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Settling Down Cross-Border Commercial Dispute in Bangladesh: Role of Arbitration

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ABSTRACT

It is becoming more and more crucial for companies to have a system in place to resolve business disputes in a timely, effective, and constructive manner due to the exponential growth of the global financial and business communities. When disagreements arise during business operations, the parties involved prefer to resolve their differences amicably and confidentially, allowing them to continue their usual business activities. The scope of implementing foreign arbitral awards in the Bangladeshi judicial system is examined in this paper, along with the role of arbitration in resolving cross-border trade disputes as compared to court proceedings.

Keywords: Cross Border Trade, Dispute, Arbitration, Arbitral Award, Enforcement

I. INTRODUCTION

International trade is essential for a country's economic success, and Bangladesh is no different. Bangladesh, as a developing nation, has been endeavouring to enhance its economic standing through numerous methods, with international commerce being its principal strategy. Bangladesh has made considerable progress in its commercial connections with other nations throughout the years. It has positioned itself as a significant exporter of ready-made clothing and jute and a prominent producer of various agricultural products, among other commodities. The nation's export sector has significantly contributed to its Gross Domestic Product (GDP) and has been pivotal in generating viable possibilities for millions. The Bangladesh Bureau of Statistics reported a GDP growth rate of 7.1% for FY22 (BBS, 2023).¹

International trade law constitutes a fundamental pillar of Bangladesh's economic growth, and as the significance of global commerce escalates, the necessity for resolving trade disputes will become increasingly urgent. Several mechanisms, such as alternative dispute resolution (ADR), commercial courts, customs tribunals, and international treaties, can resolve commercial conflicts. It is essential for Bangladesh to address the challenges associated with inadequate

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¹ Abdullah Bin Zafar, 'Impact of Selected Factors on International Trade of Bangladesh: An Empirical Analysis,' International Journal of Science and Business(2024), Volume: 35, Issue: 1, pp. 30-47

legal expertise, insufficient timeliness, restricted resource availability, and heightened awareness as the nation advances its standing in international trade law. Legal specialists, by their expertise and guidance, significantly contribute to the effective resolution of trade disputes, ultimately fostering an environment conducive to international trade law in Bangladesh. Bangladesh possesses the capacity to enhance its reputation as a reliable trading partner and an attractive destination for international investment, provided that suitable measures are implemented and development initiatives are sustained, such as improving legal frameworks, increasing training for legal professionals, and ensuring timely dispute resolution processes.²

II. MODE OF SOLVING COMMERCIAL DISPUTE IN BANGLADESH

The effective resolution of problems arising in international trade is essential for maintaining the smooth operation of trade relationships. Disputes concerning international trade rules are effectively resolved through various ways and processes accessible in Bangladesh, such as mediation, arbitration, and the involvement of trade organisations that facilitate negotiations between parties.

Alternative Dispute Resolution (ADR): In Bangladesh, problems related to "international trade" are increasingly being addressed through alternative dispute resolution methods, including arbitration and mediation. Arbitration centers, including the Bangladesh International Arbitration Centre (BIAC), offer alternatives to the conventional judicial system by providing neutral venues for the resolution of legal disputes.

The Commercial Courts: To address trade-related matters effectively, Bangladesh has established commercial courts. These courts are staffed by highly competent judges proficient in all facets of commercial law. The Commercial Courts Act of 2013 governs their operations. Disputes stemming from customs-related issues may be submitted to the Customs, Excise, and VAT Appellate Tribunal, which provides a resolution avenue for these conflicts. This tribunal plays a crucial role in resolving disputes related to customs valuation, classification, and other facets of international trade. International Agreements Executed: Bangladesh is a signatory to several international trade accords, several of which establish mechanisms for dispute resolution. The World Trade Organisation (WTO) includes a Dispute Settlement Body (DSB) that provides a framework for resolving trade disputes among member governments.³

² *International Trade Law Dispute Resolution Processes in Bangladesh - Law Firm in Bangladesh and Top Law Firm in Dhaka*, (Nov. 7, 2023), <https://lawfirm.com.bd/international-trade-law-dispute-resolution-processes-in-bangladesh/>.

³ *Ibid*

An international sales contract includes a clause for the resolution of trade disputes, allowing the contracting parties to select the venue for such resolution. If they opt for court, it is essential to specify the nation and applicable legislation in the judicial proceedings, adhering to the principles of proper law of contract. One issue with selecting legal proceedings is that it fosters animosity between the parties, so undermining their relationship, which is crucial in commercial contexts. In such circumstances, arbitration may be the optimal choice for the contending parties.

