

LAW OPINION

Applicability of the Arbitration Act 2001 in relation to foreign arbitrations: towards a new horizon

Md. SAMEER SATTAR

The Arbitration Act 2001 (the "Arbitration Act") was enacted with the spirit of recognising and dealing with, *inter alia*, aspects of international commercial arbitration. To that end, the Arbitration Act was amended in 2004 to include a provision which conferred powers upon the High Court Division of the Supreme Court of Bangladesh (the "HCD") to issue interim orders (in cases of international commercial arbitration). Section 7A of the Arbitration Act provides that the HCD may pass, in cases of international commercial arbitration, any order in relation to matters enumerated thereunder which include, *inter alia*, the power to issue ad interim injunctions and to take "any other interim protective measures which may appear reasonable or appropriate" to the HCD. However, despite having such an express provision, the same could not be consistently used by the parties due to a confusion arising from Section 3 of the Arbitration Act, which deals with the scope and application of the

Although the Arbitration Act is yet to be amended in line with the revised UNCITRAL Model Law, the international community can take great comfort from the decision of the HCD in the *Southern Solar* case until such an amendment of the Arbitration Act takes place or until the overturning appeal of the *Southern Solar* case.

Arbitration Act. The controversy appears to have stemmed from the meaning and application of Section 3 of the Arbitration Act.

The two decisions, *HRC Shipping Limited v. M.V. X-Press Manaslu and others*, 12 MLR (HC) 2007 ("HRC") and *STX Corporation Ltd v. Meghna Group*, (2012) 64 DLR (HCD) 550 ("STX"), both from different Benches of the HCD, dealt with the role of Bangladeshi courts in arbitrations seated outside of Bangladesh. In both these cases, the Bangladeshi courts had reached decisions starkly different to one another. The ruling in the *STX* case had confirmed that the Bangladeshi courts are unable to issue any interim relief, even to support the arbitration

process, if the place of arbitration is outside Bangladesh. On the other hand, the *HRC* case had earlier taken a more liberal view of Section 3 of the Arbitration Act and held that it would apply even where the place of arbitration is outside Bangladesh. However, this issue arose again for consideration by the HCD in the case of *Southern Solar Power and another v. Bangladesh Power Development Board and others*, 2019 (2) 16 ALR (HCD) 91 ("Southern Solar") - where the HCD, in stark contrast to the views laid down in the *STX* case, went back to the position taken in the *HRC* case and ruled that the HCD is well competent to entertain an application under Section 7A of the Arbitration Act even in relation to an arbitration taking place outside of Bangladesh.

One of the focal points of deliberation in this case was the applicability of the Arbitration Act for arbitrations taking place outside of Bangladesh. On this point, the HCD stated that Section 3 of the Arbitration Act is not about the jurisdiction of the courts reiterating that its wording does not seek to oust the jurisdiction of the HCD in relation to foreign arbitration. Since there is no use of any prohibitory wording, the relevant provisions of the Arbitration Act may be applicable. This observation appears to be a bold shift from the more conservative and restrictive view taken in the *STX* case, wherein the HCD, on its perusal of Section 3 of the Arbitration Act, had stated that the modern method adopted by the courts is the literal construction of statutes - which is also called the golden rule of construction.

While deliberating on the maintainability point, on a word-for-word scrutiny of Section 7A of the Act, the HCD held that the said Section "being supernal" confers jurisdiction upon the Bangladeshi courts to issue interim orders not only for arbitrations taking place in Bangladesh but also for the ones taking place outside of Bangladesh. The HCD decided to differ from the previous decisions on this point since it was of the view that the earlier cases did not have the opportunity to consider and examine the expression "until enforcement of the foreign award" as embodied in Section 7(A) of the Arbitration Act, and, as such, the said judgments were given *per incuriam* (i.e. through lack of due



regard to the law or facts). Moreover, in the past, the HCD was kept confined to the provisions of Section 3 of the Arbitration Act by portraying it to be a source for ousting jurisdiction of the courts and overlooked the provisions of Sections 7 and 7A of the Arbitration Act, by which jurisdiction regarding arbitration matters has been vested in the courts.

In the *Southern Solar* case, the HCD also stressed that the apparent purpose of the enactment of the Arbitration Act, upon repealing the earlier legislation, was done in order to harmonise the same with the UNCITRAL Model Law and, while the arbitration proceedings (both domestic and foreign) should be allowed to proceed with minimum interference from any courts, at the same time, the courts should come forward to assist the foreign arbitration tribunal as and when needed by keeping in mind the scheme and purpose of enactment of the Arbitration Act. Moreover, on such a standing, the HCD has put forth a recommendation for the Arbitration Act to be amended so that it can be applied to foreign arbitrations.

