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Position of Bangladesh in International Commercial Arbitration: An Analysis

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ABSTRACT

Arbitration has become an essential component for guaranteeing effective dispute resolution in international trade and commerce. The business community places trust in arbitral process so that the whole trade system can be expanded in spite of the challenges across the borders. In fulfillment of international community with the New York Convention and UNCITRAL Bangladesh has enacted the legislation on arbitration law namely The Arbitration Act, 2001. With this Act, Bangladesh has kept pace with the recent trends in the field of international commercial arbitration with the rest of the world. The new Act is based on the UNCITRAL Model Law on International Commercial Arbitration, (1985) and consolidates the laws relating to both national and international commercial arbitration. The new Act creates an integrated legal regime for arbitration in Bangladesh which has also been a trend in recent times elsewhere. Bangladesh has enacted its arbitration laws along the outlines of the UNCITRAL Model Law. The enactment of law relating to international commercial arbitration in Bangladesh by the Arbitration Act, 2001 gives Bangladesh a modernization as a safe place for dispute resolution in the field of international trade, commerce, and investment.

Keywords: Arbitration, Arbitration award, International trade, Commerce, and Investment.

INTRODUCTION:

Arbitration process is more preferable than any other process in case of resolving commercial disputes. So many international arbitration institutions are working all over the world to conduct commercial arbitration. The examination of these institutions will reveal that parties are given some opportunities to settle their commercial disputes. Most of the arbitration institutions provide service to their state parties.

There are some institutions which offer opportunities to every state to resolve their commercial disputes. Hence the study of these institutions will help to know the process of conducting international commercial arbitration and to enrich domestic arbitration rules.

Statement of the Problem

Now-a-days international trade and commerce have been spreading rapidly among the states. Bangladesh is a developing country and its international trade and commerce are growing. Thus so many international commercial disputes are arising. So it is indispensable to uphold the present situation of Bangladesh in international commercial arbitration. An international commercial dispute contains foreign elements. So it is difficult to resolve the dispute in any local court of the country. It is important to know the definition of international commercial arbitration because this is the best way to resolve the international commercial disputes. It is essential to know how an arbitration council

is formed and worked. For resolving an international dispute through arbitration process arbitration agreement should be made in the contract. Any ambiguity arises about the arbitration agreement in the contract and any disputes arise then it will be difficult to resolve the disputes. So this research will seek to find out some measures to resolve an international commercial dispute through arbitration process.

Objectives of the study

As now-a-days global trade and commerce are spreading all over the world and Bangladesh is also participating in the international trade and commerce, the important aims and objectives of this research are:

- 1) To find out the way of resolving international commercial disputes.
- 2) To find out the law which should be applicable in international commercial arbitration?
- 3) To know the process of enforcement of international commercial arbitration award.
- 4) To find out the present situation of Bangladesh in international commercial arbitration.

Review of Related Literature

As commercial arbitration is a major issue in present trade and commerce, there should be specific research work in this field in Bangladesh. There are some works already done in this field which are reviewed:

The book 'International Trade Law' written by Prof. Rafiqul Islam which has massive discussion on commercial arbitration but did not discuss about the position of Bangladesh.

The book 'Fundamental of International Trade Law' written by M Badruzzaman has discussed only procedure of international commercial transactions but no specific discussion on Bangladesh perspective.

In Indian book of Sen and Mitra, (2008) regarding commercial and business law, there is a separate chapter for commercial arbitration. This book has not solely emphasized on international commercial arbitration.

Sameer Satter in the article "Arbitration in Bangladesh: Looking ahead" analyses the importance of international commercial arbitration in the present context but no discussion of present situation of Bangladesh.

Dr. A. F. M. Maniruzzaman, (2019) in his article "The New Law of International Commercial Arbitration in Bangladesh: A Comparative Perspective" discuss about UniversePG | www.universepg.com

the law of arbitration in Bangladesh and how is it applicable. He does not discuss on international perspective.

Dr. Mamun Rashid in his article "Importance of International Commercial Arbitration" analyses the recognition and enforcement of foreign arbitral award. It does not include the process of commercial arbitration.