III. WHY ARBITRATION?

Arbitration is a voluntary dispute settlement method in which a neutral third party delivers a final and binding decision following the presentation of each party's perspective. This approach is particularly advantageous in international business dealings, since participants frequently lack familiarity with foreign legal frameworks.⁴ Arbitration, as a method of dispute settlement, has ancient origins; it would have been customary for early humans to submit conflicts with neighbours to the tribe's elders for a definitive and binding judgement. During the initial period, there was an absence of a structured court system. The concept of arbitration originated as a straightforward method for settling conflicts.

The practice of arbitration inherently aligns with primitive legal systems; even after state courts are established and become the conventional means of dispute resolution, arbitration persists as parties seek to resolve conflicts with reduced formality and cost compared to litigation.”⁵

Consequently, arbitration predates the formation of a legal system and, in fact, predates recorded history.⁶ It likely originated with the inception of business and was a prevalent practice among Phoenician traders.⁷

In contrast to a judicial process, arbitration occurs outside the court system, facilitated by neutral arbitrators chosen by the parties according to criteria that align with the contract's nature. Arbitration is often administered by a single arbitrator or a panel of three arbitrators, with the structure, format, location, and scope determined by the parties and documented in the arbitration provision of their contract⁸. The parties typically discuss the arbitration clause concurrently with the formulation of the first contract. An appropriately constructed provision will facilitate a framework for the swift resolution of contract disputes. Arbitration affords the

⁴ Golam Moula, 'Lectures on International Trade Law, 1st edition (2017), Law Point Prokashani, p. 90

⁵ Sir William Holdsworth, *History of English Law*, London, 1984, Vol. IV, p. 187

⁶ SA Tiewal and FA Tsegah, "Arbitration and the Settlement of Commercial Disputes" (1975) 24 ICLQ 393

⁷ F Kellor, *American Arbitration*, Harper Bros, New York, 1970, p. 3

⁸ *Supra* note 4, p. 91

parties enhanced flexibility compared to a court proceeding. Parties may determine shortened timeframes for responding to claims, the location of the arbitration, the formality of the process, and the involvement of legal counsel in the arbitration.⁹

Advantages of Arbitration over Litigation:

- **Impartiality of Decision Maker:** When a side fears that a foreign court may lack neutrality, arbitration permits the selection of arbitrators by the parties involved to adjudicate the dispute;
- **Enforceability of Arbitral Awards:** Arbitration awards are definitive and can be contested only under highly restricted conditions;
- **Confidentiality:** Arbitration hearings and awards are often secret, but court proceedings and judgements are often public.
- **Expertise:** Parties may select arbitrators possessing technical backgrounds who comprehend the specific issues at hand.
- **Restricted Discovery:** The parties may opt to constrain discovery in their arbitration, rendering the process less onerous;
- **Expense:** Arbitration typically incurs lower costs than litigation;
- **Conciseness:** Arbitration typically yields a resolution more swiftly than litigation; consequently,
- **Connections:** Arbitration can be perceived as less contentious, therefore maintaining enduring corporate connections.¹⁰

IV. ARBITRATION AGREEMENT

The most effective method for parties to guarantee a successful arbitration is to design a tailored arbitration clause that precisely addresses their requirements. While a model clause can be utilised in standardised contracts, parties engaged in complicated international transactions should customise the arbitration provision to meet the specific requirements of the contract. Arbitration clauses typically stipulate either ad hoc arbitration or arbitration administered by an institution. An arbitrator's jurisdiction is typically established by including an arbitration clause in the primary contract prior to the specifics of the dispute being identified. These agreements

⁹ *Ibid*, p. 92

¹⁰ *Ibid*

are typically differentiated from "special submissions," which are formulated subsequent to the emergence of the dispute.¹¹

V. ELEMENTS OF THE ARBITRATION AGREEMENT

No universally optimal arbitration clause is available. The suitability of each clause element is contingent upon the transaction's context: the parties involved, the contract type, the applicable laws governing performance, and the jurisdictions where the award may be enforced.¹² Nevertheless, the subsequent aspects must to be contemplated for incorporation in any international arbitration agreement:

Scope of Arbitral - The parties must clearly delineate the issues they wish the arbitral agreement to encompass. However, they should recognise that local legislation may impose limitations on matters eligible for arbitration.

