

Arbitration under the Arbitration Act, 2001, Bangladesh: Procedural drawbacks and some plausible solutions

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Abstract: *In today's world, parties in an agreement always want quick, cost-effective and fair dispute resolutions mechanism. As an alternative form of dispute resolution, arbitration is considered one of the most common and binding methods of dispute resolution between parties. In the current age of global movement towards the promotion of foreign investment in Bangladesh and keeping pace with the international business and international commercial arbitration law, Bangladesh is not lagging behind any more. As a part of the Indian subcontinent, the practice of Arbitration in Bangladesh has been being observed in various forms since the time immemorial. Nonetheless, a new arbitration law named as 'The Arbitration Act, 2001' was enacted consolidating both domestic and international commercial arbitration through repealing the British enacted 'The Arbitration (Protocol and Convention) Act, 1937', and 'The Arbitration Act, 1940'.² The new Act basically based on the Model Law on International Commercial Arbitration, 1985³, which generates a single and unified legal system for arbitration in Bangladesh. However, the much wanted model arbitration law is not free from flaws and in some extent it fails to meeting up the expectations of the parties in agreement, who want the fast and easy access to justice. The main purpose of this paper is to examine the existing arbitration law and procedures in Bangladesh, what are the enabling and constraining factors for ensuring access to justice in the mentioned process, and how it can be used effectively to resolve the shortcomings in a rapidly evolving arbitration process where parties' satisfaction is a key criterion.*

Keywords: Arbitration, Arbitration Act 2001, and Arbitral procedures in Bangladesh.

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¹ The Act came into force on the 10th day of April, 2001, vide Notification No. SRO 87-Law/2001, dated 09-04-2001, Published in Bangladesh Gazette Extraordinary, dated 10-04-2001.

² Arbitration Act, 2001(Bangladesh) s 59(1).

³ Samaha M Karim. 'Précis of a salient Act' *The Daily Star* (Dhaka, 16 August 2008) <https://un.org/sites/.un.org/files/media-documents/en/06-54671_ebook.pdf> accessed on: March 30, 2021.

1. Introduction

Dispute is inevitable in our daily lives. Since the time of civilization litigation is one of the oldest and most used methods to resolve dispute between the parties. However, due to globalization and the enhancement of global trade and commerce, the international commercial disputes requires to be resolved by exercising Alternative Dispute Resolution mechanisms such as Arbitration in an expeditious and effective manner against the prolonged mode of Justice delivery in courts.

The present Arbitration Act of 2001 was enacted through repealing the earlier Arbitration Act of 1940, which was highly influenced by the UNICITRAL Model Law. In fact, this Act was primarily enacted to meet the challenges that were not covered by the previous Arbitration Act. Since the commencement of this Act there has been a positive change in the ambiance of arbitration as well as in the business community in Bangladesh. A separate Bench of High Court Division of Bangladesh Supreme Court has been set up for disposing the matter relating to international commercial arbitration. To remove the existing flaws and for making a balance with the demand of the parties and the international commercial arbitration, the Act was modified in 2004. Such jurisdictional measures were necessary for keeping pace with the growing need of foreign investment in Bangladesh, especially in natural gas and power sectors. It is expected that the new Arbitration Act and its effective application as an alternative mode of delivery of justice will ease the pressure of already overburdened courts and bring out a meaningful change, especially in the area of enforcement of foreign arbitral awards as provided in the New York Convention, to which Bangladesh is a party. So, this article shall examine the basic features of the Arbitration Act, 2001 and existing drawbacks in terms of applying the arbitration procedures depicted in the Arbitration Act, 2001. It will also explore the need for a more modern adjustment for resolving the disputes, especially commercial and financial disputes that can provide easier accessibility to parties who have disputes. Ultimately, this paper will propose a comprehensive recommendation for resolving the existing drawbacks in the arbitration mechanisms in Bangladesh.

While explain all these issues, the First Part of this paper will provide an introductory idea about the Arbitration Act, 2001 and the arbitration proceedings in Bangladesh. Basically, a preliminary overview about the whole topic will be given in this part. Then in the Second Part, this paper gives an overall idea and definition about the arbitration from various angles. In the Third Part, this paper gives a picture of historical development of arbitration in Bangladesh. In the Fourth Part, this paper illustrates the basic features of the Arbitration Act, 2001 and the arbitral proceedings in Bangladesh, and then the Part Five of this paper speaks about the composition of the arbitration tribunal. The existing drawbacks in the arbitration mechanisms in Bangladesh are discussed in Part Six

in this paper, and in the same way, in the Part Seven, this paper also examines the possible solutions to resolve the existing drawbacks in the Act and procedures. In concluding remarks, further research guidelines is to be given for fulfillment of this research paper and purpose in Part Eight.

