LOST IN THE JURISDICTIONAL JUNGLE AND INTERPRETATIONAL MAZE: POWERS OF BANGLADESH COURTS IN RELATION TO FOREIGN SEATED ARBITRATIONS

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Abstract

This article critically assesses the accuracy of the majority judgment in the latest case of *Accom Travels and Tours Limited v Oman Air S.A.O.C* before the High Court Division of the Supreme Court of Bangladesh with respect to the jurisdiction of Bangladesh courts in foreign seated arbitrations under the Arbitration Act (Act No. 1) 2001 (Bangladesh). The article argues that the majority judgment in *Accom Travels and Tours Limited v Oman Air S.A.O.C* lost sight of the jurisdictional parameters of the court and the related interpretational elements under the Arbitration Act (Act No. 1) 2001 (Bangladesh) in relation to foreign seated arbitrations in the light of comparable judgments of India, United Kingdom and the United States of America.

Keywords: Arbitration, international arbitration, foreign seat, jurisdiction of courts, Bangladesh.

I INTRODUCTION

Bangladesh promulgated the Arbitration Act (Act No. 1) 2001 (Bangladesh) ('the Act') by repealing the Arbitration Act 1940 (Bangladesh), which predated the partition of the Indian Subcontinent. Bangladesh's commitment to promoting arbitrations has been expressed by the Government of Bangladesh in various forums. Notably, in 2016, the Honourable Minister for Law, Mr. Anisul Huque MP, stated that the 'Government of Prime Minister Sheikh Hasina has also taken steps to ensure that both foreign and local arbitration awards can be enforced in Bangladesh with ease'.[1]

However, in practical terms, the above statement has faced several roadblocks, particularly with respect to the Bangladesh judiciary's approach towards foreign seated arbitrations under the Act. The most recent example of the problem is the Larger Bench

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1 Mr. Anisul Huque MP, 5th Anniversary Seminar, *ADR: A Business Development Priority for Bangladesh*, (Speech, Bangladesh International Arbitration Centre, 04 June, 2016 (Bangladesh)).

decision of the High Court Division of the Supreme Court of Bangladesh in the case of *Accom Travels and Tours Limited v Oman Air S.A.O.C* ('*Accom*').[2]

This article critically discusses the cases of the Supreme Court of Bangladesh leading up to *Accom* and highlights the confusing state of the Bangladesh judiciary in dealing with foreign seated arbitrations, which can only be described as lost in the jurisdictional jungle and interpretational maze of the Act.

II THE CASE OF *ACCOM*

In *Accom*, the plaintiff filed Title Suit No. 12 of 2015 ('the suit') before the First Court of Joint District Judge, Dhaka seeking a money decree against the defendants jointly and severally on account of damages for an amount of BDT 78 million plus interests. The plaintiff and the first defendant ('Oman Air') entered into a general sales agency agreement on 1 September 2008 followed by a general sales and services agency agreement which were renewed subsequently. However, a dispute arose between the parties. As a result, Oman Air terminated both the agreements by termination notices dated 18 September 2014 and 29 September 2014 respectively. Accordingly, the plaintiff filed the suit against Oman Air for realization of damages in the amount of BDT 78 million plus interests.

Upon registration of the suit and issuance of the summons, Oman Air entered appearance, and thereafter filed an application under sections 10, 7 and 9 of the Act read together with section 151 of the Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) ('the CPC') seeking a stay of the proceedings of the suit on the ground that the agreements mentioned in the suit had an arbitration clause for resolving disputes between the parties and the seat of arbitration in both the agreements is Oman. After hearing the parties, the court allowed the application of Oman Air and dismissed the entire suit on the ground that the suit was not maintainable. The plaintiff appealed against the order of dismissal before the High Court Division of the Supreme Court of Bangladesh.

The appeal was fixed for hearing before a two-member Division Bench of the High Court Division. The only point of law for determination in the appeal was whether, in view of the provisions under sections 3(1) and (2) of the Act, the provisions of sections 10 and 7 of the Act would be applicable in respect of an arbitration where the seat of such arbitration was in a foreign country. In the course of hearing, the Division Bench of the High Court Division found two sets of contrary decisions given by different Benches of the Supreme Court of Bangladesh on this point of law. Accordingly, the Division Bench, without expressing any view of its own, referred the matter to the Honourable Chief Justice of Bangladesh for constitution of a larger Bench. Subsequently, the Honourable Chief Justice of Bangladesh constituted a three-member Larger Bench of the High Court Division to hear *Accom*.

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[2] *Accom Travels and Tours Limited v Oman Air S.A.O.C*, (Unreported, High Court Division of the Supreme Court of Bangladesh (Larger Bench), First Appeal No. 209 of 2016, 12 December 2021) ('*Accom*').

By a 2:1 majority judgment, the Larger Bench of the High Court Division held as follows:

(i) In view of the provisions under sections 3(1) and 3(2) of the Act, the provisions of the Act, except the provisions under sections 45, 46 and 47, are not applicable in respect of an arbitration where the seat of such arbitration is in a foreign country. Thus, the provisions under sections 7, 7A and 10 of the Act cannot be invoked in such a case except that the power of the court concerned to take interim measures under section 7A of the Act may only be invoked at the stage of enforcement of a foreign arbitral award.

(ii) Therefore, the trial court committed gross illegality in dismissing the suit concerned by invoking the provisions under section 7 of the Act, particularly when neither section 7 nor section 10 was applicable in the suit.

(iii) In spite of such non-applicability of the said provisions in the suit concerned, the trial court should have stayed further proceedings of the suit in exercise of its inherent power under section 151 of the CPC and send the matter to be resolved through arbitration as agreed by the parties.

III THE LAW

The relevant laws for the purpose of this article, as discussed in *Accom*, are stipulated in sections 3(1)[3], 3(2)[4], 7[5], 7A[6] and 10[7] of the Act. It is important to note that the Act is

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[3] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 3(1) reads (unofficial English version): This Act shall apply where the place of Arbitration is in Bangladesh.

[4] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 3(2) reads (unofficial English version): Notwithstanding anything contained in sub-section (1) of this section, the provisions of sections 45, 46, and 47 shall also apply to the arbitration if the place of that arbitration is outside Bangladesh.

[5] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 7 reads (unofficial English version): Notwithstanding anything contained in any other law for the time being in force, where any of the parties to the arbitration agreement files 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.

[6] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 7A(1) reads (unofficial English version): 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 orders in the following matters:

…

(e) To issue ad interim injunction;

…

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

[7] Arbitration Act (Act No. 1) 2001 (Bangladesh) s 10 reads (unofficial English version): 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.

written in Bangla language and there is an unofficial English translation, which has been quoted by Bangladeshi courts from time to time.[8]

IV PRINCIPLES OF *ACCOM* AND RELATED CASES

In *Accom,* the majority judgment identified two sets of cases that went in opposite directions in dealing with the Bangladeshi court's jurisdiction over foreign seated arbitrations. In the first set of cases[9] it was held that the provisions of the Act, except sections 45, 46 and 47, will not apply to foreign seated arbitrations. In the second set of cases, the majority judgment noted that there are only two cases[10] that held that the provisions of the Act will apply to foreign seated arbitrations.

