

Research Monograph on Arbitration Act under the Legal Framework of Bangladesh : A Journalistic Investigation



Daffodil
International
University

LL.M. THESIS

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Subject: Submission of Research Monograph

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**Dedicated My Parents and all the teachers in
my education life**

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Abstract

Probably two parties anytime they come to an agreement, look for some way to solve their problem quickly, cheaply and fairly. Arbitration is a binding dispute resolution process that has become increasingly popular in recent times. Never before has Bangladesh been in the forefront of vying to attract foreign investment and being abreast with new trends in international business / commercial arbitration law. Bangladesh, being a member of the Indian subcontinent, has witnessed arbitration since time immemorial in various forms. However, when British promulgated "The Arbitration (Protocol and Convention) Act 1937" and "The Arbitration Act, 1940", a new legislation called "The Arbitration Act, 2001" was promulgated which unified both domestic and international business arbitration. 2 To ensure stability and uniformity in arbitration practice in Bangladesh, the new law specifically adopts that of the Model Law on International Commercial Arbitration enacted by UNCITRAL in 1985. The model arbitration law, for its part, is not without blemishes and falls well short at least of all but the most meager expectations of the contracting parties that they have take a modern course to an efficient rendering of justice. The objective of this article are twofold: (a) to critically examine the present state of arbitration laws and practices in Bangladesh and (b) to highlight the facilitatory / obstructive factors that contribute towards accessibility to justice under this dynamic and everchanging process, including how they can be used in order to combat its shortcomings while depending on both or either of these where possible, having satisfaction for the parties as an uppermost standard.

Keywords: Arbitration effectiveness, Enforceability of awards, Speed of resolution, Cost efficiency, Party autonomy, Confidentiality in arbitration

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CHAPTER ONE : INTRODUCTION

1.1 Background of Arbitration

Conflict is present in all areas of life. Because we've had litigation forever, and because it's still one of the most popular means by which parties resolve their disputes. On the other hand, international commercial disputes need to be brought under Alternative Dispute Resolution mechanisms like Arbitration to protect it from the slow process of justice delivery in courts that has been rendered ineffective and inefficient due to globalization and expansion in global trade and commerce. The old Arbitration Act of 1940 that was greatly affected by UNCITRAL Model Law and to make better provisions, bearing in mind the objective of speedy disposal civil cases were repealed to form the New arbitration act 2001. In fact, the principal purpose of this Act was to cover matters which were not covered by the earlier Arbitration Act. With this Act the environment for arbitration and business in Bangladesh has changed. Special Bench of the High Court Division was created for try the cases relating to Business Arbitration International (International Commercial Arbitration) by Supreme Court of Bangladesh. Amendments were made to the Act in 2004, They aimed to correct certain flaws and cater for all party needs as well with respect to international commercial Arbitration. Jurisdictional actions, such as these, were necessary to satisfy the growing need of foreign investment in Bangladesh (especially in electricity and natural gas sectors).¹ Hopefully the newly-adopted Arbitration Act will offer a much-needed alternative to the congestion of courts in Bangladesh and actual reform – not least to reassure foreign investors by enabling their arbitral awards under New York Convention rules (of which Bangladesh is a member) to be enforced. This essay will then go ahead to examine the basics of the Arbitration Act, 2001 and its difficulties as it relates to functionality issues surrounding arbitration remedy mechanism contained in this law. Finally, I propose an exhaustive solution at the end of this article to address Bangladesh's arbitration ills.

1.2 Purpose of the Research

With this study we want to show you how the Arbitration Act of 2001, Bangladesh's most recent edition of arbitration law, plays out in practice. The purpose of this study is to explore how the Act contributes towards resolution of modern conflicts, promotion of ADR and aligns Bangladesh with international legal practices such as UNCITRAL Model Law and New York Convention. Among the other goals of the study: to understand what's good or bad about current arbitration, to look at why it's difficult to enforce arbitral verdicts and to look on how judges interpret the law.

1.3 Scope and Limitations

The main focus of the paper is Bangladesh's Arbitration Act 2001, however it also compares it to international standards. This qualitative study is based on a review of secondary literature, statutes, and court decisions. When does the Arbitration Act apply?

¹ Menkel-Meadow, Carrie. "A Negotiator's Guide to Legal Analysis: The Negotiation of Legal Disputes." 11 Harv. Negot. L. Rev. 347 (2006). (Discussing the flexibility and creative potential of negotiated settlements.)

CHAPTER TWO OVERVIEW OF ARBITRATION LAW

2.1 Definition and Nature of Arbitration

In arbitration – a form of ADR – the parties agree to submit their dispute to a tribunal or neutral person, instead of taking it before state courts. Arbitral Award: The arbitrator makes the final, legally binding decision. Largely due to the fact that everything depends on the legality of the (arbitration) agreement, known as autonomous compared to the foundational contract, its legal nature is essentially contractual. Under this Contract, the fundamental legal principle of party autonomy is defined and accordingly allows the parties to appoint arbitrators, determine rules of procedure and seat of arbitration. Another principle of modern arbitration is minimal judicial intervention.² This means that the state court can set aside the resulting arbitral decision only in certain, restricted circumstances, and may otherwise have a secondary role (if any, such as offering interim measures).

2.2 Historical Development

Arbitration from the old business to new legacies The world has changed and, consequently, has arbitration, being a product of its time.