2. Arbitration under the Arbitration Act 2001

The present Arbitration Act, 2001 does not define arbitration. According to the Section 2(m) of the Arbitration Act, 2001, Arbitration means any arbitration whether or not administered by permanent institution. Therefore, the Arbitration Act, 2001 indicates all types and nature of arbitration that should be resolved by following the relevant arbitration rules and procedures incorporated in the arbitral agreement or the common consensus of both of the parties in arbitral agreement.⁴

Arbitration may be categorized as domestic or international. In the same way, the Arbitration Act, 2001 distinguishes between international and domestic arbitration. If either of the parties to the dispute is a foreign entity, then the arbitration in question would be treated as international commercial arbitration. In contrast, if both the disputing parties are the citizen of Bangladesh as well as the dispute originates in Bangladesh, then the arbitration in question would be considered as domestic arbitration. Typically, when the parties are of different nationalities and/or when international trade interests are at stake, then it can be termed as international arbitration or foreign arbitration. This definition may vary depending on the governing laws of the concern parties and countries.

As per the section 2(c) of the Arbitration Act 2001, “*International Commercial Arbitration*” means an Arbitration relating to disputes arising out of legal ‘relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is —

- a. “an individual who is a national of or habitually resident in, any country other than Bangladesh; or
- b. a body corporate which is incorporated in any country other than Bangladesh; or
- c. a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or
- d. the Government of a foreign country.”

Interestingly, from the plain reading of the mentioned definition of international commercial arbitration it seems that the commercial dispute between two Bangladeshi nationals takes places even in different states cannot be considered

⁴ The Arbitration Act, 2001 (Bangladesh), s 2(m).

the subject matter of international arbitration under the Act.⁵ Therefore, here the nationality of the disputing parties is the determining factor to define the nature of arbitration.⁶ As per the Arbitration Act, 2001, if either of an international/foreign element exists in the arbitral agreement, then for dealing with that issue the international arbitral rules and procedures enunciated in the Arbitration Act, 2001 shall be applied. If any procedure is not included in the agreement under dispute then as per the common consensus of the parties the concern country's arbitration laws and procedure is to be followed, or in applicable case, the rules of civil procedures shall be applied.

Arbitration may also be categorized as institutional or ad-hoc arbitration. In institutional arbitration, the enacted rules and frameworks of the concern institution are used to settle the dispute between the parties regarding arbitral agreement. It also can be termed as institution administered arbitration. On the other hand, in ad-hoc arbitration, the parties in the arbitral agreement themselves possess the full control and authority to determine the mechanisms and framework of arbitration such as the number of arbitrator, appointment of arbitrator, the forum of arbitration, etc.

3. History of Arbitration in Bangladesh

Arbitration is an ancient concept as its nature can be found in early sixth century B.C in Greek and Roman City States. Like this ancient concept, the arbitration has a long history in the Indian sub-continent. It can be traced in the forms of Puga', 'Srenis' and 'Kulas' collectively termed as arbitral tribunals since the Vedic times in British India which is found in the *Bṛhadaranayaka Upanishad*.⁷

However, as a part of the Indian subcontinent, the practice of arbitration in Bangladesh has been being observed since the time immemorial. Nevertheless, it is said that the *Panchayet* system was the early dawn of today's arbitration.

Later on, during the Muslim Periods (1206- 1857) 'Shalish' was established to the continuation of *Panchayet*. Shalish is not of the nature of arbitration as it predominately acted as the lowest tier of formal justice system. Though there is some fundamental difference between Salish and arbitration, nevertheless many argued that the nature of Salish is similar to today's arbitration in form.

⁵ The Law Review: The International Arbitration Review - Edition 9, Bangladesh: Available at: <<https://thelawreviews.co.uk/title/the-oil-and-gas-law-review/bangladesh/>>. accessed March 25, 2021.

⁶ *ibid*.

⁷ "Puga: the local courts; Srenis: the people engaged in the same business and profession; Kulas: members concerned with the social matters of a particular community". See, Ashutosh Singh, 'Evolution of Arbitration in India and the Lack of Professionalism'. (*Pleasers*, 9 October 2021) <<https://blog.ipleaders.in/evolution-arbitration-india-lack-of-professionalism/>> accessed 20 July 2022.