After reviewing the available literature minutely, the researcher came to the conclusion that a research is essential to highlight the present scenario of position of Bangladesh in commercial arbitration. This proposed report is made to provide an in-depth study on commercial arbitration in international level.

Justification of the Study

International commercial arbitration is more important in the era of globalization. Arbitration is one of the wings of the judicial remedy. As a part of the law family it is justified to search the proceeding of arbitration both in national and international arena. This study will help both the students and teachers of law to evaluate the present situation of Bangladesh in international commercial arbitration.

Utility of the Study

Since the research area has not been explored earlier, the Government and people will be benefited by this research to find out the law of commercial arbitration and the solution process of international commercial disputes in Bangladesh. It will help the companies which are involved in international trade and commerce. The research will be beneficial to the businessmen, lawyers, legal researchers, students and teachers to make clear concept about the international commercial arbitration.

METHODOLOGY:

The research is qualitative in nature and methodology of the study is exploratory based on primary and secondary data and document analysis. Besides some cases are studied to find out the present position of Bangladesh in international commercial arbitration.

Scope and Limitation of the Study

For research purpose, the research will focus on the laws of Bangladesh of arbitration. It will also mention the present position of Bangladesh in commercial arbitration with regards to other neighboring coun-

tries. Besides, the researcher goes through some cases which are closely related to this topic. The study will mainly seek to find out the process of resolving international commercial disputes through arbitration process. The scope is limited with commercial arbitration and discusses only international cases. The research doesn't discuss about Universal Code of Practice (UCP).

International trade and commerce are most important in global economy. Arbitration is a well-known method of solving commercial disputes. Most of the cases of foreign investment are solved through arbitration institutions. As a developing country Bangladesh has to face commercial arbitration. So the laws and procedure should be updated.

Arbitration Institution

Arbitration institutions are conducting commercial arbitration through all over the world. The arbitration which are conducting international commercial arbitration are following -

ICSID Process

The International Centre for Settlement of Investment Disputes (ICSID) is an international arbitration institution established in 1966 for legal dispute resolution and conciliation between international investors.

The ICSID is part of and funded by the World Bank Group, headquartered in Washington, D.C., in the United States. It is an autonomous, multilateral specialized institution to encourage international flow of investment and mitigate non-commercial risks by a treaty drafted by the International Bank for Reconstruction and Development's executive directors and signed by member countries. As of May 2016, 153 contracting member states agreed to enforce and uphold arbitral awards in accordance with the ICSID Convention. The center performs advisory activities and maintains several publications. ICSID has an Administrative Council and a Secretariat. Each ICSID Member State has one seat on the Administrative Council. The Administrative Council plays no role in the administration of individual cases. Rather, its mandate is to address organizational matters related to ICSID's institutional framework. The ICSID Secretariat deals with individual cases. It consists of about 70 professionals who administer arbitration and conciliation cases at the Centre and support other ICSID activities. This separ-

ation of functions reinforces the operation of an impartial & independent global dispute resolution facility.

- 1) Administrative Council
- 2) Secretariat

UNCITRAL Process

In the 1960s, as global trade was significantly developing and the various national legislation on world trade obstructed the development of exchanges, the international community became aware of the necessity of having a global set of norms and rules to harmonize national and regional regulations. Thus, in 1966, the General Assembly of the United Nations created the United Nations Commission on International Trade Law (UNCITRAL) (Resolution, 2205 (XXI), December 17th, 1966). The General Assembly mandated the Commission with promoting the harmonization and unification of international trade law. The Commission has become the main legal body within the United Nations system in the field of international trade law.

