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Loopholes of the Arbitration Act: Barriers to smooth resolution of International Commercial Disputes

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Abstract

In contrast to the typical court litigations, arbitration is a much less complex method for settling disputes. Hence, The Arbitration Act of 1940 was enacted to advance towards the rapid resolution of disputes. However, the Act did not provide adequate provisions for the enforcement of foreign arbitral awards. To overcome this shortcoming, The Arbitration Act, 2001 came into force. One of the primary purposes of this new Act was to deal with international commercial arbitrations. Drafted in the light of the UNCITRAL Model Law, this Act was supposed to be a giant leap forward for the rapid resolution of national and, in particular international commercial disputes. Unfortunately, the Act has in a substantive part, failed to meet its goal. The application of this Act in national arbitrations is beyond the scope of this article. This paper discusses the reasons behind the failure of this Act in terms of international commercial arbitrations. It also suggests solutions to overcome the shortcomings by analyzing national and international statutes, cases, and conventions.

1. Introduction

Arbitration is the most popular method for the resolution of international commercial disputes. The key reason for this widespread preference is the flexibility it offers. In contrast to litigation, arbitration provides the parties the freedom to choose the arbitral procedure, the applicable law, the place of the arbitration, and even the arbitrators. Thus, in arbitrations, the parties have substantive control over the proceedings. For these reasons, in international commercial disputes, parties prefer to resolve their claims through arbitration. Due to this popularity of arbitration throughout the world, the United Nations Commission on International Trade Law formed a Model Law (UNCITRAL Model Law on International Commercial Arbitration) in 1985, which outlines the rules and procedures to assist States in updating and modernizing their arbitration laws to take into consideration the unique characteristics and needs of international commercial arbitration[1]. The Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention through the recognition and enforcement of the arbitral award[2].

Keeping up with the other signatory states of the Model Law, Bangladesh also enacted The Arbitration Act 2001[3] to deal with issues of international commercial arbitration, recognition & enforcement of foreign arbitral awards & other arbitrations[4]. The present Arbitration Act

[1] United Nations Commission on International Trade Law, United Nations https://uncitral.un.org/en
[2] Ibid
[3] Hereinafter referred as the Act
[4] Preamble of The Arbitration Act, 2001

has repealed the previous Arbitration (Protocol and Convention) Act, 1937 & The Arbitration Act 1940[5].

The Arbitration Act 2001 is substantially a reflection of the UNCITRAL Model Law. The provisions of the Arbitration Act regarding the Arbitration agreement, composition, jurisdiction and the conduct of arbitral tribunal, making of award and termination of proceedings, recourse against award and recognition, enforcement of awards are very similar to the original provisions of the Model Law. Over time, the Model Law has incorporated some crucial amendments in response to the growing significance of international commercial arbitrations. The amendments have introduced provisions regarding staying the suit & referring to arbitration and ordering for interim measures where the arbitration takes place outside the state's territory. However, although an amendment act was introduced to incorporate some changes in the Arbitration Act,[6] the updated significant provisions of the Model law have not yet been inserted in the Act.

Moreover, frequent interference of courts in arbitration proceedings, absence of limitation of time, reference of local courts in case of foreign awards, and undefined terms such as 'public policy' and 'specified states' are the other loopholes of this Act. Because of these lacunas the Act has substantially failed to achieve its goals in terms of international commercial arbitrations. The loopholes of the Arbitration Act and the feasible solutions to overcome these barriers are discussed in detail below:

2. Jurisdictional Lacking

One of the major loopholes of the Arbitration Act, 2001 is that it does not have extra-territorial jurisdiction. As per Section 3(1) of this Act, the scope of the Act is limited to the arbitrations, which take place in Bangladesh only. The following clause stipulates that in case of arbitrations that take place outside of Bangladesh, only Sections 45, 46, & 47 of the Act will be applicable.

The application of Section 3(1) has received conflicting interpretations in different cases from different benches of both the High Court Division and Appellate Division. The contradictory interpretations are discussed in detail by the judgments of some relevant cases.