However, the mentionable development of arbitration in the subcontinent was mainly occurred in during British regime. The High Court of Orissa, in the case of *State of Orissa and Others. v. Gangaram Chhapolia*,⁸ depicted the successive developments and the codification of arbitration laws in the Indian subcontinent. As a part of Indian subcontinent, they were also applicable in Bengal (in today's Bangladesh).

The Bengal Regulations of 1772 and 1780 through inserting arbitration clause initiated the enactment of modern arbitration law in the subcontinent. Although these regulations did not vastly discuss about the mechanism of arbitration, nonetheless, a clause like “*in all cases of disputed accounts, it shall be recommended to the parties to submit the decision of their cause to arbitration, the award of which shall become a decree of the court*” paved the way of application of arbitration in the Indian subcontinent. Then Sir Elijah Impey's Regulation of 1781 was enacted that provides only two clauses such as 1) “*the judges do recommend as so far as he can, without compulsion, prevail upon the parties to submit to the arbitration of one person to be mutually agreed upon by the parties*”, and 2) “*no award of any arbitrator, or arbitrators be set aside except upon full proof, made by oath of two credible witnesses, that the arbitrators had been guilty of gross corruption or partiality in the cause in which they had made their award.*”⁹ Thereafter, on 27 June, 1787, the Second Regulation of the Administration of Justice was enacted containing the case transferring rule to the arbitration. In this mechanism, cases were transferred after taking consent of the parties in suit to resolve those cases by using the mechanism of arbitration. However, it did not contain any mechanisms to regulate the arbitration proceedings such as time and manner of arbitration.¹⁰

Like the Administration of Justice Regulation, the Regulation XVI of 1793 was promulgated containing the same provision of referral of suits to arbitration. However, there was an addendum containing the referred suits will be submitted to the Nizam for its decision.

Subsequently, the Regulations XXI of 1793, and XV of 1795 were issued which made further improvement to referring certain types of disputes (such as dispute relating to accounts, partnership, debts, non-performance of contracts, etc.) was to be resolved through arbitration. Basically, these regulations incorporated the provisions relating to reference of suit to arbitration, award, appointment of arbitrators, and rule for setting aside of the arbitral awards.¹¹

⁸ 76 (AIR) 1982, Orissa 277.

⁹ Law Commission of India, 76th Report. See also, *State Of Orissa And Ors. vs Gangaram Chhapolia And Anr* <<https://indiankanoon.org/doc/584642/>> accessed on July 30, 2021.

¹⁰ Nripendra Nath. Sarkar, *Law of Arbitration in British India* (Vol. 6, The University Book Agency, India 2016).

¹¹ Naresh Markanda and Rajesh Markanda, *Law Relating to Arbitration and Conciliation* (Vol. 3, 9th Edn, Lexis Nexis, Delhi 2016).

The Regulation of 1793 was further improved by the Regulation VI of 1813 to resolve the land related litigation through arbitration.¹² Thereafter, the Regulation XXVII of 1814 was enacted containing the provision of arbitration, which allowed the advocate to act as arbitrators.¹³ In the same way, the authority was given to the Revenue Officers and the Collectors by the Bengal Regulation VII of 1822 to refer the disputes relating to the rent and revenue to be resolved through arbitration.¹⁴ Similarly, according to the Bengal Regulation IX of 1840, the Settlement Officers got the authority to refer disputes to arbitration.¹⁵ Thereafter, the Civil Procedure Code for India, was enacted in 1859 (Act VIII of 1859) containing the Sections of 312 to 327, and discussed the issues of referring pending suits to arbitration, procedure for arbitration, arbitration without intervention of the courts.¹⁶

In 1882, the Act XIV of 1882, Sections 506 to 526 of the Code of Civil Procedure was amended as it is except the interpretation held in the case of *Pestonjee v. Manockjee* regarding revocation of submission of arbitration.¹⁷ However, this Code did not indicate any provision for reference to arbitration of future disputes.

To solve the indicated issue, Indian Arbitration Act (IAA), 1899 was enacted modeled after the English Arbitration Act (EAA), 1889. In fact, the most of the sections of the EAA were similar to the IAA. However, the IAA was insufficient to meeting the needs of arbitration due to its limited jurisdictional application.¹⁸

To filling the mentioned gap, in 1908, the Code of Civil Procedure (CPC) was enacted and its Second Schedule included the provisions relating to the reference of suits to arbitration with and without the intervention of the courts.¹⁹

In 1940, the Indian Arbitration Act was enacted repelling the earlier Arbitration Act of 1899 and the provisions relating to the arbitration indicated in the Second Schedule of the CPC of 1908. This Act was based on the English Arbitration Act of 1934.²⁰

After being independence in 1947, as a part of Pakistan (Bangladesh was termed as East Pakistan), and thereafter, being independence in 1971 as a country

¹² Law Commission of India (n 10).

