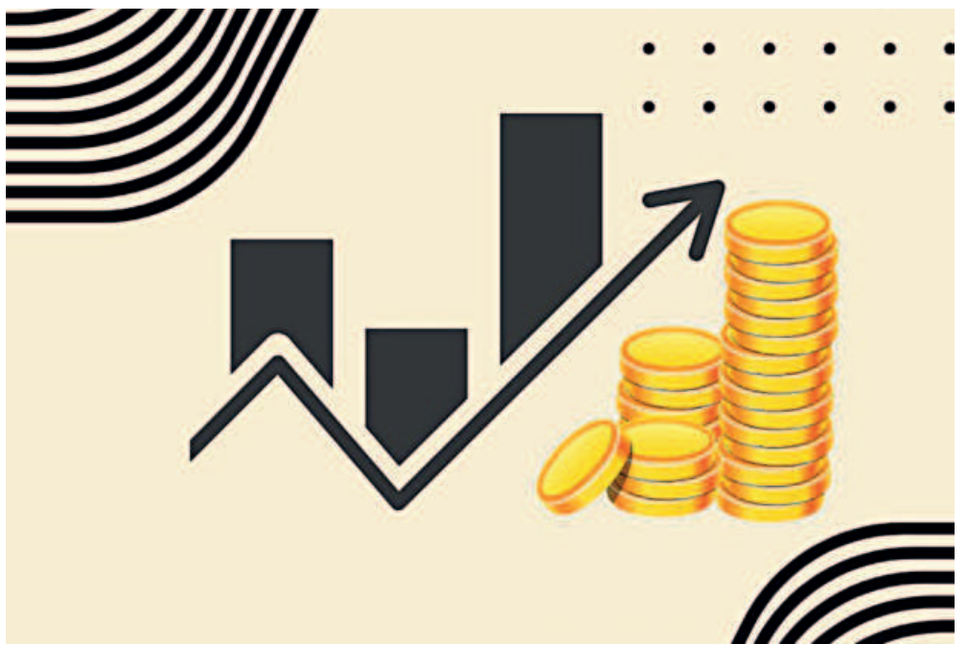
LAW REFORM

Foreign investment and property law: Bangladesh perspective

Bangladesh presents a favorable climate for overseas investment, with industries such as textiles, pharmaceuticals, and information technology experiencing rapid growth. However, the existing legal framework governing property rights, including land ownership, leasing, and transfers, frequently presents substantial obstacles.

MD. FAHMEDUL ISLAM DEWAN



Foreign investment is essential for the economic progress of a country since it brings not just financial resources, but also facilitates the transfer of technology, expertise in management, and the generation of employment opportunities. A country's legal and regulatory system, particularly property legislation, significantly impacts its appeal to foreign investors. Regarding Bangladesh, a developing market with a flourishing economy, the existing property regulations offer a combination of advantages and difficulties for international investors.

Bangladesh presents a favorable climate for overseas investment, with industries such as textiles, pharmaceuticals, and information technology experiencing rapid growth. However, the existing legal framework governing property rights, including land ownership, leasing, and transfers, frequently presents substantial obstacles. The intricacies and limitations inherent in these laws can discourage international investors, who seek transparency and stability in their ventures.

The existing legislative structure imposes restrictions on foreign property ownership, necessitating foreign firms to undergo complex bureaucratic procedures. As per the Foreign Private Investment (Promotion and Protection) Act of 1980, foreigners can possess properties in Bangladesh. This is however contingent upon obtaining government authorisation, frequently requiring a protracted and unclear clearance procedure. Furthermore, the Registration Act of 1908 and the Transfer of Property Act of 1882, which regulate property registration and transfer, do not distinguish between citizens and non-citizens.

Compared to other countries, Singapore and Malaysia have property rules that are more open to and transparent for the foreigners. This has dramatically helped in luring foreign investors. Malaysia's My Second Home (MM2H) program allows foreigners to buy property under specific conditions, and the UAE provides freehold ownership in selected regions. These policies exemplify a harmonious approach that seeks to attract international investment and safeguard national interests, serving as a potential model for Bangladesh. Not only can this result in lower transaction expenses but can also remove ambiguity for foreign investors over the acquisition and ownership of property.

