



*In the wake of a 2019 Supreme Court decision allowing Bangladesh courts to issue injunctions in support of foreign arbitration procedures, international commercial disputes with a Bangladesh angle might soon get a lot more complicated.*

## THE GOOD NEWS IS YOU CAN NOW GET INTERIM MEASURES IN BANGLADESH FOR A FOREIGN ARBITRATION. THAT IS ALSO THE BAD NEWS.

In the wake of a 2019 Supreme Court decision allowing Bangladesh courts to issue injunctions in support of foreign arbitration procedures, international commercial disputes with a Bangladesh angle might soon get a lot more complicated. The landmark decision is by some seen as reversing an earlier situation (which was also based on the Arbitration statute before it was amended in 2004) under which local courts could not issue local interim measures if a case had been submitted to foreign arbitration. The move opens up a whole new world of possibilities, with pros and cons, for disputes in connection with Bangladesh.

### What happened in the case?

The basic facts are straightforward. In 2014, the Bangladesh Government through the Bangladesh Power Development Board (“BPDB”) accepted a proposal by a Singaporean IPP (“**the Investor**”) to build and operate a solar power plant in Cox’s Bazar (yes, that Cox’s Bazar), which is at Bangladesh’s south coastal area. A letter of intent was issued in 2015, after which the Investor setup a local subsidiary in 2016, and provided a US\$1M bank guarantee. A Power Purchase Agreement

### Highlights of this note

- ▶ What happened in the case?
- ▶ What is the dispute before the Bangladesh court?
- ▶ Why would it be controversial for a Bangladesh court to issue interim measures?
- ▶ What did the Supreme Court decide?
- ▶ What happens with the bank guarantee and the PPA?
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and an Implementation Agreement were signed in January 2017. The PPA provided that the Investor had to reach Financial Close and finish the construction by August 2018, a good 18 months later. But that milestone was

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not reached. Come August 2018, there was no power plant. Let alone a plant, less than 10% of the land the Investor was supposed to acquire according to the PPA had in fact been signed up.

What was the reason the milestone was missed by such a vast distance? It depends who you believe. According to the Investor, the reason was a force majeure event in the form of thousands of Rohingya refugees from Myanmar which took shelter in the area of the project, making it impossible for the project to continue. That's why the Investor sent a force majeure notice in August 2018 and asked for cooperation from the BPDB in finding a new site. There were discussions about this but the Investor was unable to find another site somewhere in Bangladesh at short notice.

According to the BPDB, that is not the reason. Yes, there is a refugee crisis in Cox's Bazar, the BPDB agreed, but not near the land of the project. The BPDB noted that the Investor had not claimed any problems throughout 2015-2017 and the first half of 2018. By the way, the refugee crisis started in 2015. According to the BPDB, the Investor simply failed to secure the land independent of the refugee crisis and that's why they had no Financial Close. The BPDB stated that the Investor, seeing that he is not going to meet the obligations of the PPA, simply avails itself of a nearby humanitarian disaster

to find an excuse for its own failings.

The parties fail to settle the matter and an ICC arbitration is initiated, which remains pending at the time of writing this Client Briefing Note.

### **What is the dispute before the Bangladesh court?**

The parties find themselves before the Bangladesh Supreme Court, High Court Division, because the Investor is seeking two injunctions: (1) the Investor wants to prevent the BPDB from taking the US\$1M bank guarantee and (2) the Investor wants to prevent the BPDB from terminating the PPA.

### **Why would it be controversial for a Bangladesh court to issue interim measures?**

Bangladesh has revamped its local arbitration legislation in 2001 with the Arbitration Act, which was amended since in 2004. The basis for interim awards was part of the 2004 amendment, in s. 7 A of the Arbitration Act. Together with s. 7 it reads as follows:

*7. Jurisdiction of Court in respect of matters covered by arbitration agreement.-*

*Notwithstanding anything contained in any other law for the time being in force, where any of the parties to the arbitration agreement files a legal proceedings*

*in a Court against the other party, no judicial authority shall hear any legal proceedings except in so far as provided by this Act.*

*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:*

*(a) To appoint guardian for minor or insane to conduct on his/her behalf arbitral proceedings.*

*(b) To take into interim custody of or sale of or other protective measures in respect of goods or property included in the arbitration agreement.*

*(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.*

*(d) To empower any person to seize, preserve, inspect, to take photograph, collect specimen,*



*examine, to take evidence of any goods or property included in arbitration agreement and for that purpose to enter into the land or building in possession of any party.*