International Chamber of Commerce

The International Chamber of Commerce is the largest, most representative business organizations in the world. About 6 million members in over 100 countries have interests spanning every sector of private enterprise. ICC has three main activities: rule setting, dispute resolution, and policy advocacy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that governs the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of international trade. A world network of national committees in over 100 countries advocate's business priorities at national and regional level. More than 3,000 experts drawn from ICC's member companies feed their knowledge and experience into crafting the ICC stance on specific business issues. ICC supports the work of the United Nations, the World Trade Organization, and many other intergovernmental bodies, both international and regional, such as G20 on behalf of international business. ICC was the first organization granted general consultative status with the United Nations Economic and Social Council and UN Observer Status

Arbitration Laws in Bangladesh

Globalization has rendered international transactions more frequent and has shown inadequacy of national laws as a regulatory instrument thereof (K. Lynch, 2003). To meet the needs of globalization, the United Nations Commission on International Trade Law (UNCITRAL) has developed a model law on arbitration which is geared specifically for international commercial disputes (Mary *et al.*, 1986). The UNCITRAL model law aims to provide for the harmonization and unification of the national laws regulating international commercial arbitration (Mary *et al.*, 1986). The final text of the model law was adopted by UNCITRAL on June, 21, 1985. The model law was approved by the General Assembly on December 11, 1985. Presently states from all over the world have adopted the model law. Bangladesh has enacted the Arbitration Act, 2001 on the light of UNCITRAL model law.

Salient Features of the Arbitration Act 2001

The Arbitration Act, 2001 of contains 59 sections in 14 chapters. Introductory matters are discussed in chapter I; Chapter II contains the general provisions relating to commercial arbitration; Chapter III deals with the arbitration agreements; Chapter IV embeds the provisions of composition of Arbitral Tribunals; Chapter V discusses the jurisdiction of Arbitral Tribunals; Chapter VI mentions about the conduct of arbitral proceeding; Chapter VII deals with arbitral awards and terminations of proceedings; Chapter VIII outlines recourse against arbitral awards; enforcement mechanism of arbitral awards has been elaborated in chapter IX; Chapter X explicates the provisions about recognition and enforcement of certain foreign arbitral awards; Chapter XI deals with appeals; Chapter XII illustrates miscellaneous matters like deposit of costs, disputes as to arbitrator's remuneration or cost, bankruptcy, limitations etc. Chapter XIII contains supplementary provisions, such as power of the government or of the Supreme Court to make rules; and lastly Chapter XIV discuss repeals and savings. The object of the Act is reflected in its preamble. The preamble clearly mentions that the Arbitration Act is an Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitration. It is pertinent to mention that the Act is also applicable to domestic arbitration.

International Commercial Arbitration in Practice

The modernization of laws relating to international commercial arbitration in Bangladesh by 2001 Act made her an attractive place for dispute resolution in the field of international trade, commerce and investment (Moniruzzaman, 2003). In practice of the arbitral preceding the Arbitration Act has authorized certain principles of natural justice which are common to other modern arbitration laws elsewhere, not just the UNCITRAL Model Law. These principles include the duty of the Arbitral Tribunal to deal with a dispute fairly and impartially by giving each party a reasonable opportunity to present his case orally or in writing or both and by giving each party a reasonable opportunity to examine all the documents and other relevant materials filed by other party or any other person concerned before the Tribunal. In addition to these, all the proceeding of the Tribunal is settled on the basis of agreement of the parties and not at the discretion of the Tribunal. Chapter VII of the Act deals with the rules relating to the merits of the dispute, decision making by panel of arbitrators, forms and content of the award, decision on costs, finality and binding nature of the arbitral award, correction and interpretation of awards, and termination of proceedings. The scope of the rules concerning the recognition and enforcement of foreign awards in the Arbitration Act is restricted than that in the Model Law and in New York Convention. The New Bangladesh legal regime on arbitration has embraced the fundamental tenets of modernization of international arbitration including; (i) party autonomy; (ii) minimal judicial intervention in arbitration; (iii) independence of the Arbitral Tribunal; (iv) fair, expeditious and economical resolution of disputes and (v) effective enforcement of arbitral awards. This modernization has also been introduced in the context of domestic arbitration. Although the Arbitration Act is principally based on the UNCITRAL Model Law it has introduced certain improvements on the Model Law prescriptions in certain respects (Moniruzzaman, 2004). Matters that are dealt with by the 2001 Act on which the Model Law is silent are, (i) Award of interest by the tribunal; (ii) costs of the arbitration; (iii) enforcement of an award in the same manner as if it were a degree of a court under section 44 in situations where the award is not challenged within the prescribed period or the challenge has not been unsuccessful; (iv)