Selection of Arbitrator(s)

- The clause must define the selecting procedure; otherwise, statutes and regulations may address any omissions.
- If institutional regulations govern the appointment of arbitrators, additional references to the selection process may be unnecessary;

A usual practice in international commercial arbitration involves a panel of three arbitrators, with each party picking one arbitrator and the parties or arbitrators selecting a third. In certain situations, an appointing authority may nominate absent members (e.g., when one party declines to select an arbitrator as a delaying strategy); d. A solo arbitrator may be advantageous for disputes involving lesser sums; and, e. If an arbitrator requires a specific talent, it should be delineated in the arbitration agreement.

Jurisdictional Law Selection

The parties shall specify the substantive law applicable to the arbitration; b. The parties may choose a procedural law. If they fail to do so, the procedural law of the arbitration's location will govern; and, in the absence of an explicit selection of relevant law, the law of the arbitration's venue will be enforced.

Selection of Location

- A forum country must be chosen that is a signatory to an international arbitration

¹¹ William W. Park, "Arbitration of International Contract Disputes", The Business Lawyer, August 1984, Vol. 39, No. 4 (August 1984), p. 1784

¹² *Ibid*, p. 1785

convention (e.g., the New York or Panama Conventions);

- The chosen location influences the degree of potential support or interference from national courts during arbitration proceedings and may impact the enforcement of the award;
- Practical considerations, including facilities, communication and transportation systems, freedom of movement for individuals, documents, and currency, as well as support services, must be taken into account; and, d. The arbitration agreement should specify both the city and country of the chosen location.

Language Selection: The parties may choose one language as the official language of the proceedings and permit simultaneous interpretation into an alternative language.

Interim Relief: Certain arbitration regulations explicitly pertain to interim relief, notably on the parties' ability to petition a court for a preliminary injunction, an order of attachment, or any other directive that maintains the status quo until the arbitrator(s) render a decision. The regulations of the majority of arbitration organisations stipulate that seeking judicial intervention in such situations does not conflict with, nor constitute a waiver of, the right to arbitrate according to their rules. Furthermore, the majority of regulations permit arbitrators to mandate such remedies.

Costs: The arbitration agreement must stipulate the distribution of costs.

Tribunal Award: The agreement must stipulate that a majority of the arbitrators must concur on an award, which shall be grounded on relevant law. The contract must also delineate the currency for the disbursement of the award. For the award to be acknowledged and enforced internationally, it must articulate the rationale and legal foundation, including a reference to the methodology employed in selecting the legal basis. Certain awards lack accompanying rationale or written documentation.

Waiver of Sovereign Immunity: The arbitration agreement is widely regarded as an implied waiver of sovereign immunity. As a precaution, an explicit waiver should be secured in international transactions involving states, state entities, state agencies, or other manifestations of national authority.¹³

¹³ *Ibid*, p. 1788

VI. ENFORCEMENT OF ARBITRAL AWARDS

The arbitrator's decision, referred to as 'the award,' is typically a written document that conclusively determines the rights and obligations of the parties involved.¹⁴ An awarded claim grants the successful claimant a new right of action, replacing the original right upon which the claim was based.¹⁵ The award must be unequivocal, ensuring that the decision is conclusive in its terms, leaving no ambiguity on the obligations of the parties involved. The court will decline to enforce an award that is ambiguous, as demonstrated in *Montrose Canned Foods Ltd v. Eric Wells (Merchants) Ltd*¹⁶ when the verdict only instructed the losing party to compensate for damages without specifying the amount to be paid. Nonetheless, the court possesses no authority to modify or revise an award;¹⁷ It can only vacate or remand it to the arbitrator for reconsideration.

A. Enforcement of Arbitral Awards

The efficacy of arbitration in delivering a conclusive and binding resolution of international business disputes hinges on the capacity to get judicial recognition and enforcement when a party declines to comply with an award. In forming an international business contract, parties must evaluate whether the jurisdiction in which they intend to enforce an award (typically the location of the losing party) possesses a domestic legal framework for the enforcement of arbitral awards and whether that jurisdiction is a signatory to a treaty mandating the enforcement of such awards.¹⁸

B. Conventions for Enforcement of Arbitral Awards

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958 (effective in the United States since 1970).

