

Enforcing Foreign Arbitration Awards in Bangladesh

A Step in the Right Direction

by Barrister Khaled Hamid Chowdhury

An article published in the 'Law and our Rights' page on 6 April last, I touched upon the problems concerning recognition and enforcement of foreign arbitration awards in Bangladesh and concluded with the hope that a direction from the Honourable Appellate Division, our highest court of law, may help to resolve this matter. This is of crucial significance for commercial litigants in Bangladesh who are parties to contracts that involve a foreign element.

Soon after the article went to press for publication but before it was in fact published, the Honourable Appellate Division had an opportunity to address the very issue in the case of British Airways PLC v Bangladesh Air Service (Pvt.) Ltd. (Civil Appeal No 30 of 1996; judgment pronounced on 27 March 1997). Mustafa Kamal J. gave the leading judgment followed by a brief concurring judgment by Latifur Rahman J. with the other learned judges. AT M Afzal CJ, M A Rouf J. and BB Roy Choudhury J also concurring.

This case concerned an agreement between BA and BAS under which the latter was appointed as the General Sales Agent (GSA) of the former to act in certain parts of Bangladesh.

The agreement contained an arbitration clause according to which the parties had to refer their disputes to arbitration "in accordance with and subject to the Arbitration Act 1950" (that is the English Arbitration Act then in force) and also a jurisdiction clause which stipulated that the agreement had to be interpreted in accordance with English law. This is submitted should have been termed the choice of law clause as jurisdiction decides which is to be the forum for settling the disputes (lex fori) and the choice of law clause in a contract stipulates the law which the forum is to apply in settling the dispute. Thus if the parties so stipulate, a court of our country conferred with the jurisdiction to hear a case may well have to apply English law in construing a contract if this happens to be the proper or chosen law of the contract. This point deserves a more consideration in future. Moreover, the parties may choose the law of one state to construe the agreement and the law of another state to govern arbitration. These problems are quite common in the province of conflict of laws, which is a growing area for the courts and litigants in our country.

After a dispute which arose between BA and BAS, a series of litigation followed. BA relied on the aforesaid clauses and contended that the courts of Bangladesh had no jurisdiction to appoint an arbitrator to conduct arbitration proceedings locally whereas BAS asserted that such in interpretation conferring exclusive jurisdiction on English courts was wrong and

that the relevant factors favour arbitration to be held in Bangladesh. The Hon'ble High Court Division agreed with BA and made the rule absolute. Hence BAS appealed and the matter came before the Hon'ble Appellate Division. The issue then simply was — which court should have jurisdiction over the arbitration proceedings, our courts or the English courts?

One of the grounds taken up by the Appellant (BAS) was that the High Court Division did not properly consider their submission that a foreign arbitration award was not enforceable in Bangladesh. This article is concerned with this incidental issue and while it is clear that this point did not form ratio decidendi (i.e. the principle of law on which the decision of the case was based) of the case, any observation of the Appellate Division may have affected many other pending or future cases in the lower courts involving foreign arbitration awards and this is precisely the reason why two of the most distinguished lawyers of the country, Dr. Kamal Hussain and Dr

Istan Supreme Court held in the case of M/S Yangtze (London) Ltd. v M/S Barlas Bros. (Karachi) reported at 14 DLR (SC) 151 that in the absence of fresh notification by the Central Government of Pakistan a foreign award was not enforceable in Pakistan. Consequently the Government of Pakistan promulgated Ordinance 53 in June, 1962 removing doubt and declaring that the notification issued by the Central Government of India in the pre-partition period declaring any power to be party to the Convention or any territory to be the territory to which the Convention applies, shall be deemed to be a notification issued by the Central Government of Pakistan. The learned counsels submitted that in the Bangladesh Code (Vol. XI), published in 1988, the Act 1937 containing the amendment made by Ordinance 53, has been published as an existing law, indicating thereby that the Government of Bangladesh takes the view that Bangladesh continues to be bound by the Protocol and Convention.

To fortify this argu-

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M. Zahir, although not instructed by the parties to this case voluntarily came as interveners and the Honorable Appellate Division kindly gave them permission to make their submissions and also notified the learned Attorney General of Bangladesh, Barrister KS Nabi to be present at the hearing.

As has been said in the previous article, after the judgment of the High Court Division in the case of M/S Haji Azam v. Singletton Bind & Co. reported at (1975) 27 DLR 583, the acclaimed (but sternly disputed) legal position was that the Foreign Arbitration (Protocol and Convention) Act 1937 which was in force in Pakistan has not continued in force under the provisions of Laws Continuance Enforcement order 1971 and is not operative in Bangladesh as Bangladesh could not be internationally bound to accept any obligation made or undertaken by Pakistan or any other state, which was exercising control over territories now forming Bangladesh without its express consent. Besides, there was no gazette notification by the Government of Bangladesh as contemplated by the 1937 Act to signify such consent.

