Settlement of International Commercial Disputes through Arbitration in Bangladesh: Challenges that Foreign Enterprise may Encounter

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Introduction

In recent years, Bangladesh enjoys extensive overseas trade with numerous countries around the world, and her geographical location, flexible tax policy, cheap labor, and huge consumer market attract the attention of foreign enterprises much to do business in/with Bangladesh. The consistent economic growth over the last two decades and the existing favorable business climate attracts Foreign Direct Investment (FDI) in various fields, particularly in oil, gas, garments, pharmaceutical, IT, construction, and agriculture. In line with the growth of international trade and investment, there is high yield of numerous cross-border business disputes which eventually leads parties to find an efficient mechanism for resolving such disputes.

Fixation of an appropriate business dispute resolution avenue is key so that the parties involved can take advantage of a speedy and effective legal process. But national and foreign parties face multiple difficulties while resolving disputes for non-performance of contract in Bangladesh as the national courts already burdened with huge backlog of cases. International commercial arbitration (ICA), by its very nature, is cost-effective, less complex and time saving compared to litigation, thereby providing an attractive and effective method for cross-border business dispute resolution. However, outdated law poses various legislative and procedural challenges to the practice of ICA in Bangladesh. Enforcement of international commercial arbitral awards is another significant concern for foreign investors wishing to do business in Bangladesh. So, from this context this paper highlights the scope and challenges of the prevailing commercial dispute resolution mechanism that are crucial for foreign business enterprises to consider, and negotiate with their counterparts, when thinking of investing and doing business in Bangladesh.

Reasons to Choose Arbitration

A crucial concern for the foreign investors while choosing Bangladesh as investment destination is to determine an appropriate dispute settlement mechanism. Under section 4 of

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the Foreign Private Investment (Protection and Promotion) Act 1980, Bangladesh declares that the government shall accord fair and equitable treatment to foreign private investment, which shall enjoy full protection and security in Bangladesh. However, such protection may not extend to private level and may not regulate the relationship of the commercial parties involved in the FDI.

Hence, while negotiating on dispute resolution clause, foreign parties generally prefer to submit their disputes to arbitration rather than to courts in Bangladesh. There are several reasons for this preference. The primary reason for this is the unwarranted delay in getting disputes resolved through local courts. The courts in Bangladesh is overloaded with the excessive number of cases due to a hundred-year-old faulty legal system that causes wearying delays in the adjudicative process. Commercial cases involving business contracts amount of tens of cores BDT remain unresolved in various courts across Bangladesh for years together.

Secondly, the foreign parities intend to avoid the complexities of transnational litigations. Taking recourse to litigation for the settlement of cross-border commercial conflicts has been proved grossly unsuitable and prone to more damage than the resolution of conflict. In addition, over the years the increasing volume and complicacy of commercial disputes, and the non-availability of quick justice in the traditional courts lead the business community to prefer arbitration to settle their disputes. In such context of Bangladesh, arbitration is no longer an "option" but has become the must to resort for resolving cross-border business disputes.

Legal Regime for Arbitration

The Arbitration Act 2001 (the "AA 2001") is the primary piece of legislation governing commercial arbitration in Bangladesh. It is enacted replacing the old regime, the arbitration Act 1940 and the Arbitration Protocol and Convention Act 1937. This primary statute of arbitration was drafted principally following the UNCITRAL Model Law of 1985 ("the Model Law") which consolidated the rules regarding both domestic and ICA. However, the AA 2001 has not adopted all the Model Law's provisions. Moreover, Bangladesh has already adopted some policies and embraced the core principles of international arbitration to facilitate cross-border business disputes resolution. In this process, Bangladesh ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards popularly known as the New York Convention, and the ICSID Convention. Apart from the Arbitration

Act, the Bangladesh Energy Regulatory Commission Act 2003, and the Real Estate and Management Act 2010 contain provisions to facilitate arbitration.

Arbitration Institutions

The Bangladesh International Arbitration Center (BIAC) is the country's first and only licensed international arbitration institution. BIAC formally started its operation in April 2011 through the adoption of its own institutional rules, called BIAC Arbitration Rules 2011 which is updated later by the adoption of the BIAC Arbitration Rules 2019. The Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) established another forum for arbitration in 2004, known as the "Bangladesh Council of Arbitration ("BCA"). In addition, Bangladesh Energy Regulatory Commission resolves the disputes regarding energy through a distinct tribunal. Apart from institutional arbitration ad hoc arbitration, in which the parties determine the rules of arbitration, also held in Bangladesh under the auspices one of several arbitral institutions such as, the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), or the London Court of International Arbitration (LCIA).