¹³ Markanda and Naresh (n 11).

¹⁴ Law Commission of India (n 10).

¹⁵ *ibid.*

¹⁶ Microsoft Word - Dissertation. (ssrn.com).

¹⁷ Markanda and Naresh (n 11).

¹⁸ Vikram Raghavan, 'New Horizons for Alternative Dispute Resolution in India – The New Arbitration Law of 1996' (1996) 13(4) *Journal of International Arbitration* 94-96.

¹⁹ The Code of Civil Procedure 1908 (Bangladesh) Second Schedule, para 17-21.

²⁰ Law Commission of India, 76th Report.

named as Bangladesh, till the enactment of the new Arbitration Act of 2001, the Indian Arbitration Act of 1940 was applied for resolving the commercial disputes in Bangladesh.

4. Basic features of Arbitration Act, 2001 and the arbitral proceedings in Bangladesh

The Arbitration Act, 2001, which is based on the UNICITRAL Model Law, provides a uniform formula for both domestic and international commercial arbitration by consolidating the entire arbitration law in one single Act. It contains 59 sections in 14 chapters. As a modern law regarding domestic and international commercial dispute resolution through arbitration, this Act from its Chapter I to Chapter XIV sequentially states the issues of applicability and commencement of the Arbitration Act, general provisions, arbitration agreement, composition of arbitral tribunal, jurisdiction of arbitral tribunals, conduct of arbitral proceedings, making of arbitral award and termination of proceedings, recourse against arbitral award, enforcement of arbitral awards, recognition and enforcement of certain foreign arbitral awards, appeals, miscellaneous, supplementary provisions, and repeals and savings issue.²¹

A close examination of the whole Arbitration Act of 2001 that is, from introductory to savings clause the following basic topographies are comprehended:

- a. This Act shall be applicable both in case of domestic and international commercial arbitration because in the preamble it has been stated that “*An Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations.*”²² In case of existence of any foreign element in an arbitration agreement then the international commercial arbitration would be applied. In all other case, domestic arbitration would be applicable. The nature of applying jurisdiction by the arbitral tribunal is comparatively flexible than to the UNICITRAL Model Law. Section 17 of Arbitration Act 2001 states “...*unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely –*
 - *whether there is existence of a valid arbitration agreement.*
 - *whether the Arbitral Tribunal is properly constituted;*
 - *whether the arbitration agreement is against the public policy;*
 - *whether the arbitration agreement is incapable of being performed;*
 - and,*
 - *whether the matters have been submitted to arbitration in accordance with the arbitration agreement.”*

²¹ Arbitration Act, 2001 (Bangladesh).

²² *ibid* 1.

So, as per the Arbitration Act of 2001 the parties and arbitral tribunal enjoys more flexibility regarding the issue of jurisdiction.

- b. The dispute at issue must be arisen out of a legal relationship, whether contractual or not, but considered as a commercial dispute under the law in force in Bangladesh because section 2(n) of the Arbitration Act of 2001 has stated that the “*arbitration agreement*” means an agreement by the parties to submit to Arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- c. The parties are free to appoint the number of arbitrators.²³ If the parties fail to fix the number of arbitrators, the tribunal is to consist of three arbitrators.²⁴ Unless otherwise agreed by the parties, where they appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as a chairman of the tribunal.²⁵ The parties may appoint an arbitrator or arbitrators of any nationality and the chairman of the tribunal may be of any nationality if the parties agreed upon it.²⁶ In respect of domestic arbitration the District Judge’s Court, and in respect of international commercial arbitration the High Court Division of the Supreme Court of Bangladesh can intervene with a view to appointing an arbitrator/arbitrators on behalf of the parties as well as of the chairman of the arbitral tribunal within sixty days from the receipt of a party’s application, to facilitate the arbitral process.²⁷ In the case of appointment of a sole arbitrator or third arbitrator in an international commercial arbitration, the Chief Justice or the Judge of the Supreme Court designated by the Chief Justice, as the case may be, may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.²⁸
- d. The Arbitration Act of 2001 follows the doctrine of severability that is partial agreement can be arbitrated if it is enforceable as per Arbitration Act. In that case, it can be considered as separate agreement for the purpose of determining the jurisdiction of the arbitral tribunal,²⁹and arbitral agreement must be referred to the arbitration tribunal as per the mutual consensus of the parties in agreement.
- e. Beside the Arbitration Act, parties can adopt other means like, mediation or

²³ Arbitration Act 2001 (Bangladesh), (n 22) s 1.1.