The New York Convention is the preeminent convention for the enforcement of arbitration verdicts. The Convention stipulates that each nation must "acknowledge arbitral awards as obligatory and implement them in accordance with the procedural regulations of the jurisdiction where the award is invoked." This means the party only needs to supply the local court with an authenticated original or duly certified copy of the award and the original or a certified copy of the arbitration agreement in order to apply for enforcement.

¹⁴ *Thompson v. Miller* (1875) 15 WR 353

¹⁵ M Mustill and S Boyd, *Commercial Arbitration*, 2nd edn, Butterworths, London, 1989, p. 409

¹⁶ (1965) 1 Lloyd's Rep 597

¹⁷ *Hall v. Alderson* (1825) 2 Bing 476

¹⁸ *Supra* note 4, p. 96

Bangladesh is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The Arbitration Act, 2001, influenced by the New York Convention and the UNCITRAL Model Law, established a framework for the recognition and enforcement of foreign arbitral rulings. A foreign arbitral award refers to an award issued pursuant to an arbitration agreement in a jurisdiction outside of Bangladesh. Section 45 of the Act renders a foreign arbitral award obligatory for all parties involved in the arbitration agreement. This award can be enforced by the local courts of Bangladesh as though it were a decree of a local court.¹⁹ Nonetheless, such enforcement is contingent upon exclusions outlined in section 46, wherein the legislators limited the bases on which the local court may refuse execution of foreign arbitral awards.²⁰

VII. GROUNDS FOR REFUSAL TO ENFORCE ARBITRAL AWARDS

A court is generally obligated to adhere to a request for the enforcement of an arbitration ruling. The Appellate Division of the Supreme Court of Bangladesh asserted that the court cannot undermine the objectives of the arbitration process for trivial reasons; there must be a significant infringement to justify the rejection of the implementation of a foreign arbitral award. The supreme court affirmed that the factual and contractual issues are to be resolved by the arbitrator; therefore, the court should not consider such arguments unless there is evident gross illegality.²¹ In response to the inquiry regarding whether the disputing parties in an international arbitration may seek interim relief from the Bangladesh courts concerning assets situated in Bangladesh (either during or prior to enforcement), the High Court Division of the Supreme Court affirmed this possibility, stating, “It is evident that Section 3(1) stipulates that the 2001 Act is applicable when the place of arbitration is in Bangladesh.” It does not specify that it would be inapplicable if the site of arbitration is outside Bangladesh. The 2001 Act does not specify that its application is restricted solely to instances when the location of arbitration is Bangladesh”.²² The criteria for which a judge may decline to enforce an award are strictly limited. There are often seven bases for refusal to enforce, categorised into two groups:

Issues pertaining to the execution of the arbitration process. The party opposing enforcement must provide evidence that the award is defective due to:

- Inability of a party;

¹⁹ Smith Co-Generation (BD)B.D.vt. Ltd. Vs. Bangladesh Power Development Board 3(2010)15 BLC (HCD) 704

²⁰ *Arbitration issues for foreign investors in Bangladesh | Asia Business Law*. Available at: <https://law.asia/arbitration-issues-foreign-investors-bangladesh/> (Accessed: 26 May 2026).

²¹ Tata Power Company Ltd. v M/S Dynamic Const [2015] 2 SCOB (AD) 15

²² HRC Shipping Ltd. v M.V. X press Manaslu & Others, 12 MLR (2007) HCD 265

- Inadequate notification to a party, or a party's incapacity to articulate their case;
- The award was beyond the parameters of the arbitration agreement.
- The appointment of the arbitrators contravened the agreement; or, if the agreement was silent on selection, the selection process breached the law; or e. The award was nullified or rescinded.

Issues of State Sovereignty

- The legislation of the jurisdiction where enforcement is pursued forbids arbitration for the subject matter of the dispute;
- The acknowledgement or implementation of the award would contravene the public policy of that nation.²³

VIII. CONCLUSION

The selection of an appropriate dispute resolution mechanism is essential for the parties to benefit from a prompt and efficient legal process. Any disagreement arising from a cross-border business transaction shall be handled through litigation or arbitration. Litigation in Bangladesh is plagued by delays; hence, contractual parties typically favour arbitration as the primary way for settling cross-border commercial disputes. The growing interconnection of industry and commerce necessitates the prompt resolution of conflicts between parties from different nations, making arbitration a crucial mechanism to attain this goal. The arbitration process is adaptable and provides parties the freedom to resolve their problems while maintaining confidentiality.

²³ Section 46 of the Arbitration Act, 2001.