Challenges of International Commercial Arbitration in Bangladesh

The foreign parties encounter number of challenges both during the operation of arbitration proceedings and at the time of enforcing foreign arbitral awards in Bangladesh. The restricted territorial application, outdated provisions of the Act, the excessive judicial interference, absence of separate judicial forums and rules for the enforcement of arbitral awards and the complete resolution of disputes within a reasonable time are the key challenges before Bangladesh. Due to the space limitation this article covers only the core legal issues that the foreign parties face while resolving cross-border disputes through arbitration in Bangladesh.

i. Challenges During Arbitration Process

Unreasonable delay at the commencement of arbitration proceedings is a live issue in Bangladesh. The primary reasons behind the lengthy arbitration proceedings are the frequent judicial intervention at different stages of arbitration, complicated court procedures, and the dilatory tactics adopted by the parties. Most importantly, there is no time limit specified in the AA 2001 to be followed by the arbitral tribunal for rendering an arbitral award. Section 12 of the AA 2001 authorizes the local court to make the appointment of arbitrators for conducting ICA on the occasions; "if a party fails to appoint an arbitrator within thirty days

of the receipt of a request to do so from the other party, or the appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment." Generally, to delay the formal hearings of the arbitration, the other party contested in the local court in making the appointment of arbitrator(s). Since the national courts are already overburdened with numerous cases, this process naturally takes a long time to be decided. Consequently, arbitration entangles with the cycle of delay at the very early stage of its initiation, and the innocent party became the victim of this delay.

Legislative restrictions coupled with judicial uncertainty for seeking interim relief before the domestic courts for foreign-seated arbitration is another great concern for the foreign parties. Subsection (2) of section 3 of AA 2001 provides in a clear and unambiguous language that "this Act shall apply where the place of Arbitration is in Bangladesh." The existence of this provision makes national courts unable to secure the interest of the claimant even in case of extreme necessity, and thus it raises extreme concern for the overseas parties. The restrictive provisions of section 3 curtailed the scope, suitability, and applicability of the Bangladesh regime, and thus the seat of arbitration is made the determining criteria to ascertain the availability of interim reliefs in national courts for ICA.

The undue interference of the national court, already exercised in many cases in Bangladesh, made the country infamous among the global arbitration users. *Saipem v Bangladesh* is the key example of a national court's compulsive intervention in international commercial arbitration, where the Bangladesh court negated the authority of the ICC tribunal held in Dhaka, Bangladesh. *Chevron v Bangladesh* is one of several disreputable examples of the Bangladesh court's intervention in the international investment arbitration initiated by the ICSID Tribunal. The *Egyptian Fertilizer* case is another notable example of the domestic court's undue interference in ICA proceedings. The undue interference of the national courts of Bangladesh in the above-mentioned cases delayed the arbitral proceedings for excessive periods.

ii. At the time of Enforcement of Arbitral Awards

Although Bangladesh became member of the New York Convention in 1992, the enforcement of a foreign arbitral award in Bangladesh has never been a straightforward process. Even the enactment of a new Act, the AA 2001, failed to make the enforcement process simple and smooth. There are multiple difficulties that subsist regarding the

enforcement of arbitral awards, and the difficulties are more severe for the parties of ICA. The execution process confronts with some restrictive definitional challenges and, in practice, the enforcement process goes through a complex court procedure that is highly time-consuming.

The AA 2001 defines "a 'Foreign Arbitral Award' means an award which is made in pursuance of an arbitration agreement in the territory of any state other than Bangladesh except an award made in the territory of a specified state." On the other hand, in section 47 the Act further provides for the purpose of recognition and enforcement of certain foreign arbitral awards, the Government may declare a state as a specified state through a gazette notification. This provision narrowed the scope of the Act further by enabling the government to categorically avoid foreign arbitral awards made in particular states means that the domestic courts will enjoy the authority to reject the enforcement application of such awards by finding that the seat of arbitration was within the territory of a specified state.

Under Section 45 of the AA 2001 foreign arbitral award is made binding for all parties to the arbitration agreement. Such an award can be executed by the local courts of Bangladesh as if it were a decree of the court. However, such enforcement is subject to the exceptions provided in section 46, where the legislatures restricted the grounds on which the national court can deny the execution of the foreign arbitral awards.

Another major practical challenge to ICA in Bangladesh is absence of separate rules for the enforcement of arbitral awards, and there is no definite time limit for solving an execution case. The AA 2001, without formulating any special rules validates the outdated general rules of the Code of Civil Procedure, 1908 for the execution of the foreign arbitral awards. As the enforcement process has to go through a cumbersome court procedure followed by the national courts, it makes the execution slow and time-consuming.

Conclusion

The significant increase of international trade and investment in the process of economic development of Bangladesh would naturally yield numerous amount of cross-border disputes. Concomitant to the progress in trade, investment, commerce, and industries, the availability of an expedited dispute settlement mechanism is the key for the nation to sustain economic growth. ICA, among all other modes of transnational business dispute resolution, is proved as the effective and preferred method for efficient settlement of cross border disputes. However,

the current scenario in Bangladesh is not satisfactory. It is evident that unwarranted delay in resolution of commercial disputes ultimately affects the FDI and lessen the interest of foreign business enterprises.

So, the promotion of ICA in Bangladesh minimizing the challenges would be a decisive factor for her to achieve further economic growth and the flow of foreign investment. To restore confidence of the foreign investors and overseas trading partners, dynamic, creative and extensive amendments to the current system is urgent. Early amendments should bring to expressly allow national courts to issue interim remedies in case of foreign seated arbitration, introduce a fast track court system to deal with primary arbitration issues and execution of foreign arbitral awards without undue intervention. Before the legislative developments, the foreign parties may focus on other avenues like mediation and negotiation for quick resolution of their business disputes.

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