Both the learned intervening counsels strongly objected to this view in their submissions. After the partition, the Pak-

ment, they asserted that when the case of Haji Azam decided in 1975, the Government of Bangladesh had already signified its consent. The notification of 1938 by the then Central Government of British India is the notification as contemplated by the 1937 Act. Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972 (PO No. 48 of 1972) did not expressly exclude the 1937 Act and therefore, it could not be said that the 1937 Act was not carried over as an existing and operative law by the Law Continuance Enforcement Order 1971. Moreover, there is nothing in the judgment of that case showing that this point was even argued before the court. No submissions were made by the advocates from the either side to this effect. The learned counsels submitted that even if the decision in Haji Azam's case is not plainly wrong, it was decided per incuriam by reason of the failure on the part of the advocates involved in that case to bring this point to the notice of the court and should not be followed.

On the point that Bangladesh has acceded to the New York Convention 1958 in May 1992 under which we are now internationally bound to recognize and enforce foreign judgment.

Barrister KS Nabi, the learned Attorney General, however, relied on Haji Azam's case

law" and submitted that even though no domestic legislation was passed to provide for enforcement of foreign arbitrate awards, following accession to the New York convention, our Courts while interpreting such awards should favour an interpretation which upholds their validity or enforceability under the 1937 Act. He also quoted from the Bangalore principles adopted by the Commonwealth Judicial Colloquium (1988) where a principle was adopted as follows: "It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislations and common law." He also opined that the courts can either directly enforce a foreign award under section 44A of the Code of Civil Procedure by executing a judgment on the basis of which an English award has been made or by having a judgment passed abroad in terms of the award and then by filing a suit here on the basis of the foreign judgment.

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and submitted that the Act of 1937 is now at standstill and without a fresh notification by the Government of Bangladesh, the Act cannot be operative. There exists no legal mechanism for enforcement of a foreign arbitration award in Bangladesh. This view supported the arguments made in the case by Senior Advocate Khandker Mahbubuddin Ahmed, the learned counsel for the appellant Bangladesh Air Services Ltd. who, however, did not make any submission in reply to the intervening counsels.

The lawyers involved in the case were unequivocal in their criticism of the Government for not having taken any steps to implement the New York Convention after five long years have elapsed or for keeping an Act in Bangladesh Code which, the High Court Division ruled not to be operative twenty two years back. There was no explanation coming from the learned Attorney General either. In any case, the learned Attorney General assured the Court that he will instruct the Government to make immediate legislation to provide for a legal mechanism for enforcement of arbitral awards passed pursuant to the New York Convention.

Mustafa Kamal J did not favour either side on this point as he observed: 'We are not deciding in this appeal whether Haji Azam's case, 27 DLR 583 has been correctly decided or not or whether legal mechanisms exist for enforcement of a foreign arbitral award. We leave it for decision in an appropriate case, if and when occasion arises.' (at page 22 of the transcript)

The Hon'ble judge clearly foresaw the complications that may have arisen if he had decided this issue one way or the other in a case where the point of enforceability of a foreign award was not directly relevant as that may have effected those pending cases in the lower courts. Latifur Rahman J also took a similar view in his concurring judgment. (at page 28)

What matters is that the purpose has been served. The Honorable Appellate Division has conveyed the message to the Government via the learned Attorney General and our sincerest hopes are that steps will promptly be taken as per the assurance of the Attorney General. As for the decision in the case, the Honorable Court dismissed the appeal of Bangladesh Air Services Ltd. so that Arbitration proceedings may now go ahead in England in accordance with the provisions of the English Arbitration Act.

Psychologically, the important point here is that we view law as a fundamental shield against the raw exercise of power by the state — the police, the IRS and we tend to view authority not as benign, but as potentially corrupt and malignant.

Identifying with the underdog goes hand in hand with an unseemly tendency to gloat in victory, and to go into a tailspin at the first sign of defeat. There was gloating when the Japanese took over Singapore in 1942, and similar gloating in 1989 when the Japanese Bubble Economy seemed on the verge of swallowing up the world. But as an American baseball player on a Japanese team once said, 'When a team is down in the bottom of the seventh, the fight seems to go right out of them.' Hence the hysterical collapse of confidence and perspective in the aftermath of 1942 and 1989.

Angle No 2. Japanese do not go through adolescent identity crises and rebellions the way we do. This is historically and psychologically related to Angle No 1. It's interesting that adolescence in the West is actually a relatively recent phenomenon, dating back to the 17th and 18th Centuries — precisely the time that monarchs were being overthrown and replaced with constitutions. In the Middle Ages, children at the age of seven or so followed their par-

ents into the fields, mills and factories and seamlessly became miniature adults. You look at paintings of children from Middle Ages and they look like unsmiling miniature adults. Then, one day, teenagers began moping around the house, arguing with their parents, locking themselves in their rooms, growing long hair and wearing T-shirts that say 'Question Authority.' In a funny way, at the family level, the new phenomenon of adolescence, the Oedipal struggle between sons and fathers, paralleled and replicated the political revolutions that were going on at the same time.

The educational system keeps children at home, intellectually paralyzed and unable to think for themselves, pathetically dependent on their mothers. Until recently, male children first sons, simply never left home. When they go to a certain town, their parents located a suitable bride and arranged to have her move in. Given this, it's no wonder that Japanese men are in an arrested state of development, fixated on mother figures. They have never had the critical, formative experience that we all go through of standing up to our fathers and making that critical break with authority through which we define our own identities and find our own individuality.