The advancement of dispute resolution from the informal and essentially local to the formal, modern system can also be traced in one step closer to home- the history of arbitration law in South Asia (Bangladesh today). Typical law and village council (Salish) Would originally include arbitration. Rather than basing rulings purely on legal reasoning, many were reached by applying the laws to human situations as determined in the court of public opinion, moral authority, and consensus. Most of this system was not written down. Formalization started when the British took over and wanted to see that business transactions can be settled in a predictable manner. This led to the Indian Arbitration Act, 1940 that came into play post the split in 1947. But the 1940 Act permitted judges to wade too deep into arbitration waters by allowing them to enjoin awards for many reasons and effectively turning arbitration into nothing more than the first phase of a lawsuit, which is why so many people did not like it.

Alternative dispute resolution, or ADR, is not new. It is simply a back to the old style of settling differences that was upheld in the formal state courts, not new and different. But anti-litigation-ism did not originate with the limited legal model in late 20th century America, where Alternative Dispute Resolution (ADR) began its revival. There were a number of reasons that this is the case, including backlog-related delays in some cases, prohibitive costs, and the fact that it was always adversarial often times creating irreconcilable rifts among colleagues. International adoption of the UNCITRAL Model Law on arbitration ensued, importantly as a method for establishing confidence in an effective and enforceable vehicle for resolving private pairs. Mediating processes were also established. In order to solve the complex social and commercial issues of the present, alternative dispute resolution

² Menkel-Meadow, Carrie. "A Negotiator's Guide to Legal Analysis: The Negotiation of Legal Disputes." 11 Harv. Negot. L. Rev. 347 (2006). (Discussing the flexibility and creative potential of negotiated settlements.)

(ADR) is increasingly being recognized as an acceptable replacement for the inflexible state court framework.

2.3 Types of Arbitration (Domestic, International, Institutional, Ad-hoc)

All arbitrations are decided by a neutral third party, despite the fact that there are many varied types of arbitration. Ad hoc is flexible and does not associate with any single institution. It tends to be most effective for straightforward one-off disputes as the parties, or the tribunal, makes its own rules and process.³ On the other hand, institutional arbitration is regulated by respectable bodies like ICC or LCIA. This can be based on their nationalities, the location of the subject matter or a clause choosing a place of arbitration outside the parties' countries. Governed by a particular legal regime, usually adopted from the UNCITRAL Model Code The international arbitration is preferred, as it offers an impartial place of exile independent of home jurisdiction of both the disputing parties; ensures confidentiality and is based on increasingly popular legal concepts such as party autonomy or separability of the arbitration clause.

Ad-hoc Arbitration: Administratively independent arbitration and the somewhat flexible approach is referred to as ad-hoc arbitration. Absent any intervention of a formal arbitral institution the parties and arbitrators determine and control all aspects of the conduct of the arbitration.⁴ Since everything from the rules of evidence to the timetable and even where an arbitration will be held must be hammered out between the parties and a panel, cooperation is key. Ad hoc arbitration: Ad hoc arbitration does not need to pay any institutional administration fees, and may therefore be cheaper and provide the most flexible option for parties. The purpose of speed and privacy is defeated to some extent if, procedurally speaking, parties may come running back to the courts in their home countries at any time.

³ Sander, Frank E.A. "Varieties of Dispute Processing." 70 F.R.D. 111 (1976). (Often cited as seminal work noting the need for varied dispute mechanisms outside of court.)

⁴ UNCITRAL. Model Law on International Commercial Arbitration (1985). (Reference to the foundational international legal framework that standardized global arbitration practice.)

CHAPTER THREE

LEGAL FRAMEWORK OF ARBITRATION ACT

3.1 Objectives of the Arbitration Act

1. To promote ADR, or alternative dispute resolution

The Act aims to improve and expedite arbitration as a means of resolving disputes outside of the legal system.

2. To Reduce Backlogs in Court

By referring corporate and civil conflicts to arbitration, the Act aims to reduce the amount of cases that are currently pending in Bangladeshi courts.

3. To provide prompt and affordable justice

Unlike going to court for a lengthy period, the Act makes conflict resolution quicker, simpler, and less formal.

4. In order to boost the autonomy of political groups

The parties' autonomy is enhanced by the Act, which gives them the right to choose their own arbitrators, procedural rules, arbitration site, and relevant laws.

5. To make it easier to settle business disputes

The Act creates a modern, organized process for the discreet and professional resolution of business disputes.

6. Inspiring More Use of Institutional Arbitration The Act promotes the growth and use of arbitration bodies such as the Bangladesh International Arbitration Center (BIAC).

3.2 Jurisdiction and Competency

The arbitration tribunals have competence-competence to determine whether it is competent to decide upon the case. Such power is conferred on the Tribunal itself expressly under Section 16(2) of the Arbitration Act, 2001 in conformity with international best practice. The jurisdiction of the Arbitration Tribunal to hear a case is reflected in that established under an arbitration agreement. The primary function of the Competence-Competence provisions which are found in Section 20 is to protect this authority. Along this line of thought, the Arbitration Tribunal can have a say on its own jurisdiction--whether the arbitration agreement that serves as a basis for it is valid, how broad it is vis-à-vis scope/term, or whether one was properly formed at all. The EU's witless courts will no longer be able to directly interfere in an obstructive manner, so the arbitration process can function a lot more effectively and swiftly. The Act also limits national courts to providing assistance; if the arbitral tribunal oversteps its power, they can't contest or vacate it until later, typically at what is in effect the stage of "limited recourse," when their challenge comes too late to save the award.