As per the World Bank's Doing Business Report, Bangladesh's stringent property rules hurt international investment. Bangladesh ranks low in property registration metrics, indicating the need to streamline laws and policies to create a conducive environment for foreigner investors. Bangladesh also ranked 168th out of 190 in the World Bank's Doing Business 2020 survey, noting difficulties with contract enforcement, electricity, and property registration. On the other hand, countries like Singapore and New Zealand lead, through their efficient regulatory frameworks, easy business launching, and strong property rights safeguards.

Moreover, in June 2021, studies by the Bangladesh Investment Development Authority (BIDA) emphasised that foreign investors consider the intricacies and time-consuming processes of acquiring and registering properties in Bangladesh a significant worry. Estonia and Georgia have expedited and digitalised business registration and property transactions, saving foreign investors both time and effort.

To enhance its appeal to foreign investors while safeguarding its own interests, Bangladesh must undertake a comprehensive overhaul of its property law framework to increase transparency, efficiency, and alignment with global benchmarks. To enhance the investment climate, it is imperative to streamline the approval procedure for foreign property ownership and minimise bureaucratic obstacles. Introducing an efficient, digitalised system for property registration and transactions can significantly decrease the duration and expenses involved in these processes.

In addition, implementing a transparent and market-oriented land valuation system would guarantee equitable pricing and minimise the chances of corruption and speculation, factors that currently discourage foreign investment. Implementing special economic zones (SEZs) that loosen foreign ownership restrictions, like those observed in countries such as China and India, could also be a tactical decision. These zones provide a regulatory environment that is more permissive for foreign investors, along with benefits like tax exemptions and infrastructural assistance, while still adhering to the national regulations on land ownership outside of these zones.

Legal enhancements should prioritise the augmentation of legal remedies accessible to foreign investors in property disputes. Enhancing the judicial competence to resolve such conflicts promptly and impartially will potentially enhance investors' trust in the legal system's capacity to safeguard their assets.

Implementation of these reforms, along with well-planned incentives, has the potential to establish Bangladesh as a highly preferable location for foreign investment. This would contribute to the country's economic expansion while protecting both its investment needs and national concerns.

The writer teaches law at World University Bangladesh.

REVIEWING THE VIEW

Ukraine's present case in the International Court of Justice

Ukraine might still win the case, which will consequently imply that the Russian invasion was not justified. This might be historically significant, but it will not be enough in terms of reparation. It might be more beneficial for Ukraine to bring a fresh case against Russia for the genocidal acts allegedly being committed against the Ukrainian population.

ARAFAT IBNUL BASHAR

On 2 February 2024, the International Court of Justice (ICJ) delivered its judgment on the preliminary objections brought by the Russian Federation regarding jurisdiction and admissibility in the case filed by Ukraine concerning Russia's invasion in 2022.

Russia, who launched a full-scale invasion of Ukraine on 24 February 2022, attempted to justify the invasion through claiming that Ukraine was committing acts of genocide against Russian-speaking inhabitants within Luhansk and Donetsk oblasts. Ukraine subsequently filed an application in the ICJ arguing that Russia has no lawful basis to take action in and against Ukraine to prevent and punish any purported genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, along with the contention that the allegations were false.