The majority judgment in *Accom* did not agree with the conclusions reached in *HRC Shipping Limited v M.V. Xpress Manaslu* ('*HRC*')[11] and *Southern Solar Power Limited v BPDB* ('*Southern*')[12] (the second set of cases). It is noteworthy that *HRC* was dealing with the applicability of section 10 of the Act in a foreign seated arbitration and *Southern* was dealing with the applicability of section 7A of the Act in a foreign seated arbitration.

Accom's majority judgment has three aspects in not agreeing with *HRC* and *Southern*. The first aspect is the territorial point ('the Territory Point'). The second aspect of the majority judgment is a more concentrated consideration of *Southern* in the context of sections 7 and 7A of the Act and the reasons for not following *Southern* ('the Southern Point'). The final aspect is the consideration of the inherent power of the court in dealing with foreign seated arbitrations ('the Inherent Power Point').

In deciding not to approve *HRC* and *Southern* on the Territory Point, the majority judgment in *Accom* observed in essence as follows: [13]

(a) Section 3 provided the scope or applicability of the provisions[14] of the Act.

(b) Although the word 'only' has not been used by the legislature in section 3(1) of the Act and despite the fact that the applicability of the provisions under sections 10, 7A, 45 and 46 have not been clearly excluded like the UNCITRAL Model Law on International Commercial Arbitration 1985, it has, nevertheless by section 3(2), categorically stated that sections 45, 46 and 47, namely, the provisions relating to the recognition and enforcement of foreign arbitral awards, will be applicable in respect of arbitrations seated in a foreign country. Therefore, by a joint reading of

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8 Translated versions of the quoted provisions are extracted from the judgments of the Supreme Court of Bangladesh: s 3 - *Sarker Steel Limited v Government of Bangladesh* [2018] 23 BLC 834; s 7 - *Cityscape Planners Ltd. v Kari Abul Kashem* [2019] 71 DLR 482; s 7A - *Solar Power Limited v BPDB* [2020] 25 BLC 501; s 10 - *Maico Jute and Bag Corporation v Bangladesh Jute Mills Corporation* [2003] 55 DLR (AD)23.

9 *Canada Shipping Case* 54 DLR (2002) 93; *Unicol Bangladesh Case* 56 DLR (AD) (2004) 166; *Uzbekistan Airways Case* 10 BLC (2005) 614; Unreported Judgment, Appellate Division of the Supreme Court of Bangladesh, C.P.L.A No. 1112 of 2005; *STX Corporation Ltd. v Meghna Group* 64 DLR (2012) 550 (Bangladesh).

10 *HRC Shipping Limited v M.V. Xpress Manaslu* [2007] 12 MLR (HC) 265 ('*HRC*') and *Southern Solar Power Limited v BPDB* [2020] 25 BLC 501 ('*Southern*').

11 [2007] 12 MLR (HC) 265.

12 [2020] 25 BLC 501.

13 *Accom* (n 2) [4.16].

14 Ibid (emphasis added).

the two provisions under sections 3(1) and 3(2), it is clear that although the word 'only' has not been used by the legislature, *the impact of the said word is very much apparent when*[15] it is seen that the legislature, by section 3(2), has declared only sections 45, 46 and 47 to be applicable when the seat of arbitration is in a foreign country.

The majority judgment in *Accom* concluded on *HRC* and *Southern* on the Territory Point to the effect that the point regarding the absence of the word 'only' making Section 3(1) applicable to both local and foreign seated arbitrations, as expressed in *HRC* and *Southern*, cannot be accepted because the absence or omission of the word 'only' in section 3(1) has been recuperated by the provisions under section 3(2) of the Act.[16]

On the Southern Point, the majority judgment of *Accom* observed as follows:[17]

(a) Section 7A appears to be an exception to section 7 of the Act because while section 7 ousts the jurisdiction of the court to hear a proceeding in respect of matters covered by an arbitration agreement if such proceeding is not in accordance with the provisions of the Act, section 7A provides an exception with respect to interim measures in order for preservation of the subject-matter of arbitration, and the court is empowered under section 7A to pass ad-interim orders in order for such preservation during continuation of the arbitration proceedings, before such proceeding or until enforcement of the award under sections 44 and 45 of the Act.

(b) However, it is pertinent to note that when section 7A has ruled out the applicability of section 7 by saying 'notwithstanding anything contained in section 7', it has not ruled out, in any way, the applicability of sections 3(1) and 3(2), by which, the legislature has declared the scope of applicability of the provisions of the Act including sections 7 and 7A. Therefore, until and unless the legislature amends the provisions under section 7A by incorporating the words 'notwithstanding anything contained in section 3', the provisions under section 7A cannot be invoked in respect of an arbitration where the seat of arbitration is in a foreign country. Hence, *Southern* cannot be followed.

On the Inherent Power Point, the majority judgment of *Accom* observed that the court can rely upon the inherent power under section 151 of the CPC to pass necessary orders that it could not pass under section 10 of the Act due to the territorial limitation of section 3.[18]

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15 Ibid (emphasis added).

16 Ibid [4.17].

17 Ibid [4.24] - [4.26].

18 Ibid [4.39].

V PROBLEMS OF ACCOM AND RELATED CASES

There are five major problems that arise from the majority judgment of *Accom* and the related cases. These are:

(a) Over-reliance on semantics.
(b) Misplaced consideration of the Indian Supreme Court's judgment of *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc* ('*BALCO*').[19]
(c) Misunderstanding the jurisdictional structure of the Act.
(d) Misunderstanding interpretational principles.
(e) Misunderstanding the lack of inherent power in the Act.

A *Over-reliance on semantics*

On the Territory Point, the majority judgment of *Accom* and all the other cases heavily relied on the word 'only' to distinguish the territorial and extra-territorial features of the Act.

The word 'only' comes from Article 1(2) of the UNCITRAL Model Law on International Commercial Arbitration under which it is stated that 'the provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State'. There was a reason for inserting the word 'only' in Article 1(2) of the UNCITRAL Model Law. The explanatory memorandum explains that the word 'only' was needed to capture the 'territorial scope of application' of the UNCITRAL Model Law.[20] It is true that if the word 'only' appeared in section 3(1) of the Act, then things would have been easier from an interpretive standpoint. But the fact remains that the word 'only' does not appear in section 3(1) of the Act. The question that arises is this – what is the significance of the absence of the word 'only' in section 3(1) of the Act? The answer, as explained below, is paramount.

The problems posed by the wording of section 3 of the Act is a classic case of ambiguous legislative drafting. The draftsmen of the Act essentially adopted section 3 from the Indian version of the Act (The Arbitration and Conciliation Act 1996 (Act No. 26) (India)) ('Indian Act') while ignoring significant differences between the realities of Bangladesh and those of India.[21] The Indian Act is divided into four parts and Part I applies to arbitrations taking place in India. Section 2(2) of the Indian Act makes it clear that Part I 'shall apply where the place of arbitration is in India'. There cannot be any clearer statement than this to make sure that Part I of the Indian Act will have territorial application. Indeed, *BALCO* (on which *Accom* heavily relied) makes this point very clear when it observed that the Indian Act, while adopting the UNCITRAL Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) of the UNCITRAL Model Law and therefore, the word 'only' would have been *superfluous* as

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19 [2012] 9 S.C.C. 552.

