

Overview of Bangladeshi Arbitration and Maritime Law

Rahman's Chambers

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Overview of Bangladeshi Arbitration Law

Arbitration Law

The primary source of Bangladesh's arbitration law is the Arbitration Act 2001 ("**Act**") which governs domestic and international commercial arbitration. As per Section 3(1) of the Arbitration Act 2001, the Act applies whenever the place of arbitration is in Bangladesh. The legislature adopted the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") while enacting the Arbitration Act with a view to modernising the previous Arbitration Act of 1940.

After the Arbitration Act 2001 came into force Bangladesh, inclusion of arbitration clauses in commercial contracts have become the norm. Even if a contract does not contain an arbitration clause, arbitration under the Act may be invoked for resolution of any commercial dispute, if the parties to the dispute so decide, so long as the place of Arbitration is Bangladesh.

Among other things, the definition of an arbitral tribunal in section 2(o) and the composition of the arbitral tribunal in section 11 of the Act, are modelled on article 2(b) and article 10 of the Model Law.

Section 2(o) of this Act adopts the definition of an arbitral tribunal in article 2(b) being "a sole arbitrator or a panel of arbitrators". Article 10 of the Model Law grants to the parties the greatest possible freedom in the choice of the number of arbitrators to constitute the arbitral tribunal. That is to say, the parties may choose a sole arbitrator or any number of arbitrators including even numbers, and in the absence of an agreement of the parties, the default number is three.

However, section 11 of the Act departs from the Model Law in two ways. Firstly, it provides that the number of arbitrators constituting the arbitral tribunal shall not be an even number unless otherwise agreed by the parties. Secondly, where the parties appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as the Chairperson of the tribunal. Thus, the default number is three arbitrators while the maximum number is any uneven number that may be determined by the parties.

New York Convention

Bangladesh ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York**

Convention) on 6 May 1992 and the Convention entered into force on 4 August 1992. The Act provides for enforcement of foreign arbitral awards in accordance with the New York Convention.

Arbitral Institutions

Bangladesh International Arbitration Centre ("**BIAC**") is the first international arbitration institution of the country. It is registered as a not-for-profit organization and commenced operations in April 2011 under a license from the Government. BIAC provides a neutral, efficient, and reliable dispute resolution service in this emerging hub of South Asia's industrial and commercial activity. BIAC introduced its Arbitration Rules in April 2012 and Mediation Rules in 2014, both of which were updated in 2019.

Substantive Law

Under the Arbitration Act, the parties are allowed to choose any substantive law. For example, any party may select Bangladeshi law as the substantive law and the rules of International Chamber of Commerce ("**ICC**") for the arbitral proceedings. However, the Act allows an arbitral tribunal, in the absence of the parties' choice of substantive law, the freedom to apply any rule of law as suitable in the circumstances of a dispute.

Appointment of Arbitrators

Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator. In the event of default, courts can appoint an arbitrator under section 12 of the Act, but they must give due regard to any agreement of the parties as to the qualifications required of

the arbitrator, and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator (Section 12(9)).

The most noteworthy deviation from the Model Law is that section 12 uses the words "District Judge and Chief Justice" instead of the word "court" used in article 11. In other words, the Model Law permits court intervention in the matter of appointment of arbitrators, while this section avoids court intervention and vests the default power to appoint arbitrators in the "Learned District Judge in case of arbitration other than international commercial arbitration and in the Honourable Chief Justice or an Honourable Judge of the Supreme Court designated by the Honourable Chief Justice in case of international commercial arbitration".¹

The Act also allows the appointment of an arbitrator to be challenged on the grounds of impartiality, independence and the arbitrator's qualifications as agreed by the parties (Section 13).

Interim measures

Under section 7A of the Act, the judiciary in Bangladesh has previously held conflicting views regarding the applicability of the Act by dint of Section 3 in cases where the seat of arbitration has been agreed by the parties to be outside of Bangladesh.