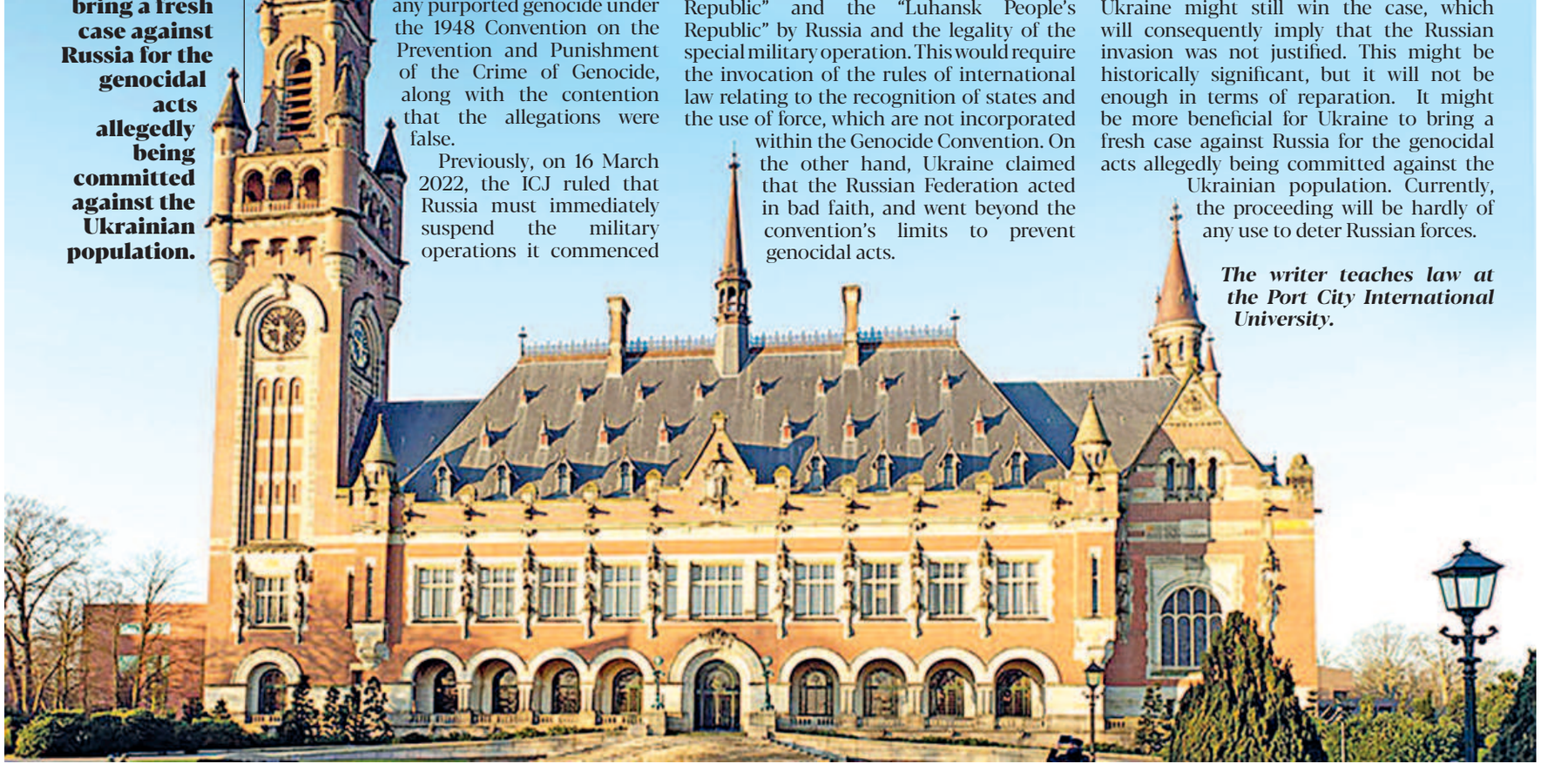
Previously, on 16 March 2022, the ICJ ruled that Russia must immediately suspend the military operations it commenced in Ukraine and called for both parties to refrain from any action that might aggravate or extend the dispute before the court or make it more challenging to resolve. However, in the verdict of the 2 February 2024, the ICJ ruled that the court does not have the jurisdiction to adjudge Russia's actions that Ukraine alleges. Instead, the ICJ will consider whether Ukraine has committed any violation of the convention. This comes as a real blow to the Ukrainian efforts to stop the Russian invasion and hold it accountable for the alleged genocidal acts.

The Russian Federation claimed that the allegations of Ukraine fall outside the scope of the Genocide Convention and thus, is not within the scope of the compromissory clause. According to them, in reality, giving an opinion about this matter would require the court to declare on matters of the recognition of the "Donetsk People's Republic" and the "Luhansk People's Republic" by Russia and the legality of the special military operation. This would require the invocation of the rules of international law relating to the recognition of states and the use of force, which are not incorporated within the Genocide Convention. On the other hand, Ukraine claimed that the Russian Federation acted in bad faith, and went beyond the convention's limits to prevent genocidal acts.