3.3 Arbitration Agreements Under the Act

For it to be enforceable, an arbitration agreement must be written and only when the parties consent to its terms. So, half of the answer may be here: The arbitration clause is found in a contract because the 2001 Act says so; it is as simple and reductive as this? The agreement, simply put, is a written contract between the two entities that obligates them to pursue their case in non-state courts. As the Act respects the principle of separability, this agreement is seen as separate from the main contract.

This means that the arbitration agreement would still be enforceable and valid even if the main contract were challenged as invalid. It offers the means in law to secure arbitration and enforce its award, and it is encapsulated with the basic philosophy of party autonomy.

CHAPTER FOUR

ARBITRATION PROCEEDINGS

4.1 Appointment of Arbitrators

The arbitrator may be selected by the participants. If the parties cannot agree, courts have right to nominate arbitrators. The modern set of arbitration laws, like the Bangladesh Arbitration Act, 2001 also provide for this concept of party autonomy that the parties are free to appoint their own arbitrators. Default procedures to avoid procedural deadlock are laid down in legislation. At first, the law sticks closely to the written agreement of the parties with respect to how many arbitrators there will be (usually an odd number) and how they are selected: it may be a stair-stepped process where each party nominates one arbitrator and then those two select the presiding arbitrator.⁵ However, given that parties do not always conclude agreements, the law provides that should one party default or if there is a dispute among the co-arbitrators about who the chairperson should be, (especially in International Commercial Arbitration) has to intervene and make the necessary appointment. Crucial is the law's mandate that the appointee be impartial and free from favor for or fear of anyone during the entirety of it. This protects the authority and independence of a complete arbitral tribunal by requiring disclosure of any legitimate doubts as to its impartiality, whilst enabling parties to challenge a biased arbitrator.

4.2 Powers and Duties of Arbitrators

The basic rules of what arbitrators can and cannot do are contained in the arbitration agreement and, as applicable, national legislation such as Bangladesh's Arbitration Act, 2001. An arbitrator's cardinal role is to be fair and objective, listening to both sides make their case. The imperative is for the parties to determine the process rules if they are unable to agree on them. This makes sure the arbitration will stick. They can even rule on their own jurisdiction (competence-competence). The most they can do is a binding judgement on the facts before them. This motion is as binding as an order would be. These powers are also accompanied by the obligations to deal with any potential conflicts of interest, complete the proceedings without undue delay and issue a decision in writing together with reasons.

As the arbitrators have the power to render an ultimate, well-reasoned judgment on arbitration, they get the final say regarding the merits of controversy. They may provide any form of relief that a civil court is competent to grant, such as an award of compensation or directions for specific performance or interim protection to the party challenging the election.⁶ With these powers come strict duties to refrain from any conflict, moving expeditiously and ensuring that the award is documented, signed, and well-reasoned in law. The arbitration agreement is valid and enforceable because it provides an intermediate ground between expansive procedural powers and strict legal and ethical duties.

⁵ UNCITRAL. Model Law on International Commercial Arbitration (1985), Article 18. (Underlining the requirement for equal treatment and full opportunity to present a case.)

⁶ Verma, S. K. Law of Arbitration and Conciliation (LexisNexis Butterworths Wadhwa, 2018), p. 5. (Discussing the tribunal's power over procedural matters and jurisdiction.) Arbitration Act, 2001 (Bangladesh). Section 44. (Referring to the enforceability of the award as a decree of the court.)

4.3 Role of Courts in Arbitration

As per the Bangladesh Arbitration Act 2001, and like legislations and compare it,” national courts have a supportive, supervising position in modern arbitration. This seriously restricts their inclination to be involved in issues of our historic typ. When the parties' freedom does not deliver, then the courts become a crutch to sustain the arbitration agreement. Support of the arbitration agreement by sending parties to arbitration where there is in place a valid clause which requires them to do so and helping to choose arbitrators when procedure comes to a standstill, as well as providing indispensable interim measures of protection (e.g. freezing orders) aimed at preserving the subject matter of dispute before or during arbitration are merely some expressions thereof.⁷ But the monitoring role of the court kicks in just at the stage when an award is made. Review of the award is allowed only under narrow jurisdictional legal points, i.e., serious irregularity that must either be due to lack of diligence or bad faith; process amounting to a breach of fair hearing; bias and lack of jurisdiction. This maintains the integrity of the process and makes the award an end in itself.

⁷ Arbitration Act, 2001 (Bangladesh). Section 33(3). (Stating that the tribunal is generally not bound by the procedural codes and evidence acts.)

CHAPTER FIVE

EVIDENCE IN ARBITRATION

5.1 Submission of Documentary Evidence

Documents are also reliable and easy to understand, they form part of the documentary evidence. As the process is generally not constrained by the strict evidentiary standards of national courts, the presentation of documentary evidence in arbitration has emerged as an essential procedural stage entirely guided by party autonomy and the discretion of a tribunal. The next critical element includes document creation also referred to as discovery. One side might ask the other to hand over papers that it believes are important for the case.⁸ The board reviews such requests for merit and relevancy. Some international standards are already used, such as the International Bar Association's Rules for the Admission of Evidence in International Arbitration. The tribunal can make an order to produce, but the court may have to intervene for it to have any real effect.