In the HRC Shipping Ltd vs. M.V.X-Press Manaslu and Others[7] [hereinafter referred to as HRC case], the arbitration clause in the agreement enabled the defendants to commence arbitration in London and apply for the suit to be stayed under Section 10 of the Arbitration Act. In this case, the Court was in a dilemma whether to stay the proceedings or not. As the plain reading of Section 3(1) does not permit the Act to apply to any arbitration proceedings taking place outside Bangladesh.

However, in this case, the Court opted for a liberal interpretation of Section 3(1). It was held that Section 3(1) indicates that this Act will apply if the arbitration is held in Bangladesh. But it does not denote that it will not apply if the arbitration is held outside of Bangladesh. Neither it says that the Act will "only" apply if the arbitration is held in Bangladesh[8]. Moreover, Section 26 of the Act allows the parties to choose the place of arbitration. Thus,

[5] Ibid Section 59
[6] Section 7A was inserted by The Arbitration (Amendment Act) 2004
[7] [2006] HCD [2012] 2 LCLR 207
[8] Ibid [32]

the Court held that if the purpose of the legislature were to limit the scope of the Act to Bangladesh only, then the inclusion of Section 26 would be needless.[9]

Again, reference was made to the *Indian Bhatia case*[10] [hereinafter referred to as Bhatia case], where the Supreme Court of India stated that the application of arbitration and conciliation act is not restricted by Section 2(2) which is a similar provision to Section 3(1) of the Arbitration Act[11]. Thus, the court opted for an inclusive interpretation of Section 3(2) and stated that "the Arbitration Act was enacted in the light of the Model Law to harmonize international arbitration. If the applicability of the Act is limited to Bangladesh only, then it would defeat the very purpose of the Model Law."[12] Therefore, Section 10 was applied, and the pending litigation was stayed before the Court.

However, in the STX Corporation vs. Meghna Group of Industries Ltd[13] [hereinafter referred as STX case], the decision made in the HRC case was reversed. In this case, the arbitration was to take place in Singapore. The order for interim relief sought by the petitioners under section 7(A) of the Arbitration Act was rejected and it was ruled that only Sections 45,46, and 47 apply to foreign arbitrations.

In the arguments, the petitioners relied on the judgments of the Bhatia and HRC case. In contrast, the respondents referred to the decisions made in Unicol Bangladesh case[14] where the Appellate Division observed that "Except for the arbitrations taking place in Bangladesh, Sections 3(1) and 3(2) of the Act have barred the Court from imposing an order of injunction."[15]

In addition, the court referred to the decision of the High Court Division in the Canadian Shipping and Trading BA vs TT Katikaaayu[16].In this case, the arbitration was to be held in London. The Court held that Section 10 of this Act is not applicable, and the application to suspend the case before this Court should not be entertained since it involves an arbitration proceeding in a foreign country rather than Bangladesh.[17]

A further reference was made to the case of Uzbekistan Airways v Air Spain Limited[18] where it was held that the scope of Section 10 appears to be well-defined, as the Appellate Division has determined in the preceding two cases (56 DLR 93 & 9 BLC 96) that Section 10 of the Act does not have any application to arbitral proceedings which take place outside Bangladesh[19].

In conclusion, it was mentioned that since the decision of the Appellate Division is binding upon the subordinate Courts under Article 111 of the Constitution, the Court cannot decide

[9] Ibid [41]
[10] *Bhatia International v Bulk Trading SA [2002] Supreme Court of India* [2002] AIR (SC) 1432
[11] N 1 [43]
[12] Ibid [27]
[13] [2011] HCD [2012] 2 LCLR 159
[14] [2004] 56 DLR AD 166
[15] Ibid [15]
[16] *Canadian Shipping and Trading BA vs TT Katikaaayu and another* 54 DLR [2002] 93
[17] Ibid [37]
[18] 10 BLC (2005) 614
[19] Ibid [5]

otherwise in this regard. Therefore, the Court did not apply the relevant provisions (Sections 7 and 10), and the order for interim measures was rejected.