The ICJ was of the opinion that claims of alleged violation of a treaty are not sufficient to invoke its jurisdiction. Rather the court must also check whether the violations that are pleaded fall within the provisions of the treaty, *i.e.*, the facts at issue if established will constitute violations of the obligations under the treaty in question. As such, the court held that even if the alleged acts of Russia that are complained of can be established, it would not constitute a violation of obligations under the Genocide Convention. Therefore, even if recognition of Donetsk and Luhansk and the launching of the special military operation are proved to be contrary to international law, they are not violations of the Genocide Convention.

Now, Ukraine may be burdened with the task of proving that they have not committed any genocidal acts in the Donbas region, in a proceeding instituted by themself. Ukraine might still win the case, which will consequently imply that the Russian invasion was not justified. This might be historically significant, but it will not be enough in terms of reparation. It might be more beneficial for Ukraine to bring a fresh case against Russia for the genocidal acts allegedly being committed against the Ukrainian population. Currently, the proceeding will be hardly of any use to deter Russian forces.

The writer teaches law at the Port City International University.



LAW LETTER

Who will be defendants in an Artha Rin Suit?

KAIUM AHMED

Non-performing loans (NPL) have become an issue of grave concern for Bangladesh. The rising trend of the NPL is bound to have a long-lasting negative impact on the country's financial sector. The state-owned banks and a number of private banks are also facing capital shortfalls due to loan defaults of significant number of large-scale borrowers. In case of state-owned banks, capital shortfall amounts had been replenished through public money; the government has spent thousands of crores of taka in the last decade to recapitalise moribund state-owned banks. According to Bangladesh Bank (BB), more than 72 thousand suits related to recovering due loans are pending before the lower courts, especially with Artha Rin Courts which are governed by the Artha Rin Adalat Ain of 2003.

The existing legal mechanism for recovering a defaulted loan is inconsistent and archaic. Despite having a bundle of laws to recover the borrowed money from the loanee, the bank authorities are failing to do so. The Artha Rin Adalat Ain 2003 was enacted by the parliament upon repealing the Artha Rin Adalat Ain 1990 to recover the borrowed loan from the defaulted borrowers. Section 4 of the Act speaks about the formation of court and the court administration. According to section 5, only banks, financial institutions and other loan providing agencies defined in section 2(ka) can file the suit for recovery of loan. Section 6(5) states that in case of money loan, the principal borrower and the third party related to the loan, who has not taken the loan, but has given a mortgage as security for the loan or who has become a personal guarantor, will be defendants.

The Artha Rin Adalat Act, 2003 is an important legal instrument to administer the bank and non-banking financial agencies. For the best interest of our economy and with a view to reducing the burden of NPLs, this Act should be updated, especially with respect to clarifying provisions on impleading necessary parties as defendants.

It is thus clear that, if a third person is a mortgagor of a loan, the suit will be prejudiced if he/she is not made a defendant. Section 6(5) of the Act also says that at the time of realising the decree amount, the decree will impact the property of the borrower first, then that of the mortgagor and guarantor, respectively. However, the provision of section 6(5) is seemingly inconsistent with section 34(3) of the Act. Section 34(3) of the Act states that if it becomes necessary to implement the decree against any company, partnership firm or any other corporate body, then the natural persons comprising whom such company, firm, or body is formed, may be committed to civil prison individually and collectively.

Apart from that, this Act has not made it clear as to who will be the defendants in a suit filed against a company. A company being a juristic or an artificial person, is run by natural person(s). Every person who, at the time when the loan was taken, oversaw, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed liable in this regard. After taking a loan if the board of director has changed and a new board of director is formed and there is no personal guarantor, then no director or chairman is to be held liable. In Mahbub Ali v Judge, Artha Rin Adalat & others, High Court Division stated that Chairman or Director, if he did not execute any charge document, he or she shall not be liable for the loan save and except their liability to the extent of the face value of the shares he/she holds.

The Artha Rin Adalat Act, 2003 is an important legal instrument to administer the bank and non-banking financial agencies. For the best interest of our economy and with a view to reducing the burden of NPLs, this Act should be updated, especially with respect to clarifying provisions on impleading necessary parties as defendants.

The writer is a corporate lawyer.