²⁴ *ibid*, s 11.2.

²⁵ *ibid*, s 11.3.

²⁶ *ibid*, s 12.1.

²⁷ *ibid*, s 12.77.

²⁸ *ibid*, s 12.10.

²⁹ *ibid*, s 18.

conciliation to settle the dispute. As per section 22 of Arbitration Act, *“It shall not be incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute otherwise than by arbitration and with the agreement of all the parties, the arbitral tribunal may use mediation, conciliation or any other procedures at any time during the arbitral proceedings to encourage settlement.*

- f. The parties in an arbitration agreement are free to choose the seat of the arbitration. If the parties fail to do so, the arbitration tribunal after considering the pros and cons and all other relevant circumstances shall fix the same.³⁰
- g. In the absence of the parties’ consensus regarding the use of language in the arbitration proceedings, the tribunal can use any language as it deems fit and proper.³¹
- h. The arbitration tribunal is free to follow rule of evidences or Code of Civil Procedure unless the parties’ come to an agreement to do so for ends of justice.³² Parties in arbitration possess the right to choose any arbitration rules or procedures.
- i. The parties in agreement are free to choose any arbitration rules and legal system of any country regarding the subject matter of a dispute. If the parties in agreement are unable to do so then the tribunal shall follow appropriate rules and procedures for ensuring the justice.³³
- j. In an arbitration tribunal, the parties in the agreement have the right to choose a lawyer or any other representatives who can represent the issues of the parties before the tribunal.³⁴
- k. As per the amendment of the Arbitration Act in 2004 (Act II of 2004), now parties in agreement may seek interim order in the form of injunction or attachment of the subject matter in dispute to the arbitration tribunal or to court, and no appeal shall lie against that interim measures.³⁵
- l. The arbitration tribunal shall have the right to issue summon against any persons for appearing before it,³⁶ and settle the issue quickly, fairly and impartially after giving the parties to present their case in written and orally and appreciating the evidences adduced before it, and finally deciding the

³⁰ *ibid*, s 26.

³¹ *ibid*, s 24.3b.

³² *ibid*.

³³ *ibid*, s 24.3b.

³⁴ *ibid*, s 31.

³⁵ *ibid*, s 21.

³⁶ *ibid*, s 33.

matter by providing an award.³⁷ After having the notice if the parties fail to submit evidences, then the tribunal may operate in-absentia proceeding and make a default judgment on the basis of the earlier evidences adduced before it.³⁸

- m. The arbitration tribunal shall also give its award without undue delay and the award shall have the same effect like the decree in court of law. An award shall be made by the majority of the arbitrators and shall be in writing and signed by the majority number of arbitrators where the tribunal consists of more than one arbitrator.³⁹ The arbitration award can be challenged in the court only on specified grounds.⁴⁰ Section 43 of the Act clearly states that when an award is received by using the fraudulent or corrupt practice, or which is against the incumbent public policy of Bangladesh, or which violates the principles of natural justice, or if the tribunal acts beyond the terms of the submission, and deciding on matters which are legally not possible to arbitrate then the aggrieved party can file petition for setting aside the awards.
- n. The Act makes provision for correction of award if any computational, or clerical, or typographical, or any other errors of a similar nature occurring in the award.⁴¹ In terms of setting aside of the order of the arbitration tribunal, an appeal may be filed to the High Court Division of the Supreme Court of Bangladesh to setting aside the order of the arbitration tribunal or refusing to set aside an award, or refusing to recognize, or enforce any foreign arbitral award.⁴²
- o. If any award is given after following the New York Convention, that is, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, then that award is to be recognized and enforced as if it was passed from the local court of Bangladesh, which was embodied in Section 45 of the Arbitration Act, 2001. Nonetheless, the court may refuse to execute a foreign arbitral award for a certain reasons such as parties incapacity, invalid arbitration agreement, improper representation and proceedings, out of subject matter of arbitration, improper composition of arbitration tribunal, subject matter of arbitration is against the law and public policy specified in Section 46 of the mentioned Act.

³⁷ *ibid*, s 23.

³⁸ *ibid*, s 35(4b).

³⁹ *ibid*, s 38.

⁴⁰ *ibid*, s 39.2.