*(e) To issue ad interim injunction;*

*(f) To appoint receiver; and*

*(g) To take any other interim protective measures which may appear reasonable or appropriate to the court or the High Court Division.*

*(2) The similar powers of the court or the High Court Division as are available in relation to any other legal proceedings shall be available to the court or the High Court Division as the case may be, while passing orders under sub section (1).*

*(3) Before passing order upon application received under sub-section (1) the court or the High Court Division shall serve notice upon the other party:*

*Provided that if the court or the High Court Division is satisfied that in the event the order is not passed instantaneously, the purpose of making interim measures shall be frustrated, there shall be no necessity of serving such notice.*

What is the problem? Although this amendment in 7A explicitly mentions orders which are interim injunctions, some question on interpretation remains mainly caused by possible impact of s. 3 Arbitration Act which reads:

*3. 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 sections 45, 46, and 47 [author: these sections deal with recognition and enforcement of foreign awards] shall also apply to the arbitration if the place of that arbitration is outside Bangladesh.*

The argument goes that s. 3 might mean that the Arbitration Act with respect to foreign awards only allows to recognize or enforce them. In that interpretation, Interim measures are not in the scope of Bangladesh's local arbitration framework. That is in fact the argument of the learned counsel of the BPDB. Not without merit, the BPDB takes the view that as the ICC arbitration has commenced, the Investor should look there for his injunctions, and not before the Bangladesh court. We will see below that the Court in fact does go along with this argument to some extent (although deciding differently on the main principle).

### **What did the Supreme Court decide?**

On the principal legal question, the Supreme Court decides in favor of the Investor. In a very well argued decision, and while examining earlier case law, the Court looks at the text of 7A as amended and decides that the text of the statute only makes sense if interim measures are applied

also in connection with international commercial disputes that are submitted to arbitration outside of Bangladesh. The Court notes that the text of the law "Notwithstanding anything in s. 7, ... until enforcement of the award under s. 45 [author: which is about foreign awards]...the High Court ...may pass Orders... as follows". The Court states that "had it been the intention of the legislator to keep foreign arbitration out of touch and grip of our Courts, it would not have incorporated the words "until enforcement of a foreign arbitration award".

### **What happens with the bank guarantee and the PPA?**

The Court does in fact refuse to prevent the encashment of the bank guarantee, based on long standing precedent that the judiciary should not interfere with bank guarantees or other such financial instrument which hinge on the first request by the beneficiary. This is in fact reassuring, we believe, and a necessary attribute of a financial guarantee system.



With respect to the PPA, the Court does indeed restrain the BPDB from terminating the PPA. But, the Court only does so for a period 60 days to give the Investor the opportunity to get the same injunction from the ICC Tribunal. In a way, thus, the Court still believes in the primacy of the foreign arbitration system, even for interim measures.

### Some lessons learned from this decision:

A few interesting things in connection with this decision:

#### 1. Good news: you can now get interim measures in Bangladesh:

if this decision is not set aside by the Appellate division of the Supreme Court, it will become settled law in Bangladesh that plaintiffs and defendants can seek an interim order for dispute that is actually before a foreign arbitration tribunal. It is unclear what would happen if the foreign arbitration has not started yet. In such case, can a party also seek orders under the Arbitration Act (without commencing a local court case?). May be not.

#### 2. Bad news: you can now get interim measures in Bangladesh:

There are two sides to every coin. The new local jurisdiction can also work against a party. Can the authority under s. 7A be used to constrain a party from starting or continuing with a foreign arbitration procedure

itself? This has happened before in Bangladesh, but not under s. 7A. Reasonably speaking, if the newfound power under s. 7A works for one party, it also works for another. Every kind of power is vulnerable to abuse and the greater the power, the greater the abuse as Edmund Burke would say.

3. The Supreme Court has no problem saying truth to power: This was a high-profile case with the Government as a defendant. There is always a concern that a domestic court might be reluctant to go against its own Government, but in this case, the Supreme Court found in favor of a foreign plaintiff against a Government department.

### Conclusion: commercial disputes in Bangladesh are in for a rollercoaster ride

The litigation and arbitration landscape of Bangladesh will be changed quite a bit if this decision is not set aside. In the past, it was a bit of a gamble if a local injunction or a seizure of assets would work and litigators would have to resort to other proceedings outside of the Arbitration Act. Now this whole arsenal of possibilities has obtained a much stronger footing in domestic law, and both plaintiffs and defendants will need to reexamine their options. Interesting times ahead for commercial disputes!

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