5.2 Digital and Electronic Evidence

The challenging part of data authentication is to verify the data source, integrity and the time accurate in arbitration. This often requires forensic expertise. The tribunal decides whether or not and to what extent the evidence is relevant to the case. There should also clearly be procedural rules around e-discovery (e-disclosure) where electronic evidence is used. To be able to keep costs down, provide privacy and ensure the same treatment for everyone all involved parties need to agree on what is/should be generated data wise, as well as its shape and structure. In those cases, widely recognised international "soft-law" instruments such as the IBA Rules on the Taking of Evidence in International Arbitration may provide guidance.

As technology continues to develop digital proof is a necessity. For instance:

CCTV video recording: As it objectively and temporally observes matters directly related to the dispute, CCTV video is a very useful variety of digital & electronical evidence in arbitration. Over the years in my opinion arbitral practice has not been heavily regulated by national evidentiary rules and so it is up to the tribunal's discretion to consider whether or not to admit it into evidence. When the CCTV video is used as evidence, its credibility verification is the primary obstacle.⁹ To do this both sides have to prove that the video does in fact exist and it is indeed an accurate depiction of time, date and incident. This may require expert witness testimony regarding the operation and security of the video system.

Cell phone records: Another form of electronic evidence, cell phone records (CDR's), text message metadata, GPS location data and communication logs are commonly relied upon in arbitration to show communications contacts and locations relevant to a contract dispute. Hard and fast national rules of evidence are missing in modern

⁸ Aceris Law LLC. "Witness Statements in International Arbitration." (Highlighting the common practice of using written statements as evidence-in-chief to save time.)

⁹ UNCITRAL. Model Law on International Commercial Arbitration (1985), Article 18. (Mandating equal treatment of parties and full opportunity to present their case, which dictates the tribunal's control over examination.)

legislation on arbitration. It is not the Court but the tribunal which decides what evidence such as may be relevant and material for the purpose of deciding the case.

5.3 Examination of Witnesses

There are two methods of questioning the witnesses: written and oral. The cross-examination of witnesses constitutes an integral portion of the arbitration hearing, albeit not bound by evidentiary regulations under national law such as the Evidence Act 1872 when compared to standard proceedings before courts. The power to cross-examine witnesses is crucial to arbitrating, which otherwise allows far looser approaches than court while still safeguarding due process. The Arbitration Act, 2001 allows the Arbitral Tribunal a relaxation from adherence to the strict standards of proof under the Indian Evidence Act of 1872 and CPC. For that reason, it has a lot of latitude in determining how to collect and present evidence. The current method heavily depends on affidavits — written statements given by witnesses ahead of time and used in both local and international arbitrations. These are the key statements of evidence from the witness. For a live hearing cross is on the re-examination and crossexam of opposing counsel. The tribunal has the key role of determining when, how and for how long to question individuals in order to ensure that no one is left waiting too long and that everyone is given a fair opportunity to present evidence. It can be anything else the national court wants, though that possibility also has limits because it cannot compel a witness to give testimony if he doesn't want to. The function of the court in this is simply to allow pertinent evidence through testimony.

These are the key statements which constitute the evidence of the witness. The live hearing is focused mainly on the opposing attorney's wrongful attempt at cross-examining and then re-examining. In an effort to make sure no one sits for too long or is given inordinate time, the tribunal must be able to decide when and how a person will testify. While the tribunal or the party is able to call on assistance from the national court, it cannot ever oblige a witness who does not wish to testify to do so. This proves that it is the duty of the court to aid in securing the testimony required.

CHAPTER SIX

AWARDS AND ENFORCEMENT

6.1 Setting Aside of Awards

The principal manner in which one party can attack the final determinative ruling of the arbitral tribunal within a national court is through use of the Setting Aside Awards process (governed by legislation such as that known as Arbitration Act, 2001). It's important to understand that modern arbitration laws are about finality (meaning courts can't just overturn an award because they disagree with the factual or legal determinations of the arbitrators — because if they could, that would be an appeal, and arbitration is not appeals).

Instead, the court's jurisdiction to intervene is very limited and is confined solely within discrete narrow statutory outlined grounds! Almost none of the rationales for celebrating this decision, as opposed to evaluating it on its own terms, have anything to do with the value of process. For instance, if there was something wrong with the arbitration agreement, or the party against whom judgment is sought could not have been sued (like a child), the award may be set aside.

1. Proceedings in terms of an arbitrator who the party did not know had been appointed by the court and about whom no appointment was actually served on them being a fatal irregularity which violated their right to fair trial.
2. The arbitrator did not have authority to issue an award on issues that were not raised in the arbitration pleading.
3. The tribunal was not properly constituted or has acted without going to the law of the case.
4. The award is in conflict with the public policy of Bangladesh- a term that usually means it is against one of the basic ideas of justice, morality or law. This is the argument that gets the most attention.

6.2 Recognition and Enforcement

International agreements are recognized through the Arbitration Act and enforced. As the instrument which is turning the arbitral award, a private judgment, into public law it may be considered to be the most important feature of arbitration. The endgame, in short, is this final round when the winner asks a national court to enforce its judgment and seize the adversary's assets.

