

RECOURSE OF AN ARBITRAL AWARD IN BANGLADESH: DISSECTION UNDER THE UNCITRAL, FOREIGN LAWS AND PRECEDENTS

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ABSTRACT

It is irrefutable that the arbitration process is controlled by arbitration seat law. Therefore, in the case of international commercial arbitration having the arbitration place in Bangladesh, and in the case of domestic arbitration that's mean where both parties are Bangladeshi, section 42 and 43 of the Chapter VIII Arbitration Act 2001 lays down the rules in which applications can be lodged to set aside arbitral awards. Moreover, if the award contains some mistakes, the tribunal can correct an award by removing any clerical mistakes or errors under section 40 of the Arbitration Act 2001. This study was an attempt in the light of court rulings, article 33 and 34 of the UNCITRAL Model Law, 1985 as well as article 36 of the New York Convention, 1958 to critically examine section 40, 42 and 43 of the Arbitration Act 2001 of Bangladesh.

INTRODUCTION

Arbitration is a dispute resolution process between the parties by means of an arbitral tribunal appointed by the parties to the dispute or by a party at the request of the Court. It is, in other words, an alternative to litigation as a method for resolving disputes. Earlier, arbitration law in Bangladesh was based on the English Law of Arbitration. The history is, undivided India adopted the Law on Arbitration in 1940 after the independence of Bangladesh; Bangladesh ratified the same law, and the arbitration process continued under this law, but it consists a lot of problems as well as created some barriers to the arbitration process after that in the year 2001, new Arbitration Act was introduced by Bangladesh.

Bangladeshi arbitration law is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law . The arbitration law is based on the principle of removing the dispute from the ordinary court and allowing the parties to appoint a domestic tribunal composed of persons of their own choosing who are named arbitrators.ⁱ The Parliament enacted the Arbitration Act, 2001 which not only eliminated several significant defects from the earlier arbitration law but also introduced new arbitration principles that are recognised globally. The arbitral award has been dealt with in accordance with the Court's decision. The arbitral award shall be enforceable in the same way as a court order.

Correction of an arbitral award is one of the post-award remedies intended to resolve any mistakes, confusions, or omissions in the award of the arbitral tribunal after it has been issued. In fact, it also occurs that arbitral awards include some minor errors, inconsistencies or omissions, or occasionally, more serious ones. Although such mistakes generally apply to minor and unintentional problems, there may also be certain forms of errors that may influence the result of the case and the award of damages.ⁱⁱ Typical examples include incorrect statistical estimates of owned quantities, failure by the arbitrator to answer such points, statements or proof, or simply reversal of the parties' identification designating the defendant as the claimant and vice versa. If these errors are obvious or slight, the parties may choose to ignore them. Nearly all legal systems allow for the correction of grammatical or procedural errors in prizes, a matter usually regulated by the seat of arbitration applicable.ⁱⁱⁱ Unlike the court, there is no scope for an arbitral award to appeal, so it is definitive and binding between the applicants. However, for other purposes stated in Section 42 of the Arbitration Act, 2001, an aggrieved

party may take recourse to the law court to set aside the adjudication decision which is also mentioned in section 34 of the UNCITRAL Model Law. The parties cannot appeal against an arbitral award and the judiciary cannot interfere on its efficacy. In a case The Supreme Court of India observed that "an arbitrator is a judge appointed by the parties, and as such an award passed by him is not to be interfered with lightly."^{iv} However this does not assume that there is no inspection on the conduct of the arbitrator. The law allows specified remedies against an award, in order to ensure proper conduct of the adjudication.

It should be noted that the underlying philosophy of section 42 of the 2001 Act seeks to bring into arbitral proceedings a state of equilibrium between the party's autonomy and judicial interference. Therefore the section provides for a situation whereby an arbitral award can be contested without much delay for the purpose of setting aside the same at first instance.^v

Where the arbitrator's opinion is logical, and cannot be regulated as one which is not acceptable, the court should not replace that of the arbitrator with its own views. However this does not mean that there is no review on the conduct of the arbitrators. Therefore the statute provides other recourse against an award in order to ensure fair conduct of the proceedings. Such remedies can be sought under the jurisdiction of a court.