20 Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 [13].

21 Seidman, Ann and Robert B. Seidman, *ILTAM: Drafting Evidence-based Legislation for Democratic Social Change,* Boston University Law Review (2009) (89) 435, 448.

none of the exceptions of Article 1(2) of the UNCITRAL Model Law were included in section 2(2) of the Indian Act.[22]

B *Misapplication of* BALCO

The majority judgment of *Accom* also heavily relied on *BALCO* to justify the territorial aspect of the Act. The majority observed that in *BALCO,* exactly the same argument was made as regard the absence of the word 'only' in the corresponding provisions of the Indian Arbitration Act, namely Section 2 (2) of the Indian Arbitration Act, which was rejected.[23]

The majority judgment of *Accom* relied on *BALCO* to substantiate the point that the absence of the word 'only' in section 3(1) of the Act did not diminish the territorial nature of that section and despite such absence, the Act would not be applicable to foreign seated arbitrations. In this regard, the majority judgment of *Accom* observed as follows:[24]

> Therefore, it appears that although the word 'only' has not been used by our Legislature in sub-section (1) and that the applicability of the provisions under Sections 10, 7A, 45 and 46 have not been clearly excluded like the UNCITRAL Model Law (where the place of arbitration is in Bangladesh), it has, by sub-section (2), categorically stated that the provisions under Sections 45, 46 and 47, namely the provisions relating to the recognition and enforcement of foreign arbitral award, will be applicable in respect of such arbitration where the seat of arbitration is in a foreign country. Therefore, by joint reading of these two provisions under sub-sections (1) and (2) of Section 3, it is clear that although the word 'only' has not been used by our Legislature, the impact of the said word is very much apparent when we see that our Legislature, by sub-section (2), has declared only three Sections, namely Sections 45, 46 and 47, which are applicable when the seat of arbitration is in a foreign country.

It is submitted that due to structural differences between the Act and the Indian Act, any reference to *BALCO* is not apposite in the Bangladeshi arbitration law context. The reasoning in *BALCO* regarding the word 'only' holds because structurally the Indian Act bifurcated the territorial limits of its applicability in two different 'Parts' (Parts I and II). For example, in the Indian Act, the court's supervisory and supporting jurisdiction (explained below) with respect to local seated arbitration appears in section 8 of Part I and for foreign seated arbitration in section 45 of Part II (like section 10 of the Act). Before the amendment in 2015 (the Arbitration and Conciliation (Amendment) Act 2015 (India)), the Indian court's supporting or subject matter jurisdiction (explained below) under section 9 (like section 7A of the Act) was only in Part I but not in Part II. Therefore, before the amendment in 2015, the Indian Act had clear legislative intent not to apply the court's supporting or subject matter jurisdiction (explained below) under section 9 (like section 7A of the Act) to Part II dealing with foreign seated arbitration. Since before the

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22 *BALCO* (n 19) [68].

23 *Accom* (n 2) [4.18].

24 Ibid [4.16].

amendment of 2015, there was a distinct bifurcation in the Indian Act about the territorial application and related jurisdictional limit with regard to foreign seated arbitration, there was no need to use the word 'only' in that Act (as observed by *BALCO*).[25] However, the Act does not have any such bifurcation feature (like the Indian Act before the amendment in 2015). Here lies the significance of the absence of the word 'only' in the Act. Due to several jurisdictional parameters within the Act, which are explained below, the word 'only' has taken a centre-stage in the jurisdictional framework of the Act.

C *Misunderstanding the jurisdictional structure*

Jurisdiction is the bedrock of any legislation. There may be several types of jurisdiction in a conventional statute – appellate, revisional, subject matter, inherent etc. In arbitration laws, there are some unique types of jurisdictions. These are supervisory, supportive and enforcement jurisdictions.[26] To understand the majority judgment's flaws in *Accom*, it is important to understand what these specific types of jurisdictions mean and how they operate.

1 *Supervisory jurisdiction*

The starting point to understand jurisdictional issues in arbitrations seated abroad is to note the comments of Lord Justice Kerr in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* ('*Naviera*'):[27]

> All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3).
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> …
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> English law does not recognise the concept of a "de-localised" arbitration (see Dicey & Morris at pp 541, 542) or of "arbitral procedures floating in the transitional firmament, unconnected with any municipal system of law" (Bank Mellat v Helliniki Techniki SA [1984] QB 291 at p 301 (Court of Appeal)). Accordingly, every arbitration must have a "seat" or locus arbitri or forum which subjects its procedural rules to the municipal law there in force. This is what I have termed law (3). . . . Prime facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also the law of the "seat" of the arbitration. The lex fori is then the law of X and, accordingly, X

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25 *BALCO* (n 19) [68].

26 The Honourable Justice Clyde Croft, *Commercial Arbitration in Australia: The Past, The Present and The Future,* (Chartered Institute of Arbitrators, London, 25 May 2011), 30: 'The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration'.

27 [1988] 1 Lloyd's Rep 116, 119.

> is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X.

The above observation succinctly captures the general concept of the court's supervisory jurisdiction in a foreign seated arbitration. It will be noted from the above observation in *Naviera* that generally, in case of a foreign seated arbitration (Country X in *Naviera*), in the absence of some express and clear provision to the contrary, both substantive and curial (that is, procedural) laws of an arbitration shall be governed by and under the supervisory jurisdiction of Country X where the arbitration is seated.[28] The term 'supervisory jurisdiction' in effect relates to the curial (or procedural) law of a country that regulates, as the UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* ('*Enka*') describes, 'the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute and includes the procedural powers and duties of the arbitrator'.[29] Thus, like the curial law, the supervisory or curial jurisdiction is concerned with the courts' jurisdiction to support and enforce the arbitration and it includes, for example, the power to remove or replace an arbitrator, to enforce or set aside an arbitral award, and to grant injunctions to support the arbitration including anti-suit injunctions.[30] In that sense, supervisory jurisdiction of the court is a combination of the curial (or procedural) jurisdiction, the supporting jurisdiction and the enforcement jurisdiction.

2 *Supporting jurisdiction*

The concept of supporting jurisdiction (also called jurisdiction in aid or support of arbitration) is exactly what the phrase means – a type of jurisdiction of the court to enable unhindered workings of arbitrations. In the context of arbitrations seated abroad, generally, to accommodate international dispute resolution process (for example, international arbitrations or cross-border litigation) the existence of the supporting jurisdiction of a country, which is not the seat of the arbitration or litigation, is embedded in a statute.[31] However, it should be kept in mind that generally a court's supporting jurisdiction operates within a narrow confinement. In *ICICI Bank Uk plc v Diminco NV* ('*ICICI*'),[32] Justice Popplewell in the English High Court (Queen's Bench Division) observed as follows:

> Drawing the strands together, I derive the following principles as applicable when the court is asked to grant a freezing order in support of foreign proceedings under section 25.

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28 See also *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, 70 ('*Enka*').

29 Ibid.

30 Ibid.

31 Civil Jurisdiction and Judgments Act 1982 (UK), c. 27, s 25: which empowers the court to grant all forms of interim relief in aid of foreign courts.

32 [2014] EWHC 3124 (Comm).