For domestic awards (awards in the same country), this is a quite straight-forward process: the award is sent to the competent local court and – unless successfully challenged – enforced as if it were a decree or judgment of that court.

But it is in the international awards that arbitration really shines. The process would be under the New York Convention (1958) if you received an award in Singapore and the opposing party holds property within Bangladesh. As a signatory of the Arbitration Act, Bangladesh is by law bound to recognise and enforce this foreign judgment. The courts are very handy in this situation, because they have to enforce the decision unless the losing party can demonstrate one of a limited set of specific reasons why not (which, for those interested, include such things as a serious denial of

due process and the award being contrary to public policy in the place which is supposed to be implementing it). It is why multinational companies opt for arbitration instead of litigation exactly on this point.

In order to get the latest available information on how to enforce foreign judgments under Bangladesh's Arbitration Act, 2001 and relevant case laws regarding this subject; I have to search faster. The recognition and enforcement stage is likely to be the most important aspect of the operation of arbitration, where a private ruling—the arbitral award—congeals into public law or at least generates to the winning party access to public power.

National Awards: Implementation by a Decree It is easy to enforce a domestic award made in Bangladesh. Once the period of time has expired to make an application to set the award aside (or such an application is made and refused), the award becomes a judgment of a civil court. In fact, the court's only function is to help "the judgment creditor execute on his award," including ordering a judgment debtor to sell its assets.

Overseas Honors: The Capacity to Do Business Across the Globe On the other hand, the Recognition and Enforcement of Foreign Arbitral Awards (SS 45 & 46 of the Arbitration Act 2001) illustrate [...] The Act, B Prajapati, Arbitration in India, 2nd 8 Edn., Lexis Nexis Butterworth Wadhwa Law House—Page No.58 provides that a foreign awards deem to be binding and enforceable at law as any domestic judgment. This is why Bangladesh has entered into the 1958 New York Convention. This ensures that judgment from neutral countries, like Singapore or London in India, is not a piece of paper but a legal document which can be used against property in Bangladesh.

They're only there to help; absent the issuance of one of a handful of specified reasons for denying enforcement — and those are not based on the rightness or wrongness (in other words, accuracy) of a decision, but on whether denying a process at trial was so manifestly unfair as to warrant being refused enforcement. Under the New York Convention, these limited grounds are: That a party lacked capacity to enter into the arbitration agreement. The arbitration contract is void failing to give adequate notice of the proceedings or the appointment of an arbitrator, for example, in violation of due process. The award pertains to a subject not covered by the arbitration submission. The Supreme Court has held that the judgment is against the public policy of Bangladesh and that such a violation must be a "gross" one, as opposed to being merely factual or legal in nature.

CHAPTER SEVEN

ADVANTAGES OF ARBITRATION

7.1 Cost-effectiveness

Narrowed Discovery/Disclosure: Arbitral panels also have noticeably restrictive and focused processes for the production and detection of documents compared to courts. Legal and expert costs can be substantially reduced by avoiding extensive e-discovery that is expensive to produce.

Final, Hard to Appeal: There are few legitimate reasons that you can contest or overturn the answer from an arbitration. This cuts nearly all costs involved in lengthy appeals often needed for anything legal. That eliminates the uncertainty of operating a business and years of legal bills.

7.2 Time Efficiency

The actions are quicker and take less steps because of the simpler moves. A selling feature of litigation pursuant to the Arbitration Act, 2001 are the savings in time. Compared to the time-consuming, backlogged court system in Bangladesh — this is greatly appreciated. There's a lot of architectural pieces that made it work very well. Indeed, the parties and Tribunal are not bound by archaic court timetables but those which are reasonable and efficient as they themselves set when using the streamlined system. In order to prevent irrelevant delay and or pointless procedural nicety, the power of the tribunal plays a significant role in determining the pace and scope of proceedings.¹⁰ D. the narrower are the bases for challenging and reversing the ultimate result, then there is little room left for long multi-tiered appeal processes of the type that can keep disputes in litigation for years on end. As a result, businesses have an opportunity to save time and move on with business as usual, and avoid the opportunity costs of prosecuting disputes through arbitration instead of spending years in litigation.

7.3 Confidentiality

There's a dark veil over proceedings, unlike the public hearings in open courts. The good thing about the Arbitration Act 2001 is that there's a private arbitration provision. Compare this with a court case. While judicial proceedings are open to public and get recorded for posterity, arbitration is a private process. The parties typically mutually assent to a specific confidentiality clause in their arbitration agreement. The proceedings are held in camera and third parties have no access to the public, and only the claimant or respondent who have initiated arbitration procedure can access at final arbitral award.¹¹ Although there is no specific overall confidentiality provision in the Act, it is generally well-understood that this principle is covered by a number of other provisions of the Act. When you're in the midst of a complex business dispute, it becomes a massive win for a company to be able to shield its core proprietary data and trade secrets along with sensitive corporate

¹⁰ Verma, S. K. Law of Arbitration and Conciliation (LexisNexis Butterworths Wadhwa, 2018), p. 5. (Highlighting the arbitrator's power to adapt procedures based on party autonomy.)