⁴¹ *ibid*.

⁴² *ibid*, ss 44 and 48.

5. The composition of arbitration tribunal and the process of arbitration

In Bangladesh, there are two types of justice delivery mechanism for ensuring justice. Generally, for dispensation of civil justice (including commercial arbitration) the Code of Civil Procedure (CPC) of 1908 is applied, and for dispensation of criminal justice the Code of Criminal Procedure (CrPC) is applied. Here, the civil suits are administered according to the provisions of the CPC (including the enforcement mechanism of commercial arbitration awards) through traditional court proceedings. Unfortunately, there are no specialized or separate arbitration tribunals available in Bangladesh to arbitrate domestic and international commercial arbitration. Even, till today, there are no arbitration rules framed by the government of Bangladesh for commencing the arbitration proceedings according to the Arbitration Act, 2001. Here, the parties are at liberty to follow and adopt their own rules or choose any internationally recognized rules for settlement of dispute regarding arbitral agreement. In fact, the Arbitration Act, 2001 is a synchronized mechanism that is, combined with the private mechanism and certain intervention of court (court-supported arbitration).

In case of private arbitration, the parties are at liberty to choose any arbitrator(s) to settle their dispute. However, in certain cases of private arbitration, the Arbitration Act, 2001 considers the support of the court, especially, dealing of the interim measures,⁴³ appointment of arbitrators,⁴⁴ challenges of rules and procedure,⁴⁵ termination of arbitrator's mandate,⁴⁶ competence of arbitration tribunal to rule on its own jurisdiction,⁴⁷ assistance of the court regarding taking evidence,⁴⁸ setting aside arbitral award,⁴⁹ and recognition and enforcement of arbitral awards.⁵⁰

Generally, if there is any arbitration clause in the arbitration agreement, then the parties may form private arbitration tribunal comprising retired justices of the High Court Division, or the Appellate Division to settle the issue. If either of the parties aggrieve from the mentioned award, then the aggrieved party may file application for setting aside the award. The Chief Justice of Bangladesh constitutes one or two benches of the High Court Division to try the cases regarding international commercial arbitration. In case of domestic arbitration, the District Judge of Dhaka tries the case and settles the arbitral agreement according to the Arbitration Act 2001.

⁴³ *ibid*, s 7.

⁴⁴ *ibid*, s 12.

⁴⁵ *ibid*, s 14.

⁴⁶ *ibid*, s 15.

⁴⁷ *ibid*, s 17.

⁴⁸ *ibid*, s 33.

⁴⁹ *ibid*, s 42.

⁵⁰ *ibid*, ss 44 and 45.

The parties in arbitration agreement fix the number of arbitrator(s) for an arbitral proceeding, and if the parties fail to come to a common consensus as to the number of arbitrator then each party will appoint one arbitrator, and then the two arbitrators (from both parties) shall appoint the third arbitrator as the chairman of the arbitration tribunal.⁵¹ Unless otherwise agreed by the parties, the arbitrator can be the citizen of any country. In case, if the parties fail to appoint the arbitrator within one month after receiving the request from either of the parties then the party must apply to the District Judge of Dhaka for appointing such arbitrator if the dispute is domestic in nature.

On the other hand, if the dispute relates to international commercial arbitration then the application for appointment of arbitrator(s) must be made to the Chief Justice of Bangladesh. In addition, if two arbitrators (from both the parties) fail to come to a consensus to appoint a third arbitrator, then again, in cases of international commercial arbitration the third arbitrator will be appointed by the Chief Justice of Bangladesh, or by his/her nominated judge of the High Court Division of the Supreme Court of Bangladesh. In case of domestic commercial arbitration, then the issue shall be settled by the District Judge of Dhaka. In both cases, the appointment must be made completed within 60 days from the date of receipt of the application in this regard. So, it can be said that the composition of the arbitration tribunal is mainly depends on the mutual and common consensus of the parties in agreement.

6. Existing legal and procedural drawbacks in the arbitration mechanisms in Bangladesh

Although the Arbitration Act 2001 has been enacted to resolve the problems in earlier Acts and to ensure access to justice in the domestic and international commercial arbitration, it not free from shortcomings. Already eighteen years have been passed since its enactment; nevertheless, it seems that arbitrations in Bangladesh are still struggling with following issues:

6.1 No Specialized Arbitration Tribunal/Court

At present, there are no specialized arbitration tribunals in Bangladesh. There is an Energy Regulatory Commission, which performs just like the arbitration tribunal to adjudicate disputes relating to energy. Moreover, the Arbitration Act 2001 does not authorize any other District Judge Courts in Bangladesh, except the District Judge Court of Dhaka to arbitrate in domestic arbitral agreement. Even there is no specialized arbitration court for trying commercial disputes in Bangladesh. Here, parties are free to file suits in formal courts, unless the parties come to an agreement to determine the disputes through arbitration.