> (1) It will rarely be appropriate to exercise jurisdiction to grant a freezing order where a defendant has no assets here and owes no allegiance to the English court by the existence of *in personam* jurisdiction over him, whether by way of domicile or residence or for some other reason. Protective measures should normally be left to the courts where the assets are to be found or where the defendant resides or is for some other reason subject to *in personam* jurisdiction.
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> (2) Where there is reason to believe that the defendant has assets within the jurisdiction, the English court will often be the appropriate court to grant protective measures by way of a domestic freezing order over such assets, and that is so whether or not the defendant is resident within the jurisdiction …

3 *Enforcement jurisdiction*

Enforcement jurisdiction is actually an extension of the supervisory jurisdiction. In *Enka,* the UK Supreme Court held that supervisory jurisdiction is concerned with the courts' jurisdiction to support and enforce the arbitration and 'includes, for example, the power … to enforce or set aside an arbitral award'.[33] The same principle is also captured by the Indian Supreme Court.[34]

4 *Subject matter jurisdiction*

If the supervisory jurisdiction is considered to include (as in *Enka* and *Indus Mobile Distribution v Datawind Innovations* ('*Indus*'))[35] the curial (or procedural) jurisdiction, the supporting jurisdiction and the enforcement jurisdiction, then two other jurisdictions become relevant. These are subject matter jurisdiction and inherent jurisdiction. Subject matter jurisdiction refers to the court's authority over the subject matter of a general class of cases.[36] Subject matter jurisdiction can be limited[37] or unlimited[38], and is always vested by statute.[39] For example, the jurisdiction to grant equitable relief is a limited subject matter jurisdiction[40] and the jurisdiction to try all suits of a civil nature is an unlimited subject matter jurisdiction.[41]

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33 *Enka* (n 28).

34 *Indus Mobile Distribution v Datawind Innovations* [2017] 7 SCC 768, [14]-[15] ('*Indus*').

35 Ibid.

36 *Harvey v Derrick* [1995] 1 NZLR 314, 326.

37 *Ernesto Rodriguez and Alan Hall v Great American Insurance Company*, C. A. 2020-0387-JRS (Del. Ch. Oct. 20, 2021) (Court of Chancery of Delaware) ('*Ernesto*').

38 *Allenger v Pelletier* [2020] SGHC 279.

39 *Ernesto* (n 37).

40 Ibid.

41 Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) s 9; *Allenger v Pelletier* [2020] SGHC 279.

5 *Inherent jurisdiction*

The concept of inherent jurisdiction, as *Islam and Neogi on the Law of Civil Procedure*[42] observed, 'furnishes the legislative recognition of age-old and well-established principle that every court has inherent power … to do real and substantial justice for the administration of which alone it exists or to prevent abuse of the process of the court'.[43] For example, section 151 of the CPC captures the inherent jurisdiction of the court.[44]

6 *Where does jurisdiction reside in a statute?*

Jurisdictional power is not confined to or stipulated in any particular section or chapter of a statute and may be scattered around in multiple sections with distinct purpose and effect.[45] For example, in the CPC, section 9 talks about unlimited subject matter jurisdiction, section 17 stipulates limited jurisdiction for suits regarding immovable property, section 19 deals with limited jurisdiction for suits for compensation for wrongs done to person or movables, section 20 talks about territorial jurisdiction, section 96 stipulates appellate jurisdiction, section 115 is about revisional jurisdiction and section 151 deals with inherent jurisdiction of the court.

7 *Summary of the jurisdictional structure*

Based on the above jurisdictional concepts, it is submitted that the following observations emerge from an analysis of the Act:

(a) The Legislature has drawn out the collective purpose of the Act under section 3, which through various provisions, has stipulated the supervisory and enforcement jurisdictional limits of the courts. Under section 3(1), the Legislative purpose is to set out the territorial extent of the court's supervisory and enforcement jurisdictions (stipulated in various sections) in local seated arbitrations.

(b) Thus, the court has supervisory jurisdiction for local seated arbitrations under sections 15 and 16 (read with section 12) of the Act because under these sections the court has the power to remove or replace an arbitrator (as observed in *Enka*) or the court has the power of regulation of conduct of arbitration (as observed in *Indus*). This supervisory jurisdiction is territorial in nature in that the court is empowered to exercise this power for local seated arbitrations.

(c) The court also has enforcement jurisdiction for local seated arbitration under sections 42, 43, and 44 of the Act because under these sections, as observed in *Enka*, the court has the power to enforce or set aside an arbitral award. Again, this supervisory jurisdiction is territorial in nature in that the court is empowered to exercise this power for local seated arbitrations.

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42 Islam, Mahmudul and Porbir Neogi, *The Law of Civil Procedure* (Mullick Brothers, 2nd ed, 2015), 515.

43 *Harun-or-Rashid v Gulaynoor Bibi* [2014] 19 BLC 123.

44 Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) s 151: Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

45 *Central India Ayush Drugs v State Of Maharashtra* AIR 2016 Bom 261 ('*Ayush Drugs*'); *Anil Hoble v Kashinath Jairam Shetye* [2015] SCC Online Bom 3699 ('*Anil Hoble*').

(d) On the other hand, under section 3(2), the Legislative purpose is to set out the extra-territorial extent of the court's supervisory (and/or enforcement) jurisdictions (stipulated in various sections) in foreign seated arbitrations.
(e) Thus, the court has enforcement jurisdiction (or supervisory jurisdiction) for foreign seated arbitration under sections 45 and 46 of the Act because under these sections the court has the power to enforce or set aside an arbitral award (as observed in *Enka*) or the court has the power to annul the award (as observed in *Indus*). This enforcement jurisdiction is extra-territorial in nature in that the court is empowered to exercise this power for foreign seated arbitrations.
(f) Additionally, the Legislature, through section 7A of the Act, empowered the court with limited subject matter jurisdiction (or supporting jurisdiction) to provide interim relief for both local and foreign seated arbitration. This supporting or subject matter jurisdiction is both territorial and extra-territorial in nature in that the court is empowered to exercise this power for both local and foreign seated arbitrations.
(g) Also, the court has both supervisory and supporting jurisdictions for both local and foreign seated arbitrations under section 10 because under this section the court has the power to refer the parties to arbitration or to deny arbitration on some stipulated grounds. These supervisory and supporting jurisdictions are both territorial and extra-territorial in nature in that the court is empowered to exercise these powers for both local and foreign seated arbitrations.
(h) The court does not have inherent jurisdiction in view of the jurisdiction ouster clause of section 7.
(i) The court has enforcement jurisdiction for local and foreign seated arbitrations under sections 44 and 45 respectively.
(j) All the above jurisdictional powers are not confined to or stipulated in any particular chapter or section (as observed in *Central India Ayush Drugs v State Of Maharashtra* ('*Ayush Drugs*')[46] and *Anil Hoble v Kashinath Jairam Shetye* ('*Anil Hoble*')).[47]

It is submitted that in *Accom*, the majority judgment lost sight of the parameters and positioning of the jurisdictional concepts within the structural settings of the Act. The majority judgment deals with the jurisdictional issue by observing as follows:[48]

> …It appears from the provisions under Section 7 that by this provision the Legislature has determined the jurisdiction of the Court in respect of the matters covered by the arbitration agreement...
>
> By incorporating Section 7A, as quoted above, in 2004 vide Arbitration (Amendment) Act 2004 (Act No. 02 of 2004), with effect from 19.02.2004, the Legislature has conferred power on the High Court Division, in respect of International Commercial Arbitration, and on the Court of District Judge concerned, in respect of other arbitrations, to take ad interim measures by way of orders or

46 *Ayush Drugs* (n 45).
47 *Anil Hoble* (n 45).
48 *Accom* (n 2) [4.22], [4.33].