¹¹ Arbitration Act, 2001 (Bangladesh). Section 33(3). (Granting the tribunal the legal authority not to be strictly bound by the Code of Civil Procedure or Evidence Act.)

information from rival businesses. This allows them to maintain their market integrity, and brand name while the dispute is settled.

7.4 Flexibility

It is the responsibility of the parties to develop their own rules and appoint experts, as well as determine where and in which language the meeting takes place. Arbitration: In much the same way as the state court system is bound by strict rules, arbitration is opened up to great flexibility under the Arbitration Act 2001. This flexibility is derived from a party autonomy basis. This provides the arbitral tribunal and the disputing parties with unlimited flexibility to structure the process in their own way. In modern arbitration arrangements, flexibility is a key attribute and an important feature of the arbitrator's role. One Feature Instead of the standardized, uniform conventions followed by state courts, this flexibility constitutes a significant aspect of arbitrator discretion in determining how to handle the proceeding. 3 To differentiate the language of proceedings, nature of filings (i.e., electronic vs hard copy), number of documents parties have to file, and scheduling hearings, arbitrators may work with the parties. This is the best way to go for both ease and speed with the process. Re [8] Importantly, the tribunal shall not be bound by technical standards of civil procedure or evidence on national law. They could admit relevant evidence not on technical admissibility but when they would be materially and logically relevant. The result is that the procedures are still efficient, adapted to both the technical and commercial aspects of the dispute and proceeding.

7.5 Enforceability

Over 160 countries can enforce awards thanks to the New York Convention. Probably the most useful aspect of using Arbitration under the 2001 Act is its enforceability. The Courts are bound to honour this commitment by the Act; they will therefore have to enforce a foreign arbitral award against property situate in Bangladesh. They can refuse to offer those reasons only for very specific and narrow circumstances. So businesses around the world are able to have the confidence and security to engage in cross-border commerce based on that robust, cross-border enforceability. It also affirms that a personal decision can seemingly become universal.

CHAPTER EIGHT

CHALLENGES AND LIMITATIONS

8.1 Judicial Interference

It's a process that is frequently slowed when the court intervenes. Under the Arbitration Act of Bangladesh, court should not get involved to such an extent that it would mar the independence and efficiency of arbitration. Rather than dominate arbitration, the courts simply supervise it and step in when required. Spirit governed throughout the discovery, the only involvement of judges is usually when they have to appoint arbitrators (when there is an absence of agreement between parties), when it reinforces them temporarily provide object of conflict, assist in obtaining evidence and annul or enforcement awards arbitrate.

The across-the-board principle of modern arbitration law is that judges should not be overly involved. The 1940 Act didn't do this, but the Arbitration Act of 2001 made a point to do so when they enacted it in order to keep arbitration on track. 1 As per the 2001 Act, courts can supervise and support only—not appeal.¹² If the parties fail to agree, the 'supporting function' takes the form of appointing arbitrators and granting interim measures for protection of subject matter on dispute. The review may include a 'micro-insertion' into the final award on grounds strictly limited and statutorily prescribed such as, no jurisdiction being caused or found by due process is violated of excessive conflict with established Bangladeshi public policy.

8.2 Problem with Evidence and Technology

Arbitration is a pragmatic process, which relies on 'elemental principles of fairness and justice' and integrity rules regarding due process - something technology can support or destabilise but where both evidence and also technological choices will make it harder.¹³ The trouble is that, while digital technologies are fast and efficient, humans crave confirmation and assurance — something superslow and deliberately unflashy to help them along. The primary issues can be arranged to use these categories:

1. The Problem of Frankness and Naturalism

The key reason why individuals are reluctant to believe digital evidence – in the shape of emails, WhatsApp chats, CCTV and cellphone data -- is because it does not look real or original. Unlike physical records, digital data is susceptible to degradation and manipulation.

How easy it is to adapt: It is easy and common to produce or manipulate communications with advanced software, be they in the form of doing screenshots in making films, deepfakes or simply scrubbing data.

¹² Arbitration Act, 2001 (Bangladesh). Section 5. (This section explicitly limits judicial intervention to only those matters expressly provided for in the Act.)

¹³ Arbitration Act, 2001 (Bangladesh). Section 43. (Sets forth the limited and exhaustive grounds upon which a court may set aside an arbitral award, focusing on process integrity, not merit review.)

Hidden lies: Smaller techniques such as data compression (e.g., JBIG2 in scanners) or auto-tagging algorithms can alter the content without anyone noticing, which may be harmless - or not. As to how far the evidence is a true record of what occurred, that would be the somewhat difficult task for the tribunal.

The Hurdle of Authentication: To authenticate digital evidence, frequently expensive and time-consuming forensic examiners must follow the chain of custody and dissect metadata. This extra cost makes arbitration less economical.

2.The Digital Divide: Law and Procedure Gaps

Although the Evidence Act of 1872 on Bangladesh is at variance with the Arbitration Act of 2001 and does not pertain to it, challenges still exist:

Fairness of the Procedure – Decisions and Fair access to justice: Virtual hearings and online case management tools being used swiftly is helpful; but if a party does not have the tools or reliable internet, it could potentially violate their right to be heard shattering into the digital divide.

Credibility: An integral part of the fact-finding process, arbitrators may struggle to gauge credibility and demeanor and thus question reliability when witnesses are being cross-examined over video link.