⁵¹ *ibid*, s 11.

6.2 No Mandatory Arbitration Provision

Like the United States of America, in Bangladesh, currently, there is no mandatory arbitration provision in the laws of Bangladesh for settlement of dispute through arbitration. Here, when the parties to an agreement insert an arbitration clause in their agreement, then it is considered as mandatory for the parties to settle the dispute through arbitration. In that case, the court shall hold the dispute instituted in formal court system and shall send the parties for arbitration.⁵² According to Section 89B of the CPC, the parties to a suit can apply at any stage of the proceedings to the court for withdrawal of the suit on the ground that they shall refer the dispute(s) for settlement through arbitration.

6.3 No Central Management System

At present, in Bangladesh there is no central management system of the domestic and international commercial arbitration. Now, the parties of an arbitration agreement administer and manage their arbitration proceedings as per their choices. Whenever any arbitration award is challenged, then the issue comes to in the official record.

6.4 Lack of Rules for Arbitration Proceedings

After enactment of the Arbitration Act 2001, already eighteen years have been passed. Unfortunately, till today, the much expected arbitration rules are not been framed in Bangladesh. Here, the parties are at liberty to follow and adopt their own rules, or resort to any internationally recognized rules such SIAC, or HIAC, or ICC rules for arbitration. As a private institute, in Bangladesh, the Bangladesh International Arbitration Council (BIAC) has developed comprehensive rules of arbitration for settlement of disputes through arbitration. Any interested parties may select the BIAC rules as their preferred rules while writing the arbitration clause in the agreement.

6.5 Lack of Special Procedure to Dispose and Enforce A Arbitral Award

Currently, if any award is challenged in the formal court system, the rules of civil procedure will apply. There are no special rules or procedures to enforce an international or domestic arbitral awards in Bangladesh. So, parties have to assume rules of civil procedure cum civil justice delivery mechanism to enforce the arbitral awards in Bangladesh. As the civil justice delivery method is already overburdened with mounting arrears of cases, so using the civil rules and procedures for enforcing the arbitration awards would be an additional burden to the civil justice system in Bangladesh instead of ensuring access to justice.

⁵² *ibid*, ss. 7, 10.

6.6 Delay of Arbitration Proceedings

In fact, at present, there is no stipulated time to enforce the arbitration award in Bangladesh. For this reason, the enforcement mechanism of the arbitration award is very time-consuming. Moreover, for enforcing the award, parties have to adopt the civil court, which is already overburdened with thousands of cases. The delays and cost in the civil justice delivery mechanism in Bangladesh is the most vex and nerve-racking problem, which in fact, deters access to justice of the parties.

6.7 Lack of Definition of Public Policy

Currently, there is no ‘public policy’ definition in the Arbitration Act 2001. Due to this deficiency any aggrieved party can file application for setting aside the arbitration award which goes against the interest of public. Sometimes, it creates confusion to the courts regarding its interpretation. For example, an award may not be enforced if it is contrary to the public policy in Bangladesh. Due to this procedural requirement, the parties in an agreement need to go to the very civil justice delivery mechanism, which is already overburdened with delays.

6.8 Lack of Time Frame for Arbitration Procedure

The current Arbitration Act 2001 lacks the speedy arbitration procedures, which in fact, hinders the access to justice to the parties in arbitration proceedings. Due to this statutory limitation, the parties in arbitration proceedings always seek for a cost effective and easy accessible mechanism to settle their disputes within a shortest period of time.

6.9 Lack of Time Frame for Appointment of Arbitrator

Parties’ discontent or disagreement regarding appointment of arbitrator is one of the most common problems in Bangladesh. This may be due to their ill-intention to make the process delay, or lack of knowledge regarding procedure of arbitration. As a result, the innocent party in domestic arbitration has to move to the District Judge Court, and in international commercial arbitration, has to move to the Chief Justice of Bangladesh for the appointment of the arbitrator. Due to lack of specialized arbitration court, this typically takes a long time in Bangladesh, and as a result, the overall access to justice in the arbitration process gets delayed and hindered.