The High Court Division followed the approach of the STX case in the case of Egyptian Fertilizer Trading Limited[20] and did not grant interim relief to arbitration seated outside of Bangladesh. Another judgment on this debate also reiterates the judgment of the STX case. In the M/S Project Builders Ltd. Vs. Joint Venture of M/s. China National Technical[21] , the place of the arbitration as per the arbitration clause in the contract, was Paris. On a breach of a subcontract, the petitioner filed for interim measures and appointment of arbitrators under Section 7A and 12. The High Court Division dismissed the Petitioner's Applications. The Court held that unless any amendment is introduced, "The STX ratio continues to be preferred by this Court over the HRC ratio, leading this Court to conclude that the Act does not apply to foreign-seated arbitration at this time."[22]

After the HRC decision, the Court took a restrictive approach to the Act's application in foreign arbitrations in subsequent cases until the latest judgment in the '*Southern Solar'*[23] *case*. The High Court Division in this case, in contrast to the decision laid down in the *STX* case, went back to the position taken in the *HRC* case and ruled that the Court is competent to entertain an application under Section 7A of the Arbitration Act even if an arbitration takes place outside of Bangladesh.

In this judgment, the High Court Division stated, "Section 3 of the Arbitration Act is not about the jurisdiction of the courts. Since there are no prohibitory wordings to apply the provisions of the Arbitration Act in the case of international commercial arbitration taking place in Bangladesh, the High Court Division may use the relevant provisions of the Arbitration Act. To be specific, Sections 7A and 10 on top of applying the provisions of Sections 45 to 47, in an arbitration which would take place or is being held in a foreign country."[24]

After scrutinizing the Section, it was held that "…in sub-Section (1) of this newly inserted Section 7A, the Legislature has employed the expression "*until enforcement of the award under Section 45"*, therefore, an interim order may be passed by the High Court Division to help the foreign tribunal till the time a foreign arbitral award is enforced".[25]

The Court rejected the contradictory decisions of the previous cases and stated that these are to be held *per incuriam*[26]. Hence these judgments would not have legal force to bind the Courts to follow and apply the ratio laid down therein[27]. In the recent *Frigo Mekanik case*[28] , the High Court Division followed the decision of the *Southern Solar* case and upheld the applicability of Section 7(A) even in the case of foreign arbitrations.

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[20] *Egyptian Fertilizer Trading Limited (Egyptian Fertilizer) v East West Property Development (Private) Ltd.* (Arbitration Application No. 11 of 2010, 10 June 2014)

[21] 2017 (2) LNJ 114

[22] Ibid [16]

[23] *Southern Solar Power and another v. Bangladesh Power Development Board and others*, 2019 (2) 16 ALR (HCD) 91

[24] Ibid [34]

[25] Ibid [41]

[26] Ibid [56]

[27] Ibid

[28] *Frigo Mekanik Insaat Tesisat Ve Taahut Sanayi Ve Ticarest A.S. v. Bangladesh Milk Producers' Co-operative Union Limited (BMPCUL)*, 2019 (2) 16 ALR (HCD) 357

These two observations appear to be a bold departure from the restrictive view taken in the STX and similar cases. However, until the required amendment is incorporated to apply the relevant provisions in case of arbitrations outside Bangladesh, the Court will always be in a dilemma as regards to the enforcement of these provisions in case of arbitrations taking place outside Bangladesh due to the contradictory decisions delivered in the above-mentioned cases. This barrier can easily be abolished by amending the texts of Section 3(2) as such so to apply Section 7, 7A, and 10 to arbitrations taking place outside of Bangladesh. It is pertinent here that Model Law[29] and our neighboring country India[30] have introduced similar amendments to remove the barriers in international arbitrations. Bangladesh can follow these laws and incorporate necessary amendments thereof to remove the hurdles in international commercial disputes.

3. Insufficient power of the arbitral tribunal

Another drawback of this Act is that although the Act empowers the arbitral tribunal to order for interim measures under Section 21, it does not provide the power of enforcement of the same to the tribunal. For the enforcement of the interim measures, an application has to be filed before the District Court[31]. Hence, these unnecessary formalities act as impediments towards the speedy adjudications of disputes.

In arbitrations, the scope to go to the court for the enforcement of the interim measures should be limited. One of the main reasons why arbitration is preferred is to lessen the burden of the court. Again, it was held in the M/s Strains case[32] that the court should have minimum interference in an arbitration proceeding. Therefore, a valid arbitral tribunal should have the power of enforcement of interim measures without any intervention from the court.