In *HRC Shipping Ltd v. MV X-Press Manaslu* ("**HRC case**"),² the High Court, following *Bhatia International v. Bulk Trading SA*,³ was of the view that the court can order interim measures where the seat of arbitration is outside Bangladesh. On the other hand, in *STX Corporation Ltd v. Meghna Group of Industries Limited* ("**STX**

case”),⁴ the High Court adopted a completely different approach and held that the provision of the Act is not applicable to a foreign arbitration except as provided in Section 3(2) of the Act itself, meaning that interim measures would not be available in foreign-seated arbitrations.

Thereafter, the High Court Division revisited the ratio of both the HRC and STX cases in *Project Builders Ltd (PBL) v. China National Technical Import and Export Corporation and others*,⁵ and confirmed that there is no scope to deviate from the provisions of section 3 of the Act. However, recently in *Southern Solar Power Ltd. and Ors Vs. Bangladesh Power Development Board and Ors*,⁶ the High Court Division comprising Honourable Justice Mr Muhammad Khurshid Alam Sarkar, held that the “... Court is well competent to entertain an application under Section 7A of the Arbitration Act regarding an arbitration which would take place or is taking place in a foreign country.” This means that Bangladeshi courts have the power to order interim measures in both local & foreign arbitrations.

Awards

An arbitral award is enforceable on the same footing as a court decree. However, there is a time limit for initiating proceedings for setting aside an award. Proceedings for setting aside an arbitral award will have to be initiated under section 42 within 60 days of receipt of an award. Section 43 along with section 42 of the Act provide the grounds for setting aside an arbitral award. Fraud, corruption, or conflict with the public policy of Bangladesh, a violation of the principles of natural justice, acting beyond the terms of the submission and deciding on matters that are legally not arbitrable are the grounds on which an award can be set aside.

Virtual Hearings

Nothing under the Act prohibits virtual hearings. Sections 25 and 26 of the Act allow the Tribunal and/or the parties’ full freedom to decide on a procedure and a place respectively for holding oral hearings. There is no legal bar against fixing a designated digital platform like "Zoom" or "Skype" or other similar platforms available in Bangladesh.

Further, during this COVID–19 pandemic, the Parliament enacted the Adalat Kartrik Tottho-Projukti Bebohar Ordinance, 2020 (Use of Information communication technology by court Ordinance, 2020), which allows the conduct virtual hearings.

Overview of Maritime Law in Bangladesh

Bangladesh is a common law system country based on English common law. The law on admiralty and maritime affairs in Bangladesh can be traced back to the Law relating to the Admiralty Courts of England, in particular, the Admiralty Court Act, 1861, The Courts of Admiralty Act, 1891 and the Admiralty Rules of 1912. Now, the Admiralty Courts Act 2000 deals with all issues related to Admiralty Jurisdiction of the Admiralty Court of Bangladesh while the Admiralty Rules of 1912 is still applicable. Any person or company can initiate a suit in the Bangladesh Admiralty Court involving a vessel. The most common causes for admiralty suits in Bangladesh are vessel Collisions, cargo short landing, cargo damages, non-payment of crew & supplier, charterparty claims involving freight & hire, salvage, ship finance, and so on.

The Admiralty court may exercise its authority over all ship or aircraft, whether Bangladeshi or not and whether registered or not and

wherever the residence or domicile of their owners may be, in relation to such claims as provided under the Admiralty Court Act 2000.

Arrest of ships

Bangladesh is not a signatory to any arrest convention. Bangladesh law recognises *in rem* and *in personam* proceedings.

The High Court Division of the Supreme Court of Bangladesh has admiralty jurisdiction. To file an application for the arrest of a ship, the applicant must initiate a suit before the Admiralty Court. After the application for arrest is heard and if the court is *prima facie* satisfied, it passes an order for arrest of the ship for security of the claim amount. Ships may be arrested for maritime liens as well as maritime claims, and the Court does not require any counter security for arrest. To date, the practice for awarding damage for wrongful arrest is still at an early stage; A P&I club's letter of undertaking or letter of indemnity is not accepted for release of the vessel and a vessel is only released upon furnishing a bank guarantee.