appeal in respects of certain matters; (v) fixing the amount of deposit as an advance for the cost of arbitration; (vi) non discharge of arbitration agreement by death of a party; (vii) rights of a party to an arbitration agreement in relation to insolvency proceedings; (viii) identification of a court having exclusive jurisdiction over the arbitral proceedings ; (ix) applicability of the Limitation Act, 1908 to arbitration as it applies to proceedings in court or related issues. On the issue of the competence of the Arbitral Tribunal to rule on its jurisdiction the Act deviates to some extent from the provision of the Model Law. It seems that the Act allows more freedom to the parties on the matter by adding the proviso 'unless otherwise agreed by the parties' to the authority of the Arbitral Tribunal to rule on its own jurisdiction. The Model Law does not make any such provision, nor does it provide specific guidance like the act on the nature of the jurisdiction questions. In that sense the Model Law approach is that the jurisdiction issues are initially in full control of the Arbitral Tribunal. There are few arbitration institutions running their activities in Bangladesh, which are vastly used by the commercial sector of the country (A. Responek, 2011). Among them the following are notable

- The Federation of Bangladesh Chambers of Commerce and industry (FBCCI) has introduced the Bangladesh Council of Arbitration (BCA) for the resolution of commercial disputes.
- The Metropolitan Chambers of Commerce and Industry (MCCI), Dhaka has been accepted in the international market as the only body in Bangladesh eligible and entitled to arbitrate on commercial disputes. The Chamber's arbitration over the period of the last 58 years has been so impartial that it has won wide-spread confidence of the overseas users.
- In order to assist the local business for settlement of commercial disputes, the International Chamber of Commerce Bangladesh (ICCB) has taken the lead role in the establishment of the Bangladesh International Arbitration Centre (BIAC) jointly with two main trade bodies of the country The Metropolitan Chambers of Commerce and Industry (MCCI) Dhaka; and the Dhaka Chambers of Commerce and Industry (DCCI).

These arbitration institutions failed to fulfill the ultimate goal of the Arbitration Act due to some lacking. In most of the cases conducting arbitration in these institutions are costly and as a result small and medium enterprise do not feel confident in initiating arbitration proceeding there. Another weakness is that all these institutions are based in Dhaka, the capital of the country whereas a large number of foreign trades are in Chittagong and some other big cities of the country. These arbitration institutions follow their own arbitration rules which sometimes may become inconvenient for the parties to the dispute. None of these institutions is patronized by the Government.

Interim Measures

There is no clear definition of interim measures in most of the national arbitration laws and Bangladesh is not an exception in this regard. Interim measures may take many different forms and go under different names i.e. interim measures of protection, interim or conservatory measures, measures provision resources conservatoires or some author prefers the term provisional measures. However, a definition of interim measures is given in Article 17(2) of the Model Law.

The Arbitration Act, 2001 provides in details the power of the Arbitral Tribunal to order interim-measures than the Model Law and the Indian Arbitration and Conciliation Act, 1996. In fact, the latter two laws contain identical provisions. Although the Bangladesh Act adopts the Model Law provision on the matter, but it includes some added features such as the requirement of notification to the other parties involved and application to a court for enforcement of an order of interim measures by Arbitral Tribunal. The Arbitration Act allows the Arbitral Tribunal, unless otherwise agreed by the parties, to order a party to take any interim measure of protection as it may consider necessary in respect of the subject matter of the dispute and at the same time makes a bar of filling a appeal against such order. As a matter of practical demand, along the lines of modern international arbitral practice, the Act also provides that the Arbitral Tribunal may require a party, usually a requesting party, to provide requisite security in connection with such measure ordered by the Arbitral Tribunal. Such interim measures may be required to be enforced by the court on the application of the party requesting such mea-

asures. It is relevant to mention that the provisions regarding interim measures ordered by the Arbitral Tribunal in all the three regimes, i.e. Bangladesh Act, Indian Act and the Model Law are ineffective because such orders are not enforceable alone as decree or order of a court. Yet it is not-able that like the Arbitration Act of Bangladesh, neither the Indian Act 1996 nor the Model Law clarifies the nature of enforcement of the interim measures ordered by the Arbitral Tribunal. If an interim measure ordered by an Arbitral Tribunal sitting abroad is merely in the form of an order and not an award, a Bangladesh court may not be able to enforce such interim measure according to section 3(1) of the Arbitration Act, 2001.