> ad-interim injunction etc. in order for preservation of the subject matters of the arbitration … Therefore, this Section 7A appears to be an exception to Section 7 of the said Act in that while Section 7 ousts the jurisdiction of the Court to hear a proceeding in respect of the matters covered by the arbitration agreement if such proceeding is not in accordance with the provisions of the said Act, Section 7A provides an exception as regards interim measures in order for preservation of the subject-matter of arbitration …

By using the words 'jurisdictional footing' as used in *Southern*,[49] the majority judgment in *Accom* rested the 'entire' jurisdictional basis on section 7 of the Act by holding that 'by this provision the Legislature has determined the jurisdiction of the Court in respect of the matters covered by the arbitration agreement'. The same point is also made in *Southern*, where the court observed that section 3 'is not about jurisdiction of the Courts'[50] and section 7 'is the provision by which jurisdiction … regarding arbitration matters have been conferred upon the Courts'.[51] It is submitted that section 7 is not the 'only' jurisdictional provision of the Act. Rather, it is a jurisdictional ouster clause which, as observed by the majority judgment in *Accom,* states that 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, 'the court shall not have jurisdiction to hear any such proceeding which has not been initiated in accordance with the provisions of the Arbitration Act, 2001'.[52] In other words, section 7 of the Act is a jurisdiction ouster clause with 'specified jurisdictional carve-outs' ('the court shall not hear any such proceeding which has not been initiated in accordance with the provisions of the Arbitration Act, 2001'). It is submitted that the majority judgement of *Accom* and *Southern* did not consider that these 'specified jurisdictional carve-outs' are scattered around the Act[53] just like the provisions in the CPC[54] and as observed in *Ayush Drugs* and *Anil Hoble*.

On the other hand, if the analysis is done through these 'specified jurisdictional carve-outs' of the Act, we will see that all these carve-outs serve specific purposes with a single objective, which, as the majority judgment in *Accom* correctly observed,[55] is to sustain the 'flavor of internationality in the field of arbitration'. The Preamble of the Act is also useful to understand these 'specified jurisdictional carve-outs' of the Act, where it is stated that the Act is 'the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations'.[56] The Preamble does not state that the Act is the law relating to international commercial arbitration 'seated or held in Bangladesh' and the definition of 'international commercial arbitration' in

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49 *Southern* (n 12) [55].

50 Ibid [36].

51 Ibid [55].

52 *Accom* (n 2) [4.22].

53 For example, Arbitration Act (Act No. 1) 2001 (Bangladesh) ss 7A, 10, 42, 48.

54 Code of Civil Procedure (Act No. 5) 1908 (Bangladesh) ss 9, 17, 19, 20, 96, 115, 151.

55 *Accom* (n 2) [4.7].

56 The Bengali version of the preamble of the Act reads: *"আন্তর্জাতিক বাণিজ্যিক সালিস, বিদেশী সালিসী রোয়েদাদ স্বীকৃতি ও বাস্তবায়ন এবং অন্যান্য সালিস সম্পর্কিত বিধান প্রণয়নকল্পে প্রণীত আইন।চ.*

section 2(c) also does not stipulate the locality of such arbitration. It is important to note here that the Act repealed the Arbitration Act 1940 (Bangladesh), which, in its Preamble stated that the Arbitration Act 1940 was to consolidate and amend the law relating to arbitration 'in Bangladesh'. Therefore, there is a stark contrast between the Act and the Arbitration Act 1940 (Bangladesh) regarding the legislative intent of 'internationality' of arbitrations. This point was also made by the minority judgment of *Accom*.[57] Therefore, it is submitted that when sections 3(1) and 3(2) stipulated the 'scope'[58] of the Act, they are referring to the application of the curial law of Bangladesh (that is, the supervision and enforcement related law) to Bangladesh seated arbitration under section 3(1) and to foreign seated arbitration under section 3(2). The meaning of curial law is succinctly explained by the UK Supreme Court in *Enka* in the following words:

> What is commonly referred to as the curial law is, according to Mustill and Boyd, Commercial Arbitration, 2nd ed (1989), pp 60-62, 64-68, the law dealing with "the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute" (p 60) and includes "the procedural powers and duties of the arbitrator" (p 62). The curial law is (almost) invariably the law of the seat of the arbitration. … Inextricably linked to this is what may be referred to as the curial or supervisory jurisdiction of the courts. This is concerned with the courts' jurisdiction to support and enforce the arbitration. It includes, for example, the power to remove or replace an arbitrator, to enforce or set aside an arbitral award …

The same principle of curial law and enabling supervisory and enforcement jurisdictions under the jurisdictional carve-outs of section 7 of the Act can also be demonstrated by the following examples with reference to *Naviera*:

(a) If a contract is governed by English law (that is, as per in *Naviera, '*(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement)' and arbitration is to be held in London, United Kingdom (that is, as per in *Naviera,* '(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will not have any supervisory jurisdiction over that foreign seated arbitration, but a Bangladesh court will have supporting and enforcement jurisdiction in terms of section 3(2) read together with sections 7A and 10.

(b) If a contract is governed by English law (that is, as per in *Naviera,* '(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement') and arbitration is to be held in Dhaka, Bangladesh (that is, as per in *Naviera,* '(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will have supervisory and enforcement jurisdiction over that local seated arbitration.

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[57] Per Justice Md. Ashraful Kamal, *Accom* (n 2), 77.

[58] The Bengali translation of the word: : *পরিধি*.

(c) If a contract is governed by Bangladeshi law (that is, as per in *Naviera,* '(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement)' and arbitration is to be held in Dhaka, Bangladesh (that is, as per in *Naviera,* '(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will have supervisory and enforcement jurisdiction over that local seated arbitration.

(d) If a contract is governed by Bangladeshi law (that is, as per in *Naviera, '*(1) The law governing the substantive contract and (2) The law governing the agreement to arbitrate and the performance of that agreement)' and arbitration is to be held in London, UK (that is, as per in *Naviera, '*(3) The law governing the conduct of the arbitration' or curial law), then in terms of section 3(1) of the Act, a Bangladesh court will not have any supervisory jurisdiction over that foreign seated arbitration but a Bangladesh court will have supporting and enforcement jurisdiction in terms of Section 3(2) read together with Sections 7A and 10.

It is submitted that the majority judgment in *Accom* lost sight of the above jurisdictional carve-outs of section 7.