The HCD's ruling in the *Southern Solar* case is a welcome change to the arbitration landscape in Bangladesh (in so far as the jurisprudence is

concerned). In the case of *Frigo Mekanik Insaat Tesisat Ve Taahut Sanayi Ve Ticarest A.S. v. Bangladesh Milk Producers' Co-operative Union Limited (BMPCUL)*, 2019 (2) 16 ALR (HCD) 357, the HCD (following the *Southern Solar* case) upheld the maintainability of a Section 7A application even in case of foreign arbitrations. It is laudable as to how the HCD in the *Southern Solar* case has gone ahead to give a liberal interpretation to the provisions of the Arbitration Act in order to aid the arbitration process. For arbitration enthusiasts, it is most certainly to be seen as a timely attempt at stretching the provisions of the Arbitration Act to the point of giving effect to its actual spirit envisaged at the time of its conception. This is indeed a major paradigm shift in the jurisprudence of international commercial arbitration in so far as Bangladesh is concerned and, undoubtedly, a welcoming one - especially with the ushering in of an era where cross-border transactions are at their peak. Most importantly, the HCD's stance in the *Southern Solar* case is also in line with the revised UNCITRAL Model Law. In the year 2006, the UNCITRAL Model Law was substantially revised which stated that "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 regardless of the place/venue of arbitration. Although the Arbitration Act is yet to be amended in line with the revised UNCITRAL Model Law, the international community can take great comfort from the decision of the HCD in the *Southern Solar* case until such an amendment of the Arbitration Act takes place or until the overturning appeal of the *Southern Solar* case. The fact that judge-made law is an independent source of law contributes to its flexibility; and judges continue to adapt the common law to changes in commercial practice and social values. It is felt that judgments like the *Southern Solar* case will certainly instill a strong confidence on the part of foreign investors to keep on investing in Bangladesh instead of feeling discouraged to do so.

The writer is an Advocate of the Supreme Court of Bangladesh, assisted by his research associate Sajid Hossain.

LAW VISION

Foreign university branches/study centres in Bangladesh: law and policy to improve higher education

M RAFIQUIL ISLAM

Few recent matters have solicited the attention and concern of many in Bangladesh and abroad as intensely as has the current state of its higher education. The successive successes in development and need for speedy recovery from the pandemic hit economy have but added to the urgency of prioritising high quality human resources to face the post-pandemic challenges. The ongoing development and its vision of achieving a middle-income country by 2030 and a developed country by 2041 warrants a mission of developing its human resources capable of achieving this goal and identifying and addressing the challenges of sustainable development momentum now and beyond 2041. The education policy of Bangladesh needs to recognise higher education as a driver of economic and social development and creator of responsible citizens to address ever growing social inequality. Given the widely criticised performance record of universities in the regional and global rankings, a meaningful overhauling of the higher education sector is needed now more than ever before.

In response, the government has taken some steps to lift the quality and standard of higher education. One of these steps is to allow the establishment of foreign university branch campuses or study centres under the Foreign University, Its Branches or Study Centres Operating Rule of 31 May 2014. Prior to this Rule, foreign university campuses/study centres were prohibited under the Private University Act 2010, which deemed such campuses/centres as profit-making (unlike non-profit private universities). Hence previous attempts at establishing foreign university campuses failed. In November 2016, the Education Ministry rejected two applications from one British and one Australian university to establish their respective portal campuses in Dhaka. The Strategic Plan for Higher Education 2018-2030 reiterates the government's resolve to improve higher education to be competitive internationally and develop a world standard human capital nationally. To this end, the government has adopted the policy of approving foreign university campuses in Bangladesh. Recently, the Education Ministry has conditionally



approved a new study centre, called Monash Study Centre, of Monash College Australia. A private company, Educo Bangladesh Ltd, sought and got this approval and will operate this study centre. The 3-member committee set up for the finalisation of the Regulatory Policy Framework has recommended the establishment of foreign university branches (Prothom Alo, 6 May 2021). There are several other similar applications await consideration for approval.

The sole purpose of permitting foreign university branch campuses or study centres is to contribute to the improvement of quality and standard of higher education by better academic performance, innovative research, and healthy competition among universities, private and public alike. Given this purpose, which one serves better—a branch campus or study centre?