Regardless of the fact that either of the parties to the arbitration agreement may be based in Bangladesh and is a Bangladeshi national, or the subject matter of the arbitration agreement or the subject matter of the dispute may be situated in Bangladesh, interim measures ordered by Arbitral Tribunal is not applicable if the place of arbitration is outside of Bangladesh. Seeking remedy to a judicial authority for interim measure or for implementation of such measure ordered by an Arbitral Tribunal is now a well-established trend in international arbitration law and does not violate the parties' agreement to arbitrate. In order to remedy this loophole in the Arbitration Act Bangladesh Parliament should make specific provision on this matter by an amendment to the Act in near future. In this context it is pertinent to mention that under the Model Law the scope of the authority of the court and that of the Arbitral Tribunal to order interim measures are not the same. Under the Arbitration Act such authority of the Arbitral Tribunal is restricted to the subject matter of the dispute, whereas the court's authority is rather open-ended and not restricted. The Model Law does not provide any solution to any conflict between the court and the Arbitral Tribunal concerning the grant of interim measure.

Rather, the Model Law leaves the matter to be attended to by each state of its own choice. It is desirable that the modern arbitration law of a country should demarcate the boundaries of authority between the court and the Arbitral Tribunal, though it is not always easy to do so (Faysal and Arifuzzaman, 2022; Moniruzzaman, 2003).

Amendment of the Arbitration Act, 2001

Although the Arbitration Act, 2001 is a timely step by the legislature of Bangladesh, there are still some defects in the Act. According to the Act, interim measures can be taken both by the Arbitral Tribunal and the court. So there is a need to draw a border between these two powers. This Act also needs amendment to incorporate rules of UNCITRAL Model Law on International Commercial Conciliation.

Change of Attitude of Judiciary

The effectiveness of the Arbitration Act, 2001 depends on the attitude of the judiciary as the spirit of the modernization of arbitration as a global phenomenon. The intervention of courts in arbitration proceeding in the name of interim measures is a very live issue not only in Bangladesh but also in many other jurisdictions which needs to be solved in some manner. Less interruption from courts can make this process more strengthened and effective. The judiciary should believe that arbitration is not a threat to them rather it could be a supplement to reduce the backlog of cases. The judiciary should not interrupt the arbitration proceedings by issuing interim orders which are not necessary at all.

Importing International Values and Norms

Though international commercial arbitration is guided by national law of the land, it should be kept in mind that it is an international phenomenon. So, the international values norms and principles must be considered in arbitration proceedings otherwise it will become waning and useless to the international business community.

Enforcement of Foreign Arbitral Award

The issue of enforcement of arbitral awards in Bangladesh is a very crucial problem which needs to be addressed and resolved quickly. The enforcement of arbitral awards in Bangladesh is uncertain and challenging. The difficulty is greater when it is an international commercial arbitration and a foreign party is involved. The Arbitration Act entrusted jurisdiction to the court of District Judge for recognition and enforcement of foreign arbitral awards whereas the High Court Division is entrusted with the power to set aside the arbitral award made in international commercial arbitration held in Bangladesh. The latter is better placed with responsibility of enforcement of foreign awards and

also desirable even if it means amending the Code of Civil Procedure.

Duration of Arbitration

Duration of arbitration is a very important issue as the process is very lengthy in Bangladesh. This actually stands against the principle of arbitration concept. Further in case of appointment of arbitrators, the parties make application to the court to appoint arbitrators when another party does not cooperate in terms of going to sit for arbitration. This arbitration takes a long time to be disposed of in the local courts. It makes this process slow and frustrates the parties seeking the alternative dispute resolution. Initiative must be taken so that arbitration proceeding end within a reasonable period of time.