Furthermore, the majority judgment deals with the *Southern Point* in the following words:[59]

> It is pertinent to note that when Section 7A has ruled out the applicability of Section 7 by saying "notwithstanding anything contained in Section 7", it has not ruled-out, in any way, the applicability of Section 3, sub-sections (1) and (2), by which the Legislature has declared the scope of applicability of the provisions of the said Act including Sections 7 and 7A. Therefore, until and unless the Legislature amends the provisions under Section 7A by incorporating the words 'notwithstanding anything contained in Section 3', the provisions under Section 7A cannot be invoked in respect of an arbitration where the seat of arbitration is in a foreign country, except at the stage of enforcement of foreign arbitral award. Because, such enforcement of foreign award has been accommodated by sub-section (2) of Section 3 itself by declaring that the provisions under Sections 45, 46 and 47 will be applicable even if the seat of arbitration is in a foreign country. This being the position through our extensive examination of the relevant provisions of law, in particular Section 7A along with the provisions under Section 3 of the said Act, we hold that the expressions, as occurring in sub-section (1) of Section 7A, namely the expressions "until enforcement of award under Sections 44 or 45", do not in any way override the limited or territorial applicability of the provisions of the Arbitration Act, 2001 as declared by Section 3, sub-sections (1) and (2), of the said Act. Thus, we have no option but to ignore the said decision of the said single bench of the High Court Division in Southern Solar case.

[59] *Accom* (n 2) [4.26].

It is submitted that in the above observation on the *Southern Point*, the majority judgment in *Accom* convoluted the interrelation between sections 3, 7 and 7A without understanding the distinct jurisdictional purposes of these sections. It should be kept in mind that section 3 of the Act has stipulated the supervisory and enforcement scope of the Act. The absence of the word 'only' in section 3 is significant because the supervisory and enforcement jurisdictions are not the only jurisdictions that the courts have under the Act. However, despite the word 'only' not being present in the Act, by holding that 'the impact of the said word is very much apparent' in section 3(2) of the Act, the majority judgment in *Accom* effectively (and impliedly) applied the maxim *expressio unius est exclusio alterius* (to express one is to exclude others) to exclude other jurisdictional application of the Act to foreign seated arbitration. As explained below, it is submitted that this maxim is inapplicable to the Act.

As a matter of statutory interpretation, the rule of *expressio unius est exclusio alterius* is of no significance and is to be given no consideration in the construction or interpretation of a statute when the application of such rule contravenes legislative intent.[60] Let us examine some of the provisions of the Act in the context of this maxim. In the Act, we have section 3(1) enumerating the applicability of the Act in Bangladesh. Section 10 is a general grant of supervisory and supporting jurisdictions to the court which standing alone would include those powers applicable to local seated arbitrations as per section 3(1). Moreover, in section 10 of the Act there is no express or implied indication that it only applies for arbitrations seated in Bangladesh. In other words, if sections 3(1) and 10 were not asenacted, no one would contend that section 10 of the Act does not include supervisory and supporting jurisdictions in connection with arbitrations seated outside Bangladesh.[61] In other words, it is submitted that the legislative intent of jurisdictional parameters of section 10 in no way affects the provisions contained in section 3(1). Therefore, the maxim *expressio unius est exclusio alterius* (to express one is to exclude others) should not be applied to the Act to defeat the legislative intent of the jurisdictional parameters of section 10.

The majority judgment in *Accom* did not consider that sections 7A and 10 also have supporting or subject matter jurisdiction of the court, which could operate outside the supervisory and enforcement scope of section 3 of the Act. As explained above, under the principles of *expressio unius est exclusio alterius,* by section 3 these additional jurisdictions are not excluded by the legislature from the Act. Let us take section 10 again as an example to understand this analysis. Section 10 allows the court to provide supporting jurisdiction in aid of an arbitration seated within or outside Bangladesh. The legislature in 2004, when inserting section 7A,[62] thought it fit to leave section 10 as it is and did not confine its supporting jurisdictional reach within the territory of Bangladesh. This goes on to show that the legislature intended not to disturb the supporting jurisdiction of the court in foreign seated arbitrations. Indeed, there was no need to disrupt the structural integrity of section 10. The issue can be seen from another angle. If the party denouncing

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60 *Wachendorf v Shaver*, 149 Ohio St. 231 (Ohio 1948) (Supreme Court of Ohio).

61 Ibid.

62 Arbitration (Amendment) Act (Act No. 2) 2004 (Bangladesh).

the agreed arbitration clause in an agreement is a Bangladesh subject or has Bangladesh assets, then the Bangladesh court, in exercise of its *in personam* jurisdiction, can always invoke section 10 (in terms of *ICICI*) and refer the parties to arbitration. This analysis of section 10 (in line with *ICICI*) is equally applicable to the supporting (or subject matter) jurisdiction under section 7A.

If section 7A is analysed, we will come to the same conclusion. The majority judgment in *Accom* stated that for section 7A to have extra-territorial effect, the *non-obstante* provision of section 7A should have included section 3 along with section 7. It is submitted that this is an incorrect analysis of the problem for two reasons. Firstly, the majority judgment in *Accom,* while pivoting the 'jurisdictional footing' (like *Southern*) entirely on section 7, also classified section 3 in the same jurisdictional category as section 7, when in reality section 3 contains no such jurisdictional element. The judgment of *Southern* correctly makes this point when it states that section 3 does not talk about jurisdiction[63] but stops short of accurately articulating what section 3 meant. The scope of the Act in section 3 in simple terms, as Erskine May puts it, 'represents the reasonable limits of its collective purposes, as defined by its existing clauses and schedules'[64] (for example, sections 7, 7A, 10, 11, 12, 44, 46 etc.). Therefore, it is submitted that there was no need for section 7A to put a *non-obstante* provision for section 3 because that would be tantamount to section 7A rewriting the legislative 'extent' of the Act (which is discussed further below), which would have been absurd. Secondly, the majority judgment in *Accom* (also *Southern*) did not comprehend that the *non-obstante* clause in section 7A is actually a redundant exercise which in no way affected the structural integrity of section 7. This is because once we see that section 7 is a jurisdiction ouster clause with 'specified jurisdictional carve-outs' (as stated in *Accom* - 'the court shall not hear any such proceeding which has not been initiated in accordance with the Arbitration Act, 2001'), there was no need to put the *non-obstante* provision in section 7A since section 7, through the 'specified jurisdictional carve-outs', allowed courts to assume specific jurisdictions if the Act so permitted. To put it another way, by virtue of the 'specified jurisdictional carve-outs' in section 7, the court could exercise jurisdiction over a matter so long as a section in the Act stipulated so. For example, the legislature has rightly drafted section 10 without any *non-obstante* provision like section 7A and yet, it has empowered the court to exercise supporting jurisdiction within a given parameter in line with the 'specified jurisdictional carve-outs' in section 7.

D *Misunderstanding interpretational concepts*

It is submitted that from a statutory interpretational perspective, the majority judgment in *Accom* did not consider the difference between the 'extent' and 'application' of the Act. As *Bennion on Statutory Interpretation* ('*Bennion*') puts it: [65]

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63 *Southern* (n 12) [36].

64 Natzler, David and Mark Hutton (editors), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usageof Parliament* (LexisNexis, 25th ed, 2019) [28.81].

65 Bennion, Francis, *Statutory Interpretation* (LexisNexis, 6th ed, 2015), 306.

> Extent defines the area within which the enactment is law. Application is concerned with the persons and matters in relation to which the enactment operates. These may be within or outside the area of its extent.