Privacy And Data Security: Highly sensitive company information is at stake in arbitrations. Storing in the cloud, or using video conferencing and e-discovery technology creates an unnecessary exposure to cybersecurity threats and undermines one of arbitration's goals of preserving confidentiality.

3.Too much of information (information overload) Contemporary disputes create a wealth of ESI.

Among the costs: Any time large numbers of digital documents need to be managed, reviewed and produced, software is required to sort through them, as are human reviewers.)

AI and Bias: ML/AI is a tool being used to help screen papers or even do some exploring of the law. The court of tribunal might not be as fair and impartial due to the growing threats from algorithmic bias (reinforce to the biases presented in the training data)2019 oht vs qb (the problem of 'black box').

CHAPTER NINE COMPARATIVE ANALYSIS

9.1 Arbitration Act of Bangladesh vs. Other Jurisdictions

Though a country like UK and Singapore already have stronger institutional mechanism to oversee the resolution process, Bangladesh has its own model law based on UNCITRAL Model Law that it only partially adhering to. The Bangladesh Arbitration Act, 2001 is mostly in line with international standards, however it significantly differs from the best practices widely accepted elsewhere in the world namely as to foreign seated arbitrations due to certain statutory constraints and diverging judgments on the issue.¹⁴ The Act adopts the Competence-Competence theory, party autonomy, and the philosophy that courts should facilitate cases instead of getting involved in them. **Final Thoughts** These internationally recognized principles are encapsulated within the Act which is founded on UNICTRAL Model Law. The Act further provides for recognition of international arbitral awards and states that Bangladesh is a signatory to the 1958 New York Convention. Much like the UNCITRAL Model Law, the Act requires prospective arbitrators to disclose any facts or circumstances that would cause someone with doubts regarding their impartiality to suspect the integrity of such an individual. Their appointment can therefore be challenged by parties. But perhaps one exit would be selection of the judges to vote, in the even they tied, versus not having had given both.¹⁵ The Act reasonably vests the power to nominate judges for international commercial arbitration in the Chief Justice or a designated Supreme Court judge. Nonetheless, the qualifications process is often perceived to favour candidates who are retired local judges, as opposed to individuals with professional experience in international arbitration, potentially limiting the tribunal's expertise relative to other jurisdictions. Foreign investors might, however, feel less secure despite the clear support of the law for the concept of international neutrality.

Best Practices

Both parties need to write a clear, thorough and unambiguous arbitration agreement that covers what kinds of issues can be raised, the number of arbitrators (one is best if you want to save money), whatever institutional rules are applicable, and an easy-to-understand time frame. The time involved in oral hearings needs to be minimized, which shall require the tribunal with its own motion and upon request to make the best use of its power (for example: order limited document production/ show directed), hold an early Case Management Conference (CMC) focusing only on the legal and evidentiary issues and most importantly, largely rely on a written witness testimony.

¹⁴ Arbitration Act, 2001 (Bangladesh). Section 14(1). (Mandating the disclosure requirement for circumstances likely to affect an arbitrator's independence or impartiality.)

¹⁵ UNCITRAL Model Law on International Commercial Arbitration (1985), Article 11(5). (International standards prioritize the appointment of qualified arbitrators, often considering technical expertise and nationality for impartiality in international disputes.)

CHAPTER TEN RECOMMENDATIONS

10.1 Strengthening Institutional Arbitration and Legal Reforms

Arbitration Act of 2001 was absolutely the right thing they've got to do a little better on that is it's become both an economic force for its local population across Asia and also an attractive place for international investors. Bangladeshi law has a rich history of arbitration, but unlike the experience in some other industrialized countries, its use is practically crippled. Hence, the time is ripe for us to use alternate dispute resolution mechanism in lieu of normal court adjudication for settlement of disputes.

At the moment exists in Bangladesh two systems of justice - civil and criminal. It uses procedural laws in both cases to administer justice through the process of litigation. For those disputes that are not in the courts, alternative dispute resolution (conscientious objection) processes including arbitration apply. Although alternative dispute resolution mechanisms, including mediation and village courts, are available, they are subsidiary to litigation.

And that's why the Judiciary of Bangladesh nowadays is now entangled in a vicious cycle of backlogs and delays, I believe. 53 Given the costs of litigation and huge backlog of cases, the poor and vulnerable in Bangladesh have limited access to formal justice delivery system.¹⁶ Here a change of paradigm could help solve the problem. In a paradigm shift to serve for access-to-justice which serves the needs of the parties in agreement, Government of Bangladesh can introduce new Arbitration law like Uniform Arbitration Act (UAA) in USA or it can amend It's existing Arbitration Act.

The over-arching paradigm-shifting mindset-setting way forward The development of arbitration in Bangladesh will not be complete without finding a solution to the prevailing provisions and actual experience of the Arbitration Act 2001 and arbitral practice of Bangladesh as has been detailed so far, in addition to shifting sovereign's attention from gaining out of exiting court-based litigation sector. To ensure that those before an arbitration tribunal can access justice much thinking had to be reduced into action than in courtroom exercise discussed above. The following are some practical suggestions which might help to remove the present impediments in arbitration mechanism in Bangladesh:

a. Domestic and international commercial arbitral awards have no arbitration rules of procedure so far available for their enforcement. There was no allowance for civil process, as it now exists if a judgment is to be reviewed by the court. Bangladesh does not have any national or foreign commercial arbitral award enforcement programs or procedures. For ensuring all participants have equal opportunities of being heard and presenting their case before the arbitral tribunal in Bangladesh, the said rules of procedures must be legislated at once.