For enhancing the power of the arbitral tribunal in this regard, the law makers can follow the Arbitration Act of India, which has introduced such amendment. Section 17(2) of The Arbitration and Conciliation (Amendment) Act,2015 has empowered the arbitral tribunal to enforce the arbitral award in the same procedure under the Code of Civil Procedure as if it were a decree of the Court. Bangladesh can also incorporate this change in the Act to lessen the burden of the Court and fasten the arbitral proceedings.

4. Reference to District Judge Court in case of execution of the foreign arbitral awards

A further shortcoming of the Act is the reference of District Court in case of recognition and enforcement of a foreign arbitral award under Section 45. The Section states that foreign arbitral awards shall be executed by the District Judge Court. Since the district courts are already marred with cases, it will take a long time for the execution of the award. One of the main reason parties prefer arbitration is its quick remedy. Thus, if the award cannot be executed within a reasonable period, it will defeat one of the main objectives of the arbitration.

[29] Article 1(2) of Model law has been amended by the Commission at its thirty-ninth session, in 2006
[30] Section 2 (2) amendment by The Arbitration and Conciliation (Amendment) Act,2015
[31] The Arbitration Act, 2001 s 21(4)
[32] *M/s Stratus Construction Company v Government of Bangladesh represented by Chief Engineer, Roads and Highways Departments* [2002] HCD [2002] BLD 236

Therefore, it will be convenient for the parties if, in the case of a foreign arbitral award, matters are decided by the High Court Division as the High Court Division can deal with the matters promptly. It is pertinent here to mention the Arbitration Act of India which has amended this similar provision. Section 2(e) (ii) of the Act denotes that in case of international commercial arbitrations, the term Court shall refer to the High Court. Bangladesh can also incorporate this emendation in the Arbitration Act, which shall ensure quick disposal of the disputes and therefore encourage foreign companies to invest in Bangladesh.

5. Refusal of an award under public policy

Ambiguity of the term 'public policy' under Section 46 is another defect of the Act. The Section states that the Court can refuse the recognition or execution of any foreign arbitral awards if it is in conflict with the public policy of the State. However, there is no clarity as to which grounds will be considered under public policy. Thus, it creates vagueness for the parties to an international arbitration. As the international community is not aware of the norms of our society, the enforcement of a foreign arbitral award might become impossible in this country on the ground of the obscure term 'public policy'.

Until now, the judgment in the Tata case[33] is the only instance where the court had an opportunity to discuss the term public policy. The court, in this case, referred to the Black's Law Dictionary to define the term public policy under the Arbitration Act 2001 as "Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society"[34].

Even this definition is not an exhaustive one & it does not clarify the concept of public policy. To remove this ambiguity, the Act should clearly specify the grounds, which are to be considered under the term 'public policy'. In this regard following the Indian Arbitration Act can be an ideal solution. The explanation part of Section 57 of the Indian Act clearly states the grounds which are to be considered under the term public policy. Bangladesh can follow these explanations to incorporate similar changes and remove the ambiguity.

6. Absence of time limitation regarding the completion period of arbitration

Further shortcomings include absence of time limitation regarding the completion period of arbitration. Although the Act prescribes a limitation period for the enforcement of arbitral awards[35] , there is nowhere any mention of a time limitation regarding the completion period of arbitration. One of the main advantages of arbitration is that it puts a dispute to resolution within a short period, unlike the typical Court adjudication. However, in the case of our country, as there is no time limitation as to the arbitration period, it often takes several years for the completion of an arbitration proceeding. This is why arbitration often takes the form of Court litigation in our country, and it takes years for the disposal of the disputes.

Therefore, there should be a strict time limit in this case, and it should be thoroughly followed. In default, the parties or the arbitral tribunal should be fined. In this regard, the Indian Arbitration Act has filled this lacuna by inserting time limitations in Section 29 (A)[36] for arbitral awards. The Section states that arbitral award shall be made within a period of

[23] *Tata Power Company Ltd. v M/S Dynamic Const* [2015] 2 SCOB 15 (AD)
[34]Ibid para [27]
[35] Section 44 of the Act states that "... awards shall be enforced ... in the same manner as if it were a decree…"
[36] Inserted by s. 15 of The Arbitration and Conciliation (Amendment) Act,2015

twelve months from the date the arbitral tribunal enters upon the reference. Similar provision can be incorporated in the Arbitration Act of Bangladesh for the completion of the arbitration proceedings within a specified period.