It is submitted that the majority judgment in *Accom* did not appreciate that sections 3(1) and 3(2) stipulate the 'extent' of the enactment contained in those sections, which set out the territorial reach of the legislation. But sections 3(1) and 3(2) do not determine the 'extent' and 'application' of the Act in foreign seated arbitrations, which are dealt with, *inter alia*, in sections 7A and 10 of the Act. In this regard, *Bennion* states that: [66]

> The sections dealing with territorial extent are expressed in terms of enactments rather than Acts because it is possible for different provisions of an Act to extend to different territories.

The aforesaid statement of law is crucial to understand the jurisdictional structure of the Act and the related interpretation exercise. Section 3(1) does not set out the territorial limit for the 'effect' of the powers or jurisdictions conferred by the relevant provisions of the Act. Rather, it is submitted that section 3(1) merely stipulates that the provisions of the Act conferring powers or jurisdictions shall be exercised in arbitrations held within the territories of Bangladesh. On the other hand, section 3(2) does not set out the territorial limit for the 'effect' of *all* the powers or jurisdictions conferred by the relevant provisions of the Act and *only* deals with the'extent' of the enforcement power or jurisdiction of sections 45, 46 and 47 in case of foreign seated arbitrations. In other words, while section 3(1) only deals with the 'extent' of the Act (that is, its territorial reach for Bangladesh seated arbitrations) but the 'application' or 'effect' of powers or jurisdictions under relevant provisions of the Act is stipulated in other parts of it; for example, sections 7A and 10, which apply equally to both local and foreign seated arbitrations. On the other hand, section 3(2) only deals with the 'extent' of the enforcement power or jurisdiction of sections 45, 46 and 47 but not the other jurisdictional sections of the Act (for example, sections 7A and 10). These principles of 'extent' and 'application' were applied in the dissenting judgment of Lord Justice Richards in the case of *Serious Organised Crime Agency v Perry* ('*SOCA*')[67] (reversed by the United Kingdom Supreme Court in [2012] UKSC 35) where section 461(2) of the Proceeds of Crime Act 2002 was the subject matter of analysis, which stipulated that 'In Part 8, Chapter 2 extends to England and Wales and Northern Ireland only'. Lord Justice Richards, in his dissenting judgment, while holding that Part 8 did not have extra-territorial effect (which was also concluded by the United Kingdom Supreme Court in [2012] UKSC 35), observed as follows: [68]

> Carnwath LJ has cited … the general principle stated in Bennion, that "[u]nless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters".

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66 I Ibid.

67 [2010] EWCA Civ 907.

68 Ibid [58].

> As Lord Mance said in Masri v Consolidated Contractors Int (UK) Ltd (No.4) [2010] 1 AC 90 at [10], whether and to what extent the principle applies in relation to foreigners outside the jurisdiction depends ultimately upon who is "within the legislative grasp, or intendment" of the relevant provision …

It is submitted that sections 7A and 10 of the Act should be interpreted in the same line as the observation of Lord Justice Richards in *SOCA* because foreign seated arbitrations are 'within the legislative grasp, or intendment' of sections 7A and 10 of the Act.

Furthermore, the majority judgment in *Accom* did not consider the meaning of the word 'enactment' appearing in *Bennion*,[69] which is defined in section 3(17) of the General Clauses Act (Act No. 10) 1897 (Bangladesh) ('General Clauses Act') as to include 'any provision contained in any Act'. An enactment is a single proposition contained in a sectional unit.[70] This concept is also captured in section 28(1) of the General Clauses Act which states that 'any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained'. Thus, under section 3(17) read together with section 28(1) of the General Clauses Act , each section in the Act is an 'enactment' which, as *Bennion* states,[71] has different 'extent' and 'application'. Sections 3(1) and 3(2) lay out specific propositions (enactments) that apply to or have effect in local and foreign seated arbitrations. But it is submitted that in addition to the propositions (enactments) of sections 3(1) and 3(2), there are other propositions (enactments) in sections 7A and 10 of the Act that apply to or have effect in both local and foreign seated arbitrations. Therefore, it is submitted that the majority judgment in *Accom* failed to appreciate that there exist fundamental differences between the effect of the 'enactments' in sections 3 on the one hand and the 'enactments' in section 10 and 7A on the other hand, in terms of their 'extent' and 'application' in relation to foreign seated arbitrations.

The distinction between legislative 'extent' and 'application' discussed above can be exemplified by other laws of Bangladesh. In the CPC, section 1(3) states that it 'extends to the whole of Bangladesh'. If section 1(3) of the CPC is taken on its own (as the majority judgment in *Accom* did for section 3(1) of the Act), then it would be taken to apply 'only' within the territories of Bangladesh or 'only' for subject matters that are within the territories of Bangladesh. From that standpoint, we can take a single provision of the CPC to analyse this hypothesis. In section 92 of the CPC, in relation to public charities, it is, *inter alia*, stipulated that two or more persons, having an interest in a trust created for public purposes of a charitable or religious nature, may institute a suit in the principal civil court of original jurisdiction within the local limits where 'the whole or any part of the subject-matter of the trust is situate', to obtain a decree for 'removing any trustee or appointing a new trustee'. Now, the question that arises is this – under section 92 of the CPC, is a Bangladesh court competent to entertain a suit for the administration of a charity, for removal of trustees, and for appointment of new trustees when the charity is a foreign charity carrying its management in a foreign country with trustees

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69 Francis Bennion, *Statutory Interpretation* (LexisNexis, 6th ed, 2015), 376.

70 Ibid, 378.

71 Ibid, 306.

that are non-resident foreigners when some of the properties of that foreign charity are situated in Bangladesh? At first brush, it appears that under section 1(3) of the CPC read together with section 92, a Bangladesh court is not competent to entertain a suit for the administration of a foreign charity, for removal of trustees, and for appointment of new trustees. In *Fazlehussein v Yusufally* ('*Fazlehussein*'),[72] this argument was made before the Bombay High Court (the Code of Civil Procedure 1908 (India) is in *pari materia* with the CPC) where it was observed as follows:[73]

> … it is argued on behalf of the defendants that the provisions of the Civil P. C. can only apply within the limits of the State and they cannot have any extra territorial operation, and that a State by legislation cannot confer jurisdiction upon Municipal Courts, to deal with immoveable property outside their jurisdiction… nor can it exercise any powers against persons who are not domiciled in the country and who do not submit to the jurisdiction of the Municipal Court.
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> In the present case, the charity is a foreign charity; it is administered in a foreign country, and even the trustees are residing in a foreign country, and normally this Court would not be entitled to administer that charity or to give directions with regard to administration of that charity to persons who are not subject to its process. The question then is : Does the fact that some of the properties are within the jurisdiction confer jurisdiction upon this Court to entertain the present suit and to interfere with the administration of a foreign charity by exercising jurisdiction over the defendants who are non-resident foreigners, or even to grant any other relief?
>
> The expression 'jurisdiction' is used … not in the sense of territorial or inherent authority to entertain an action, but is used in the sense of sanction behind the judgment in its operation beyond the limits of the territory in which the Court functions. The context in which the expression is used makes it abundantly clear that it was not sought to lay down that a claim in which 'inter alia' a relief seeking to remove trustees of a foreign charity and to interfere with the administration of a foreign charity is asked cannot be entertained.
>
> If that view is right, then obviously this Court has jurisdiction to entertain the suit on the allegations made in the plaint, that there are certain properties which are the subject-matter of the trust which are situate within the jurisdiction of this Court, though the Court in the exercise of its authority will not interfere with the administration, of a foreign trust and will not exercise its equity jurisdiction in respect of non-resident defendants.
>
> In the present suit the plaintiffs have claimed reliefs for declaration of title of the trust, for removal of trustees, and appointment of new trustees for vesting the property in new trustees, for accounts and for framing scheme and for further and other reliefs. Even if this Court be incompetent to grant the reliefs, which interfere

[72] AIR 1955 Bom 55.