Shipowner's Limitation of Liability & Collision

Bangladesh is not a signatory to any of the conventions relating to limitation of liability & collision. However, our Merchant Marine Ordinance incorporated provisions on limitation of liability which is similar to the 1957 Brussels Convention. Limitation of shipowner's liability arising from collision is provided under sections 471 and 472 of the Bangladesh Merchant Shipping Ordinance, 1983.

Maritime liens

Sections 477 to 479 of the Bangladesh Merchant Shipping Ordinance 1983, recognize maritime liens on seaman's wages and the master's wages. No other statute recognizes maritime liens. However, the Court follows the English law of maritime liens. If the plaintiff's claim is a maritime lien, the claim survives even in case of a change in ownership of a ship, and the ship can still be subjected to arrest. If the claim is a maritime claim and not a maritime lien, the ship cannot be arrested if, before filing of the suit, ownership of the ship has changed.

Carriage of goods by sea

The laws relating to carriage in Bangladesh are the Carriers Act 1865, the Carriage by Air (International Convention) Act 1966, the Carriage of Goods by Sea Act 1925, and the Railway Act 1989. In the absence of any special laws, the Carriers Act 1865 is uniformly applicable to all the modes of carriage. Accordingly, the Carriers Act 1865 applies to inland water carrier, land carriers. It does not apply in case of carriage by Air (including inland air) and carriage by sea. The Carriage of Goods by Sea Act, 1925 reflects the Hague Rules (Brussels 1924). Under the present legal system of Bangladesh, MTO cannot lawfully operate with regard to carriage by sea since Carrier has been defined as the owner /charterer of a ship (Article I of the schedule to the carriage of goods by Sea Act 1925).

Charterparties

A charter party agreement would be governed by the Bills of Lading Act, 1856, the Carriage of Goods by Sea Act, 1925 and the Contract

Act, 1872. After the contract of affreightment ends, the carrier incurs a new liability as bailee and the limitation for bringing a suit in that case would be 3 years under Article 115 of the Limitation Act.

Disputes involving charterparty claims for example, freight, sub freight, lien of cargo, etc. are mostly referred to arbitration. However, on very limited occasions an admiralty suit may be brought before the Admiralty Court of Bangladesh. The Admiralty Court will arrest a cargo if the vessel is also arrested, but the sole arrest of cargo is not allowed.

Salvage

The Maritime Conventions Act, 1911 is an enactment of the British Parliament, resulting from the ratification of the Collision Convention 1910⁷ and the Salvage Convention 1910.⁸ The Maritime Conventions Act, 1911, gave statutory effect to both the provisions of the Collision Convention 1910 and the Brussels Salvage Conventions 1910. Though Bangladesh did not ratify the conventions of 1910, the Courts of Bangladesh have followed the English enactment.

The High Court Division of the Supreme Court of Bangladesh in *Owners M.L. Madina vs. Owner Jalamoni (1978)*⁹ applied the principle of the Maritime Conventions Act, 1911 giving recognition to the applicability of such Act in admiralty jurisdiction. The Appellate Division of the Supreme Court in *Bangladesh Inland Water Transport Corporation vs. M/s. Seres Shipping Corporated World Trade Centre (1984)*¹⁰ concurred with the finding of the High Court Division as to the applicability of Maritime Conventions Act, 1911. Since then, no dispute has been raised as to the applicability of Maritime Conventions Act, 1911 in Bangladesh. At present, reference is made

to the Maritime Conventions Act, 1911 whenever required by our judiciary to address the issue of salvage in admiralty suits.

Marine Insurance & General Average

In Bangladesh, in the absence of any legislation relating to Marine Insurance, the courts have followed the principles of good faith, etc. of English Law and English decisions as well as the provisions of UK Marine Insurance Act, 1906.