CORRECTION OF AN ARBITRAL AWARD

Article 33 of the UNCITRAL Model Law provides, which specifies that a party may apply, within 30 days of receipt of the award; the arbitral tribunal is entitled to correct any technical errors, any clerical or typographical errors or similar errors in the award. The tribunal has jurisdiction to make changes to its award within the same time-limit on its own behalf. Section 57 of the English Arbitration act 1996 states, on the basis of application or tribunal's own initiative, tribunal can correct an award by removing any clerical mistake or error which is arisen from an accidental slip or omission or clarify or remove any ambiguity in the award; the same thing also reflects the section 40 of the arbitration act 2001 of Bangladesh, but here parties have to apply within the fourteen days from the receipt of an award. Article 38 of the UNCITRAL Model rules 2010 also provides these same powers to the tribunal.

RECOURSE OF AN ARBITRAL AWARD

National arbitration laws, often trying to equate awards to court rulings, provide a variety of remedies for arbitral awards, with varying and often long periods of time and extensive lists of grounds that differ widely in the different legal systems. The Model Law aims to provide ameliorate condition which is of significant concern to all of those who are concerned in international commercial arbitration.

Under Section 42 of the Act, if an arbitration that can be domestic or international rendered in Bangladesh, within sixty days of getting an award, a party can appeal to set aside that under certain grounds. All of those are materially the same as for challenging an enforcement application in Article 34 of the Model Law. An award can be apportioned if:

- a party had a certain incapacity; or
- arbitration arrangement has not been accepted under applicable legislation; or · a party has not given the necessary notice of appointment of an arbitrator or of arbitration; · award shall deal with a conflict which does not fall within the scope of arbitration submissions or which contains decisions far beyond scope of the submissions; or
- formation of the arbitral tribunal or the arbitral proceedings was not provided for in under the agreement of the parties; or
- subject-matter of the conflict is not subject to arbitration; or
- arbitration award is in contrast with the public policy of Bangladesh.

In essence, this list is just the same as Article 36(1), taken from Article V of the New York Convention of 1958. While the reasons for setting aside are almost similar to those for denying acceptance or compliance, two specific variations might be noted, firstly, the premises relating to public policy can be different in nature, depending on the Country in question. Those are cases of setting aside or enforcement. Lastly, and more significantly, the reasons for denial of recognition or compliance are legitimate and applicable desires recognition and enforcement in where parties want, while the reasons for recourse have a different impact; setting aside of the award at the place of origin prohibits the award from being implemented in other countries under article V(1) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.

a. Incase of incapacity of the party:

The following sections state that the court may set aside an arbitral award only when the party making the request provides proof that the other party suffers from certain incapacity. Therefore, if a party to arbitration is not capable of caring about its own concerns and is not represented by an individual who will defend its interests, the award would not be binding on him and can be set aside on his request. For example, if a minor, or an unsound minded person is a member, a guardian must properly represent him, otherwise the award will be liable to be set aside.

b. If there is any Invalidity of agreement:

The legitimacy of an implied contract can be questioned on any of the grounds for bringing into question the fairness of the arrangement. For situations where the arbitration clause is included in an agreement, if the agreement becomes null, the arbitration clause will be void. If the arbitration agreement is null and void, it would be invalid and can be set aside the reference there under as well as consequently the award on the basis of such regard.

If the notice was not duly served and parties was unable to present: This provision says that an arbitral award can only be set aside by the court if the party making the request offers evidence that the party has not received a proper notice of the appointment of an arbitrator, or that the party has not received a proper notice of the arbitral proceedings, or that the party has been compelled to present his case for any reason.

Section 12 of the 1996 of Indian arbitration and conciliation Act gives a party the right to appeal the appointment of an arbitrator on the basis if no notice of appointment of an arbitrator is issued to that party.^{vi} It is therefore essential that the parties be properly notified of the arbitration process in order to file claim or defense statements as prescribed under section 5 of the Arbitration Act 2001.

Consequently, the failure to notify the party on different accounts ultimately leads to the setting aside of the arbitral award, as it is completely in violation of the principle of natural justice because everyone has a right to prosecute the trial.^{vii}

c. An award which is given beyond the scope of references:

It provides that an arbitral award is liable to be dismissed if it deals with a dispute that is not covered by agreement or that does not fall within the terms of the reference, or if it includes a decision on aspects beyond the reference. Furthermore, the provision to that section provides that if the decision on the matter outside the jurisdiction of the tribunal can be separated from the decision on matters within its jurisdiction, only that part of the arbitral award containing decisions on matters beyond its jurisdiction will be set aside. There is a difference between disputes over the arbitrator's jurisdiction and disputes as to whether the jurisdiction will be applied. The court may interact in the former sort of situation where an arbitrator's jurisdiction has been challenged.^{viii} Furthermore, in a case the Supreme Court of India issued a decision allowing for the extension of the reference and it should be noted prominently that the scope of reference is broadened when the parties send their statement and that statements are not protected by the original reference.^{ix} Section 17, as discussed above, marks the points in which jurisdictional objections can be presented. Where it seems that a portion of the award is not referred to in a matter, and that portion can be segregated from the other part without affecting the judgment of the matter referred, the court may change the award as appropriate. In relation to the conditions of a legitimate award that the award does not go beyond the application and that if it does and the excess element cannot be removed, the entire award is void.^x

d. Illegality of tribunal composition or in proceedings:

According to the provision, an arbitral award may only be set aside by the court if the party making the request provides proof that the composition of the arbitral tribunal or arbitral proceedings was not in accordance with the agreement of the parties or that the procedure prescribed by the Act was not followed in the absence of agreement as to the procedure. Accordingly, the aforementioned section specifies that the composition of the Arbitral Tribunal and the process that arbitrators are expected to follow should be consistent with the agreement. In the absence of such agreement, this should be in line with the procedure provided for in the Act.^{xi}

e. Disputed arbitration:

The presence of an unreasonable conflict is a precedent requirement for an arbitrator to exercise his authority. Accordingly, as per the section an arbitral award may be set aside by the court if it discovers that, for the time being in force, the subject matter of the dispute cannot be

settled by arbitration under law.^{xii} For all contested cases, not necessarily of a criminal nature, can usually be referred to arbitration.^{xiii}

f. Against public policy:

This section provides that an appeal can be made to set aside an arbitral award if the arbitral award clashes with Bangladesh's public policy. It therefore necessarily implies that an award won by hiding evidence, misleading or deceiving the arbitrator, bribing the arbitrator, exerting pressure on the arbitrator, etc., would be liable to set aside.^{xiv} Parties have the right to enter into agreements, the court will refuse to enforce the contract if right is outweighed by the public interests.^{xv} The definition was taken in order to connote a greater public interest or public benefit.

In Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd case, Supreme Court of India stated that if any award goes against the Fundamental policy and Interest of the country, Justice or morality; Or If it is patently illegal then that award can be set aside.^{xvi}

CONCLUSION

The grounds for challenging an award are generally limited, and many countries do not allow appeals from an arbitral tribunal's decision. In countries where the UNCITRAL Model Law on International Commercial Arbitration has been adopted, awards can be challenged by seeking their 'repeal' at the arbitration seat. Awards can also be contested by opposing their compliance at a position where they are being implemented by the successful party. Even if an award is cancelled, or if enforcement is refused, this may not necessarily impede enforcement in another state. But the process of correcting clerical mistakes is easier than the recourse of an arbitral award. In conclusion, section 42 is a very essential part of the Arbitration Act, 2001 because it plays a significant role to protect the parties' rights. It guarantees fairness in the process, and preserves that no party is affected by the errors. To ensure further that the parties are not manipulated, a time-cap is imposed on the proceedings so that there is no wasting of time and resources. In this way the purpose of choosing arbitration is secured.

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5. The Arbitration Act, 2001 of Bangladesh
6. The Arbitration and Conciliation Act, 1996 of India
7. The Arbitration and Conciliation Act, (2001 amendment) of India
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ENDNOTES

ⁱ Malhotra, O.P. and Malhotra, I., 2006. *The Law and Practice of Arbitration and Conciliation: The Arbitration and Conciliation Act, 1996*. LexisNexis Butterworths. p. 30.

ⁱⁱ *Union of India v. Ratan Singh*, AIR RAJ, 1999, 117.

ⁱⁱⁱ Singh, A., 2002. *Law of Arbitration and Conciliation*. Eastern Book Company. P 301.

^{iv} AIR 1999 SC 2102.

^v Above note 3. p 392.

^{vi} Ibid. p 193.

^{vii} Principle of Natural Justice- Audi Alteram partem: No one should be condemned unheard.

^{viii} *Union of India v. Ratan Singh*, AIR RAJ, 1999, 117.

^{ix} *Renusagar Power Co. Ltd. v. General Electric Company*, 1984, 4 SCC 679.

^x Above note 3. p 301.

^{xi} 11 AIR 1999 SC 2102.

^{xii} Sharma, S., 2009. Public Policy Under the Indian Arbitration Act In Defence of the Indian Supreme Court's Judgment in *ONGC v. Saw Pipes*. *Journal of International Arbitration*, 26(1).

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^{xiv} Above note 1.

^{xv} Ibid.

^{xvi} AIR 2003 SC 2629.

