
[27] Article 111 states: "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."
[28] *Dozco India P. Ltd. v Doosan Infracore Co. Ltd* 2010 (9) UJ 4521 (SC) Manu/SC/08/2010.

potential harm to the arbitral process. For example, effective authority may be required from a national court within whose jurisdiction the party against whom the relief is sought is resident. As Lew explains:

> "due to the standing organisation of state courts, and the direct enforceability of court ordered interim measures, they are in general quicker and more effective than measures ordered by tribunals which in some cases may have to be declared enforceable by state courts."[29]

The construction of the AA 2001 in the *STX* case is regressive in terms of the development of arbitration laws in Bangladesh as it leaves open the possibility that the innocent party, after undertaking expensive arbitration proceedings, is left with little more than a *paper* award. To allow for such a result would be against the spirit of the New York Convention, to which Bangladesh is a party.

A literal interpretation of the AA 2001 is also out of line with the intention of the Bangladeshi Parliament, when it specifically amended the AA 2001 in 2004 to incorporate a Section on interim relief. The *Bangladesh Law Commission Report No.55*, dated January 8, 2003, which formulated this amendment states:

> "the arbitral tribunal, (after it is constituted), is empowered to take interim measures during the arbitral proceedings. The absence of a provision to take such measures before constitution of the arbitral tribunal and after making of an arbitral award may provide an unscrupulous party an opportunity to defeat the award that may be made against it … We feel that a provision empowering the Court to take interim measures should be included in the [Arbitration Act, 2001] in order to prevent an unscrupulous party's attempt to defeat enforcement of an award."[30]

Given the procedure behind the preparation of the Law Commission Reports and the stakeholders in the Commission, such a report would not have been published without the consultation of, and consensus with, legislative and governmental bodies. It is also important to keep in mind that the Bangladesh Law Commission itself was set up by the Law Commission Act 1996 which affirms the Commission's duty to:

> "recommend amendment of relevant laws including company law or legislation of new law in appropriate cases in order to create competitive atmosphere in the field of trade and industry."[31]

E. Conclusion

Despite this, the uncertainty regarding the Bangladeshi courts' powers in respect of foreign arbitrations remain in a state of uncertainty. It seems that, unless the Bangladeshi Parliament amends the AA 2001 to expressly include that the Bangladeshi courts would have the power to issue interim remedies in cases of foreign-seated arbitrations, this uncertainty created by the conflicting judgments in the *HRC* and *STX* cases will continue. It is feared that this might, in turn, dilute the reputation that Bangladesh is trying so hard to develop as an arbitration friendly jurisdiction. This is not healthy for a developing country which is actively trying to attract foreign investment and international trade.

For the sake of completeness, it is also necessary to briefly mention that it would be interesting to see what effect the recent Indian Supreme Court's decision in *Bharat Aluminium Co.* (BALCO)[32] will have on the Bangladeshi courts considering Indian case law bears a strong persuasive effect on Bangladeshi jurisprudence. Recently, the *BALCO* case confirmed that the Indian courts are unable to interfere and/or issue any interim orders in respect of arbitration seated outside of India. This has made the position in the *STX* case much stronger but in a bid to help develop arbitration laws, along the lines of non-interference from national courts, the *BALCO* case has removed all possibility of international arbitration users to seek help, through interim remedies from the Indian courts, in order to support the process. This would prove to be disastrous to the development of arbitration laws and would be in direct conflict with the spirit and ethos of the New York Convention.

In relation to this particular interim remedy issue, it is felt that Bangladesh could take valuable lessons from Singapore, which is a developed arbitral jurisdiction in South-East Asia. In *Multi-Code Electronics Industries v Toh Chun Toh and Others*,[33] the Singapore High Court took a less restrictive approach on this issue, deciding that it could, under its general statutory power, grant injunctions in support of foreign-seated arbitral proceedings.

In terms of legislation and to avoid any future confusion, Singapore's International Arbitration Act (IAA), which is largely based on the Model Law, has also been amended in line with the amendments made to the Model Law in 2006. In 2006, the Model Law was substantially revised. As part of the revisions, the original art.17 of the Model Law was replaced by a new chapter on interim measures. This contains a new art.17J which provides that:

[29] J. Lew, L. Mistelis et al., "Comparative International Commercial Arbitration", (London: Kluwer Law International, 2003) at paras.23–113.
[30] Bangladesh Law Commission, "Report on the Proposal for Amendment of the Arbitration Act, 2001, for Including a Provision Relating to Interim Measures by Court" (January 8, 2003) Available at *http://www.lawcommissionbangladesh.org/reports/55.pdf* [Accessed January 10, 2013].
[31] Article 6(b) of the Law Commission Act 1996.
[32] *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.* , Civil Appeal No.7019 of 2005.
[33] *Multi-Code Electronics Industries (M) Sdn Bhd and Another v Toh Chun Toh Gordon and Others* [2009] 1 SLR 1000.

> "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in court."

The intention of this new provision of the UNCITRAL Model Law was to clarify beyond doubt the powers of a competent court to grant interim measures. In line with this, Singapore's IAA was amended on January 1, 2010 to include a new s.12A on court-ordered measures. The new s.12A(1) drew on art.17J of the Revised Model Law and clarified that the court's powers to grant interim measures are not restricted to Singapore-seated arbitrations.