[73] Ibid [6], [8], [11], [12].

> with the administration of the trust in the foreign countries, such as framing a scheme, removal of trustees and appointment of new trustees and corresponding reliefs, this Court can at least protect the property within its jurisdiction for the benefit of the trust, and to that end pass all such consequential orders as may be necessary.

Thus, *Fazlehussein* shows that even though section 1(3) of the CPC lays out its territorial 'extent', section 92 has been interpreted to have extra-territorial 'application' when a foreign charity with non-resident trustees in a foreign country has some properties in Bangladesh. It is submitted that the same line of interpretation of *Fazlehussein* should apply to section 3(1) that deals with 'extent' and sections 7A and 10 of the Act that deal with 'application'.

E *The Act lacks inherent jurisdiction*

The majority judgment in *Accom* observed on the Inherent Power Point that if a court is prevented from ordering a stay of judicial proceedings because of the non-applicability of section 10 of the Act in view of the provisions under Section 3, then the court should exercise its inherent power under section 151 of the CPC to secure ends of justice and to prevent the abuse of the process of the court in order to avoid potential conflicting decisions between the arbitral tribunal in a foreign country and the court in Bangladesh.[74] It is submitted that this observation is unsustainable for the following reason.

The jurisdiction ouster clause of section 7 limits the applicability of the CPC in relation to the Act. The minority judgment in *Accom* points to this aspect by observing as follows (unofficial English translation):[75]

> If parties agree to arbitrate, then under Section 7, notwithstanding anything contained in any other law for the time being in force, no court shall have jurisdiction to hear any legal proceedings except as provided in the Arbitration Act, 2001. Since the parties to the instant suit agreed to submit to arbitration, any legal proceedings under any other law including the Code of Civil Procedure is without jurisdiction …

It is submitted that the above observation of the minority judgment in *Accom* is the correct proposition of the law. The erstwhile Arbitration Act 1940 statutorily allowed the application of the CPC in terms of section 41(a) where it was stated that 'the provisions of the Code of Civil Procedure, 1908 shall apply to all proceedings before the Court, and to all appeals, under this Act'. There is no provision in the Act that is comparable to section 41(a) of the Arbitration Act 1940. It is true that the Act does not specifically state that the CPC will not apply, but it is submitted that the jurisdiction ouster clause of section 7 makes a clear indication of limited juridical intervention in arbitrations through the 'specified

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74 *Accom* (n 2) [4.39].

75 Ibid 80; The original Bangla version reads: *ধারা ৭ মোতাবেক পক্ষগনের মধ্যে সালিসে অর্পণ সম্মত হলে বর্তমান প্রচলিত অন্য কোন আইনে যাহই থাকুক না কেন সালিসি আইন, ২০০১ ব্যতিত অন্য কোন আইনগত কার্যধারা শুনানির এখতিয়ার আদালতের থাকবে না। যেহেতু বর্তমান মোকদ্দমার পক্ষগন সালিসে অর্পনে সম্মত হয়েছিল সেহেতু অন্য কোন আইনগত কার্যধারা তথা দেওয়ানী কার্যবিধির অধীন কার্যধারা এখতিয়ার বহির্ভূত ...*

jurisdictional carve-outs' (discussed above). By stipulating in section 7 that no judicial authority shall hear any legal proceedings 'except in so far as provided by this Act', the legislature has laid out specific provisions in the Act under which a court can interject within defined parameters and it is submitted that those statutory parameters in the Act do not, like section 41(a) of the Arbitration Act 1940, include the application of the CPC.

The Indian Supreme Court has grappled with this issue in two cases in the context of section 5 of the Indian Act, on which section 7 of the Act is based and the Code of Civil Procedure 1908 (India) (which is the CPC in Bangladesh). In *ITI Ltd. v Siemens Public Communications Network Ltd* ('*ITI*'),[76] the Indian Supreme Court, following *Bhatia International vs Bulk Trading S. A.*[77] (which has been overruled by *BALCO*), held that the jurisdiction of the civil courts to which a right to decide a *lis* between the parties has been conferred, can only be taken away by a statute in specific terms, and the exclusion of such right cannot be inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of a civil nature and on that basis, it cannot draw an inference that the Code of Civil Procedure 1908 (India) is inapplicable merely because the Indian Act has not provided for the Code of Civil Procedure 1908 (India) to be applicable.[78] The case of *ITI* came up before the Indian Supreme Court in the case of *Mahanagar Telephone Nigam Ltd. v M/S. Applied Electronics* ('*Mahanagar*')[79] where the court, referring to section 5 of the Indian Act (on which section 7 of the Act is based), section 41 of the Indian Arbitration Act 1940, and the Code of Civil Procedure 1908 (India) (which is the same as the CPC) disagreed with *ITI* and observed as follows:

> Section 5 which commences with a non-obstante clause clearly stipulates that no judicial authority shall interfere except where so provided in Part 1 of the 1996 Act. As we perceive, the 1996 Act is a complete Code and Section 5 in categorical terms along with other provisions, lead to a definite conclusion that no other provision can be attracted. Thus, the application of CPC is not conceived of and, therefore, as a natural corollary, the cross-objection cannot be entertained …. The three-Judge Bench decision in International Security & Intelligence Agency Ltd. (supra) can be distinguished as that is under the 1940 Act which has Section 41 which clearly states that the procedure of CPC would be applicable to appeals. The analysis made in ITI Ltd. (supra) to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act clearly envisages otherwise and the legislative intendment also so postulates.
>
> … we are unable to follow the view expressed in ITI Ltd. (supra) …

It is submitted that the Indian Supreme Court in *Mahanagar* captures the correct legal proposition and the majority judgment in *Accom* failed to consider the impact of section

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[76] *ITI Ltd. v Siemens Public Communications Network Ltd.* AIR 2002 SC 2308; 2002 (2) Arb LR 246 (SC) 12.

[77] (2002) 4 SCC 105

[78] Ibid [11].

[79] *Mahanagar Telephone Nigam Ltd. v M/S. Applied Electronics* [2017] 2 SCC 37.

7 of the Act on the non-applicability of the court's inherent power under section 151 of the CPC.

VI CONCLUSION

Any judicial exercise is a reactive process where the court relies upon the law and facts as presented before it to resolve a problem. When the legislative draftsmen do not deal adequately with the foreign dimension in a statute, the court then has to find an acceptable solution to this problem. The Act is an example of a legislative drafting debacle and it is submitted that the majority judgment in *Accom* has not presented an acceptable solution to the problem of applicability of the Act in foreign seated arbitrations, which will not bode well with Bangladesh's bid to project herself as an arbitration friendly investment destination.

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