The Supreme Court of Bangladesh in *Eagle Star Insurance Company Limited vs. Rahmania Trading Co.*¹¹ stated “... [t]here is no such law in our country, Marine Insurance contract is therefore governed by the general principles of contract and the English principles. The principles in English Marine Insurance Act 1906 are also applicable.” The Appellate Division in *Sadharan Bima Corporation vs. Bengal Liners Ltd.*¹² also held “...in respect of marine insurance in general the Court of Bangladesh follow the general principles of contract and English law and practice.”

Enforceability of Foreign Awards

Application

Foreign arbitral awards are enforceable under section 45 of the Arbitration Act. The Act clearly sets out provisions dealing with recognition and enforcement of foreign arbitral awards. Section 45 of the Act states that, notwithstanding anything contained in any other law for the time being in force, subject to section 46, a foreign arbitral award shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by

any of those persons by way of defence, set off or otherwise in any legal proceedings in Bangladesh.

However, there are grounds for refusing recognition or execution of foreign arbitral awards as set out in section 46 of the Act which include, amongst others, incapacity of any party, invalidity of the arbitration agreement, inadequate notice of arbitration to the party against whom award is invoked, subject matter of the dispute not capable of being settled by arbitration and award being in conflict with public policy of Bangladesh or contrary to public policy.

Competent Court

Section 45 of the Arbitration Act provides that unless there is any of the ground enumerated under section 46 for refusal, any foreign award shall be executed upon an application made to the Court of the District Judge, by any party in accordance with the Provision of the Code of Civil Procedure 1908 as if it were a decree of the Court.¹³

Timeframe

An award can be enforced only after “*the time for making an application to set aside the arbitral award under section 42 has expired or such application having been made has been refused*”. An application to the court for setting aside the award must be made within 60 days.¹⁴

Enforceability of New York Convention foreign awards

Section 45 of the Act embodies Article III of the New York Convention, in that it makes a foreign arbitral award binding for all

purposes on parties to the arbitration agreement and such an award can be executed by the local court as if it was a decree of the local court. This principle has been upheld in the case of *Canada Shipping and Trading SA v TT Katikaayu and another (Admiralty Jurisdiction)*,¹⁵ where it was held that “[o]nce an arbitration proceeding in a foreign country is completed, the Arbitral Award, on an application by any party, will be enforced by a court of this country under the Civil Procedure Code in the same manner as if it were a decree of the court.” Thus, there is no requirement to obtain separate permission from the local court for enforcement.

Institutional and ad hoc Arbitration

Institutional and ad hoc arbitration are types of arbitration for administering the dispute resolution process based on the terms of the agreement and the applicable law. There is no difference in terms of their status, enforcement, or recognition of the award in Bangladesh. As with the leading international arbitration practice and institutions, BIAC has also developed to assist parties to arbitrations comprehensively from beginning to end. It is now becoming common practice in Bangladesh to incorporate an arbitration institution’s arbitration rules into a contract. Ad hoc arbitration under Arbitration Act used to be more popular domestically, but this is slowly changing.

Status of SCMA Awards in Bangladesh

Singapore is a party to the New York Convention and a SCMA award will be treated as a New York Convention award under the Act. An SCMA award will therefore be enforced in Bangladesh in accordance with Section 45 of the Act.

¹ Government of Bangladesh & Others Vs. Samir and Co 28 DLR (AD) 21.

² Reported in 58 DLR 185.

³ Reported in 2002 AIR (SC) 1432.

⁴ Reported in 64 DLR 550.

⁵ Reported in 69 DLR 290.

⁶ 2019(2) LNJ.

⁷ Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels.

⁸ Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea.

⁹ 30 DLR 149.

¹⁰ 36 DLR (AD) 82.