Special Arbitration Bench in the High Court Division

It is the demand of the time to establish special arbitration bench in the Supreme Court of High Court Division to deal with international commercial arbitration

matters effectively. For this purpose special training can be arranged for the judges to be appointed in the special bench.

Arbitration Attorneys

To deal with commercial arbitration effectively, a separate legal profession may be introduced in the name of arbitration attorneys. Only those who has expertise on arbitration system shall be authorized as arbitration attorneys to represent the parties to arbitration proceeding. In this regard, the Bangladesh Bar Council may be entrusted with the duties of issuing license to arbitration attorneys.

Case Law Regarding Commercial Arbitration

As commercial transactions are increasing rapidly, there are so many commercial disputes arising between the parties. There are several cases which are resolved by international arbitration institutions. Some cases are analyzed here. Case analysis will help to find out the process of international commercial arbitration.

SI No	Case Name	Awards	Remarks
1	Saipem S.P.A vs People’s Republic of Bangladesh	Saipem was entitled for the relief	Domestic court cannot exercise supervisory jurisdiction over ICC process
2	Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People’s Republic of Bangladesh (ICSID Case No. ARB/06/10)	Chevron was entitled their cost	As respondent prevailed on the merits of the dispute the tribunal awarded cost.
3	Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex"), and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla") (ICSID Case Nos. ARB/10/11 and ARB/10/18)	Corruption is found	Award is given on confidential documents.

Research Findings

International commercial arbitration is conducted by some rules. Globalization has rendered international transactions more frequent and has shown inadequacy of national laws as a regulatory instrument thereof.

- To meet the needs of globalization, the United Nations Commission on International Trade Law (UNCITRAL) has developed a model law on arbitration which is specifically for international commercial disputes.
- The UNCITRAL Model Law aims to provide for the harmonization and unification of the national laws regulating international commercial arbitration. Bangladesh is the member state of these arbitration institutions.

- Presently states from all over the world have adopted the model law.
- As Bangladesh enacted Arbitration Act, 2001, it has not become popular in the domestic level.
- There is no special Arbitration Court in the domestic level. Thus commercial arbitration process is a lengthy process in domestic level.
- Commercial arbitration in international level is conducted by different arbitration institutions referred by the parties. It is also a lengthy process.
- Parties can include arbitration clause when they sign contracts that arbitration agreement may give a clear direction to solve the disputes.

Suggestions

International commercial arbitration has a great influence in resolving commercial disputes. Arbitration institutions are conducting commercial arbitration to make an amicable settlement. As Bangladesh is developing in commercial field, it has also involved in commercial disputes. Bangladesh enacted Arbitration Act in 2001. Still it needs some suggestions that are given below

- a) Some specific amendments should be brought in the Arbitration Act, 2001.
- b) There should be establishment of a Special Arbitration Tribunal.
- c) Arbitration process should be convenient for the parties.
- d) Developing awareness amongst the people is the urgent need.
- e) Commercial arbitration needs to be promoted by sponsoring and conducting educational and training programs for the business persons.

CONCLUSION:

Bangladesh's new legislative step in the field of international commercial arbitration is very timely. Bangladesh's timely approach regarding the international arbitration legislation for attracting foreign investment, international business operations, sustainable economic growth and development; triggered by economic globalization and liberalization of the justice system. The Arbitration Act basically contains provisions identical to those of the Model Law and to some extent it outsmarts the Model Law. But there are still some irregularities in the Act which need to be reformed. The attitude of the judiciary of Bangladesh towards international commercial arbitration must be changed as judiciary has some control over the arbitration proceeding under the Act. The Government of Bangladesh and related professional organizations must also play their respective roles in contributing to the vibrant and congenial atmosphere required for international commercial arbitration. We hope that the new era of commercial arbitration in Bangladesh will grow up in the light of real life experience to benefit the international trade of the country. It is obvious that the advancement of international commercial arbitration in Bangladesh will not only boost up international investments but also will definitely strengthen our country's economic growth as a whole.

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CONFLICTS OF INTEREST:

The authors declare they have no conflicts of interest.

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