Angle No 3. Law, commercial law, is a tool that makes possible economic and other transactions among complete strangers. In the West, in the 17th and 18th Centuries, disaffected adolescents left home and headed for London and the colonies. There, they found themselves thrown together with a lot of strangers from whom they had to buy things, borrow money, rent rooms, and so forth.

Japanese lawyers and bureaucrats are great sticklers for proper form and procedure. Meanwhile, in back alleys, men emerging from pachinko parlours run by North Korea and organized crime exchange tokens for cash through small holes in the wall and stop off at brothels that are outlawed and officially do not exist.

I'm afraid that I am beginning to sound like one of those rabid foreign writers of letters to the editor of the Japan Times, complaining about the local treatment of dogs, women and foreigners.

The views expressed are the writer's own and are not necessarily of The Daily Star.

Lawyering in Japan: A Foreigner's View

by Dr Md. Zahirul Hoq Mollah

Watergate, the OJ Simpson case, Paula Jones, which are dramatic examples of the daily butting of heads in the courts between the state and its citizens that we take for granted — simply don't happen here.

They view authority as benign or benevolent. In Japan's great revolution in 1868, the Meiji Restoration, they didn't topple and behead the emperor, the put him back on the throne?

Because, let's face it, law in Japan is marginal, lawyers are marginal, compared to what they are back in America, England and Europe.

I mean this as a serious existential question for myself and for you.

I have a number of friends from law school who are now professors at well-known law schools in America teaching Japanese law. I often wonder what it is they teach, unless it is a kind of antimatter, negative gravity physics course in which the whole point is that this is a country that operates without a system of law as we know it.

To understand why Japan lacks a legal system, is to understand why and how Japan is different from the West across a whole spectrum — historical, anthropological, psychological. Japan's legal system, such as it is, is just a special case of the larger issue of Japan itself. You can't grapple with the legal system without grappling with the larger Tar Baby of what makes Japan tick.

Let me write the Japanese legal system from four or five different angles that I hope will converge at some kind of focal point.

Angle No 1. Law in the West, historically, reflects a profound mistrust of authority. Somewhere in the 17th and 18th Centuries, people in Europe and England woke up one day and said, 'There is no reason the king should arbitrarily be able to deprive me of my freedom or property just because he is king.' Monarchs across Europe were toppled and beheaded, and replaced with the framework of constitutions, parliaments and the Rule of Law that we all take for granted.

Psychologically, the important point here is that we view law as a fundamental shield against the raw exercise of power by the state — the police, the IRS and we tend to view authority not as benign, but as potentially corrupt and malignant.

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Here we have an entire country rooting for the Japanese version of the New York Yankees. There is a lot of handwringing about organized packs of Alpha Dog school children picking on the weak, but no one stands up to protest and there is a sense that the victim somehow deserves his fate, invincibility.

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Metropolitan

26 pilot projects under SEMP likely to start from Sept

The government is expected to start execution of 26 pilot projects at a cost of Taka 120 crore under Sustainable Environment Management Programme (SEMP) to benefit the grassroot level population, particularly women, from September this year, reports BSS.

The United Nations Development Programme (UNDP) will fund the projects initially to fulfil the government's commitment to poverty alleviation through better resources management, making people aware of environmental problems and stopping further environmental degradation.

The concerned government officials and representatives of non-government agencies and donors on Thursday discussed the implementation modalities of the 26 priority components identified by National Environment Management Action Plan (NEMAP) at a day-long workshop.

Inaugurating the workshop

at the CIRDAP auditorium in the city, the Environment and Forest Secretary Abbaq Ahmed said that all our actions should be aimed at poverty alleviation.

He described the NEMAP as an important document for redirecting our plan towards the poor.

Assistant resident representative of the UNDP Michel Constante also spoke at the inaugural session. Presided over by the Joint Secretary of the Ministry of Forest and Environment KM Ehsanul Haq, the working sessions was addressed, among others, by NEMAP team leader Dr Mahfuzul Haque, Dr Atiar Rahman of the BIDS, Additional Secretary of Industries S Zamal Mazumder, Dr Rashida K Chowdhury of the CAMPE, Dr Mohiuddin Faruque of BELA, Badil Alam of the FEJB, Badal Rahman of Environment and Development Alliance and Dr Sabi Nandi of the UNDP.

A UNDP paper, circulated in the workshop, said that the immediate beneficiary of the SEMP projects will be the poor, particularly the women, in the eco-specific intervention areas. Special focus will be given on enhancing their productive potentials for better livelihood. Capacity building efforts for public sector bodies and civil society organisation will promote increased awareness, enhance competence and develop conducive policies towards sustainable development.

Participants at the workshop appreciated the government's seriousness in dealing with the environmental issues and poverty alleviation. They suggested equal number of representatives from the civil society in the steering committee of SEMP. The fire incident at the Magurjhara gas field in Sylhet, causing serious environmental problem in the country, also came up for discussion and measures to check repetition of such incidents in the future, were suggested.

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