¹⁶ Dhaka Tribune. "Arbitration Act needs to be modernized - Dhaka Tribune." (Citing expert suggestions for mandatory deadlines for processing applications contesting awards in order to cut down on delays.)

b. As yet there is no special arbitration tribunal or fast-track arbitration court for disputes concerning arbitration. But, on the flip side, they can also be an arbitration panel for other types of issues in those civil courts. This trend has already slowed down the process of justice delivery and put greater pressure on concerned courts. Consequently such number of specialized courts shall be established quickly by the Supreme Court of Bangladesh and other than SCB creating a) The other courts.

c. The High Court Division (HCD) is empowered to set aside any arbitral award made in Bangladesh under the Arbitration Act 2001, yet there is no mechanism with power to enforce it. However, it is the case that the High Court Division already has such power suo moto but on application, yet there is no provision in the Arbitration Act 2001 to enforce the matter by HCD. Conversely, if a local or international arbitral award is made, it can be enforced and recognised by the District Judge's Court of Dhaka.

The District Judge's Court may also misinterpret the modus operandi in a case of this nature as quite often it has been seen that party who desires to benefit from such situation takes deliberately the steps to go up before HCD by setting aside the arbitral decision with an intention of keeping arbitration busy. Therefore, the powers that are vested for recognition and enforcement of arbitral award should be on both parties: HCD and private arbitration tribunal.

The parties' right to justice in the arbitration proceedings of Bangladesh will remain at stake pending immediate disposal of this procedural irregularity.

d. While the BIAC and a small number of other private arbitration facilities exist in Bangladesh, their arbitral awards are not currently enforceable. The successful or losing party has the right to apply for the force of any award made by this center by filing an application before civil court, i.e. District Judge's Court at Dhaka or High court division of Supreme Court of Bangladesh. For the sake of conformity with the Model Law, in such a case the private arbitral tribunal should have an equivalent power to that at issue here on the part of those courts. Mutatis mutandis applies to the arbitral tribunal(s)' interim rulings which are supposed to be as binding as same if they had been rendered by said courts. The aforesaid inadequacies can be addressed on an urgent basis by the addition of the provision to the Arbitration Act, 2001 which will instil confidence in public mind about arbitration process vis-a-vis patronage and present civil justice delivery system. That will be the ultimate path to justice between the parties to an arbitration agreement.

e. The bad news is however that the Arbitration Act of 2001 does not contain a specific reference to when the arbitral award can be enforced. This has made the enforcement of arbitral awards lengthy and costly. What's more, the civil court is already overwhelmed with 3.3 million cases, and parties will be forced to use it to enforce a verdict. 54 So by providing time frames, the Arbitration Act 2001 should ensure the parties to an arbitration case receive justice independent.

f. There is no current requirement in Bangladesh law for arbitration to be used as a method of resolving disputes. The Bangladeshi parliament may immediately want to consider amending the Arbitration Act 2001 with an obligatory arbitration clause given that such “binding” arbitration provision supported by precedent is still a new issue in Bangladesh.

g. There is no body having zonal jurisdiction for domestic/international business arbitration in Bangladesh. Consequently, there is a need to have the one stop, central data based information management systems for business directly and indirectly operating within in the domestic and international arena to gain unfair justice in arbitration tribunal domain supported by statutory requirements of Arbitration Act 2001.

h. The Act of Arbitration, 2001 has not defined “public policy” as yet. This defect may have caused serious misconceptions between the parties, the arbitral panel and the courts. So, the current Arbitration Act 2001 must be amended allowing government to lay down some factors that constitutes public policy.”

i. As the (‘special’) arbitral tribunal [does] not apply in this case, frequently participants indicate their lack of consent or dissent to the appointment and invoke challenge before a civil court. "And this is a very long time. For this reason the appointment of Arbitrators by District Judge's Court should be confined to a particular time to ensure greater access to justice.

CHAPTER ELEVEN: CONCLUSION

This is the best time to amend The Arbitration Act in order to remove this artificial trade barrier within the process of arbitration by and large for Bangladesh is a potential country for investing abroad. That this will bring justice to the people of Bangladesh in respect of the entire arbitration system. It is a laudable move in the arena of arbitration that Bangladesh has already stepped forward by enacting the Arbitration Act, 2001 but enacting an Arbitration legislation is not enough. E, In order to enhance justice delivery and making the system more meaningful, fair and inclusive for all concerned, it is high-time that the authority (especially LLRB Ministry of Law, Justice & Parliamentary Affairs consider arbitration as a model approach in addition to existing practiced traditional dispute settlement mechanism. The Bangladeshi branches of government and all others involved must therefore work in concert to ensure equal access for the parties to arbitration proceedings in Bangladesh to justice. Further, the current system of arbitration in the US may be examined for pragmatic applications capable of enhancing the efficacy and efficiency underpinning Arbitration Act 2001 and its arbitral tribunal. To conclude, the research about cost and delay issues of arbitration in Bangladesh would be useful for public at large to start with. This would help to add efficiency to the arbitration system.

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