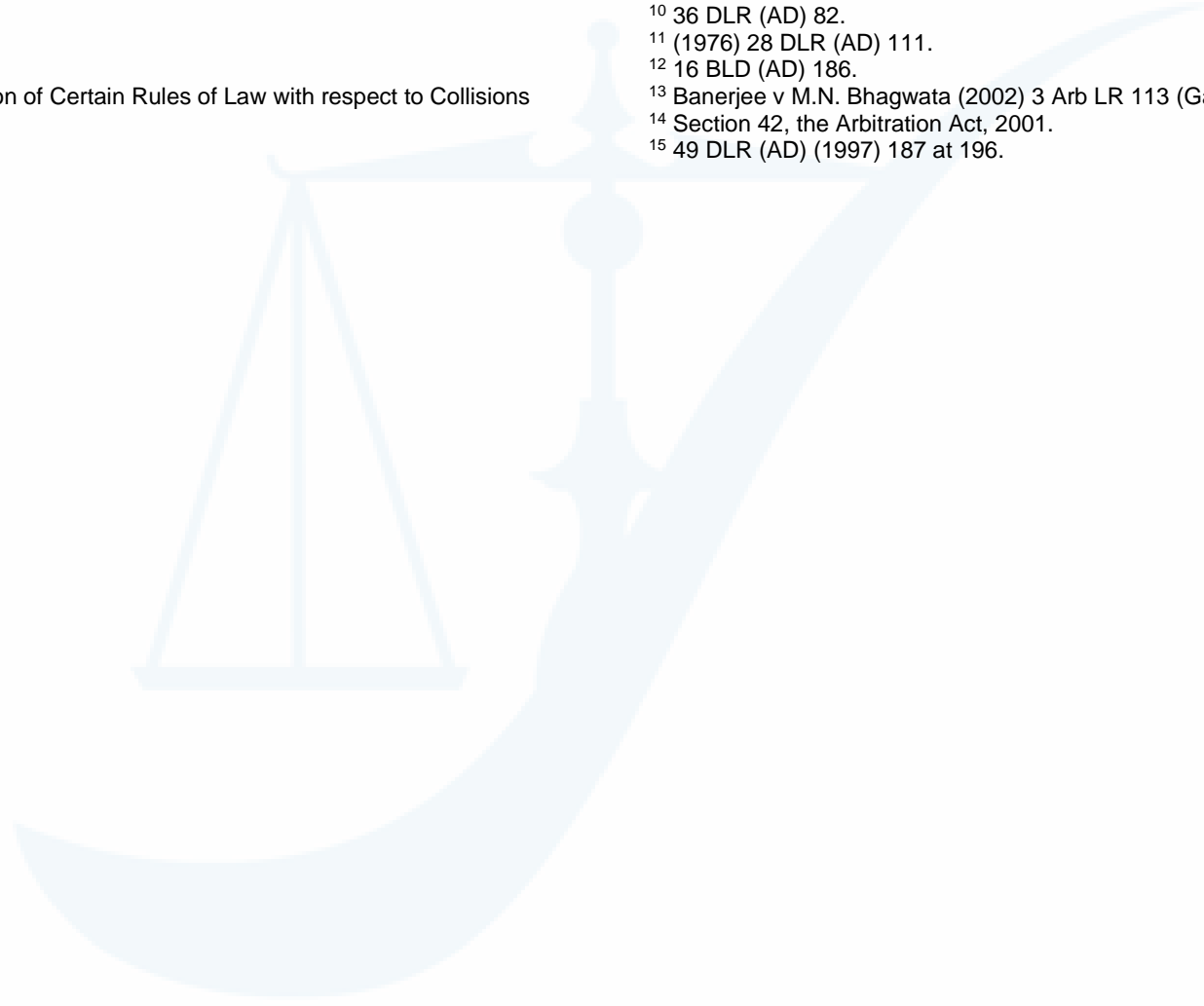
¹¹ (1976) 28 DLR (AD) 111.

¹² 16 BLD (AD) 186.

¹³ Banerjee v M.N. Bhagwata (2002) 3 Arb LR 113 (Gau).

¹⁴ Section 42, the Arbitration Act, 2001.

¹⁵ 49 DLR (AD) (1997) 187 at 196.



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