7. Specified States

According to the definition of 'foreign arbitral award' under Section 2(k), an award made in the territory of the specified state is excluded as a foreign arbitral award. However, no state has been marked as specified states yet. Thus, if any foreign award falls under the purview of the specified state, it will not be enforceable. This provision of specified state is in conflict with the New York Convention. As per the article I paragraph (3) of the New York Convention, States are allowed to make reservations. The article reads, "… any State may be based on reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."[37]

From this article, it can be deduced that The New York Convention allows two reservations to its member states. The two reservations are commonly referred to as the "reciprocity" reservation and the "commercial" reservation[38].

"The "reciprocity" reservation denotes that a signatory state may choose to only recognize and enforce arbitral awards with other signatory countries or their citizens. On the other hand, the "commercial" reservation permits a signatory country to apply the New York Convention only to those disputes of a commercial nature according to its national law."[39]

The member states can adopt one or both the reservations by declarations. Although many states have declared to adopt one or both reservations, Bangladesh has ratified the New York Convention on 6 May 1992 without any declaration of reservation[40].
Therefore, under the convention, Bangladesh cannot deny enforcement of any award against any state under the term 'specified states' unless it declares to adopt any or both of the reservations.

Furthermore, if a signatory state to the New York Convention is classified as a "specified state," it will violate the spirit of the Convention, which stipulates that, arbitral awards made in one state are enforceable in all other New York Convention signatory states jurisdictions.[41]

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[37] 'United Nations Convention on the Recognition and Enforcement » New York Convention' <https://www.newyorkconvention.org/english> accessed 10 August 2021.

[38] gccarbitration, 'RECIPROCITY AND COMMERCIALITY RESERVATIONS UNDER 1958 NEW YORK CONVENTION' (*gccarbitration*, 20 August 2012) <https://gccarbitration.wordpress.com/2012/08/20/reciprocity-and-commerciality-reservations-under-1958-new-york-convention/> accessed 10 August 2021.

[39] Ibid

[40] New York Arbitration Convention "Contacting States: New York Convention" (2020) <www.newyorkconvention.org/countries>
accessed on 16 August, 2021

[41] Professor Maimul Ahsan Khan "Jurisdictional Issues, Choice of Law and Lex Arbitri Provisions in International Commercial Arbitration"
<https://www.academia.edu/36536828/Jurisdictional_Issues_Choice_of_Law_and_Lex_Arbitri_Provisions_in_International_Commercial_Arbitration>
Accessed on 16 August, 2021

To remove this ambiguity the States which are to be considered under this term shall be clearly specified. At the same time it shall be noted that no state which is a party to the New York Convention can be specified as such.

8. Concluding Remarks

Prior to the partition, both India and Bangladesh (then Pakistan) were regulated by the same Arbitration (Protocol and Convention) Act, 1937 & The Arbitration Act 1940. After independence India and Bangladesh have in accordance with the Model Law enacted The Arbitration and Conciliation Act, 1996 and The Arbitration Act, 2001 respectively. However, India has in accordance with the Model Law and in preference to their convenience updated quite a few significant provisions of the Act. On the contrary, Bangladesh still holds on to the decades-old Act without introducing some major amendments to keep pace with the arising circumstances in international commercial arbitrations.

The consequence of non-upgradation of the obsolete Act is clearly visible in the ease of doing business rankings. According to the latest World Bank annual ratings[42], Bangladesh is ranked 168 whereas India is ranked 63 among 190 countries in the ease of doing business index. One of the key factors of this ranking index is the conducive regulatory environment to business operation,[43] in which Bangladesh lags behind because of the unfavorable business environment created by the loopholes of the Arbitration Act.

It is high time that lawmakers take into consideration the inconveniences incurred by the controversial provisions of this Act. Amendments should be inserted in the Act in accordance with the amended Model Law as well as the Statutes of other countries like India, which have introduced such amendments as required for the smooth resolution of international commercial disputes.

[42] Ease of Doing Business in Bangladesh, Trading Economics
Ease of Doing Business in Bangladesh | 2021 Data | 2022 Forecast (tradingeconomics.com)
[43] Ibid