There are established branch campuses of foreign universities, such as Monash University branch campus in Kuala Lumpur and New York University branch campus in Abu Dhabi, among many others. These branch campuses are directly associated/affiliated with their parent universities and offer internationally acceptable standard of higher education accredited by their parent universities. This very direct affiliated status of these branch campuses draws and attracts students and academic scholars from all over the world to study and research in

resource-rich environment. These branch campuses have crafted their curriculum and teaching related matters with a global vision, which is cross-fertilised with their regional and local needs, taught and researched by internationally, regionally, and locally drawn intellectuals. Equipped with a broad horizon of knowledge and skill, their degrees are readily acceptable in the Western World and recognised internationally. As a Monash University alumnus and member of the Monash Alumni Association, I am aware that the graduates from all overseas Monash University campuses are regarded as Monash alumni in that they are an integral part of a vibrant and growing global Monash community. These students are also supported by Monash Career Mentoring Program through peer assisted advisory programs by connecting graduates from these campuses with experienced alumni for career advice, employability, higher education prospects, industry insights, opportunities and challenges of specific career interests and preferences.

Overseas branch campuses of western universities serve locally as private universities and portal campuses of parent universities which maintain direct link with and accredit course-contents, assessment modes, and issue certificates/diplomas to students of these campuses. The complexion of students and staff (both academic and administrative)

is hybrid - national and international, recruited on a competitive basis. Parent universities and portal campuses often have their staff and students exchange programs through which their staff and students are exposed to each other's teaching, research, and administrative techniques, culture, and society. It is this interconnected educational environment that uncovers new frontiers of knowledge to boost human talent, curiosity, creativity, inclusiveness, and critical reflections contributing to the progressive improvement of higher education quality and standard.

Without going into the detail operational arrangement of the Monash Study Centre in Dhaka, its academic orientation pertaining to the quality and standard needs to be raised and addressed. The Centre is affiliated with Monash College, affiliated to Monash University. As an affiliated college of Monash University, the status of Monash College is the same as a college affiliated to The University of Dhaka. Make no mistake - affiliated college and its parent university are not the same in terms of educational quality and standard. Unless the Study Centre is directly affiliated to Monash University, there is a room for institutional misrepresentation. Students may well be attracted, if not lured, to the Centre with the hope that they would receive education at a standard equivalent or at least similar to an Australian G8 university. Thus, the Centre is likely to create a false hope of high-quality higher education at the level that the Centre may not be able to deliver.

Will the students of Monash Study Centre really be receiving the same or similar standard of education as that of Monash College? Will the same or similar check be in place to monitor and endorse course contents, teaching materials, periodic curriculum reviews and development, methods of teaching and assessments/examinations, staff recruitments and their teaching evaluation, and to assess the Centre's academic performance? Would the Centre be drawing its students and staff from local and international markets? Would there be a staff and students exchange programs between the Centre and Monash College? Being not a portal branch of a foreign university, can the Study Centre award tertiary graduation degree certificates and will these certificates be recognised/acceptable in Australian and

international education institution (for higher studies) and global employment market? These matters are inextricably linked with the quality and standard of higher education that the Centre is supposed to deliver. Unless the answers to these questions are in the affirmative, the mere use of the name of a foreign university is misleading for students and public in general.

If Bangladesh wants to improve its higher education quality and standard by permitting foreign university campuses or study centres, portal campuses of foreign universities would be a better option compared with study centres. Treating a foreign university branch campus and study centre as qualitatively the same is a far-fetched idea. Given the purposive consideration of allowing foreign universities and current developmental performance, foreign university branch campuses may be a better change-maker for higher education in Bangladesh. This comparison is not meant to be undermining study centres or asserting that study centres do not have any role in higher education. A study centre may serve as an academic bridge for students unable to fulfil the undergraduate admission requirements for direct entry. It can run and teach pre-university/preliminary/and foundation courses to prepare these students and issue diploma for entry into universities, just like Sunway College in Kuala Lumpur and Johor Bahru in Malaysia. There appears to be no reason for Bangladesh to settle for less when renowned western universities are willing to establish their campuses in Bangladesh. Hence, the 2016 proposal of Monash University to establish its branch campus (and similar other proposals) may warrant a searching reappraisal. Such campuses would create an internationally recognised hub of cutting-edge scholarship, teaching, learning, and research, a global education institution operating locally to change the way higher education should be in the 21st century. Should this eventuate, the higher education system would be capable of developing human resources necessary for development on a sustainable basis and a knowledge and skill-based economy in Bangladesh.

The writer is Emeritus Professor, Macquarie University, Sydney Australia.