6.10 Limitation of The Legal Provisions (The Principle of Territoriality)

The Arbitration Act 2001 follows the principle of territoriality regarding enforcement of the arbitral award rather than the principle of *lex arbitri* under which the award was rendered. According to the principle of territoriality and as per Section 3 of the Arbitration Act 2001, the arbitration which takes place within the territory of Bangladesh falls within the purview of the clause. On

the other hand, an international commercial arbitration takes place beyond the purview of the local jurisdiction of Bangladesh shall not come within the scope of Arbitration Act 2001. Moreover, the word of ‘place... in Bangladesh’ sometimes causes huge confusion as to its meaning and interpretation. In fact, this limitation of interpretation restricts the power of the court to issue interim order where the arbitration takes place outside the territorial jurisdiction of Bangladesh. In addition, it creates barrier to the aggrieved party to access to justice in the Arbitration proceeding of Bangladesh.

6.11 Interim Order

As per Section 7A of the Arbitration Act 2001, the arbitral tribunal, as an interim measure, may issue interim order in necessary and proper circumstances within the local jurisdiction of Bangladesh. Nevertheless, it does not provide any specific guidelines, or limitations regarding issuing of the same. Regarding this interim measure, the judiciary of Bangladesh has pronounced contradictory decisions. In *HRC Shipping Ltd v. MV X-Press Manashu*, 58 DLR 185, the honorable High Court Division of the Supreme Court of Bangladesh held that the court can issue interim order where the seat of arbitration is outside the territory of Bangladesh. Conversely, in *STX Corporation Ltd v. Meghna Group of Industries Limited*, 64 DLR 550, the honorable High Court Division held that the provision of interim measure of this Act is not applicable to a foreign arbitration where the seat of arbitration is beyond the local jurisdiction of Bangladesh.

In support of the mentioned literary interpretation, the Court mainly relied on the decision given by the Appellate Division of the Supreme Court of Bangladesh in *Unicol Bangladesh v Maxwell*, 56 DLR (AD) p.166, and p.172, where the apex Court of Bangladesh held that according to the spirit of the Section 3(1) of the Arbitration Act, 2001, the application for interim measure is limited to the arbitration proceeding that seat of arbitration is within the boundary of Bangladesh. Recently the honorable High Court Division has reconsidered its earlier decision like the decision of the apex Court (Appellate Division of Bangladesh) and held in *Project Builders Ltd (PBL) v. China National Technical Import and Export Corporation and others reported*, 69 DLR 290, there is no scope to deviate from the provisions of Section 3 of the Arbitration Act of 2001. As a result, unless any revised order issued by the Appellate Division of the Supreme Court of Bangladesh, or any amendment in the legislation is done regarding the interim measures, currently there is no scope for the District Judge Court of Dhaka, and the High Court Division of the Bangladesh Supreme Court to issue the interim order in a foreign-seated arbitration proceeding.

6.12 More Requirements than Model Law

Although the Arbitration Act 2001 was enacted in Bangladesh with a vision to keep pace with the modern trends in international commercial arbitration, there are some aspects where the Act does not follow the requirements of the Model Law, or New York Convention. As for example, at present, if any applicant wants to file an application under this Act to execute a foreign arbitral award, then the applicant has to submit additional documents like, the original or authenticated copy of the arbitral award, an original or certified copy of the arbitration agreement and duly certified translations of such documents to ensure that the award is a foreign award. In fact, the ambit of the Arbitration Act 2001 is much narrower than either the Model Law or the New York Convention.

7. Plausible Recommendations for Resolving the Existing Drawbacks in the Arbitration Mechanisms in Bangladesh

As a rapidly growing economy and a potential destination for foreign investment, Bangladesh has already taken a right approach through enacting the Arbitration Act of 2001. Though the history of arbitration is not new in the legal system of Bangladesh, but in practical sense, the scope of application of arbitration mechanism is comparatively very limited like other developed nations. So, it is the right time to enhance use of arbitration mechanism as an alternative method for settlement of disputes beyond the traditional court adjudication process.

At present, in Bangladesh, there are two types of justice delivery mechanism: one is civil justice delivery system, and another one is criminal justice delivery system. In both cases it uses procedural laws for dispensation of justice through the litigation procedures. There is so separate or individual mechanism such as arbitration to settle the dispute beyond the jurisdiction of courts. Though in addition to the litigation procedures, there are village courts and the mediation system for delivery of justice, but those are subservient to the court proceedings. For this reasons, the present Judiciary of Bangladesh is caught in a vicious cycle of delays and backlog of cases.⁵³ Access for the poor, vulnerable and underprivileged to formal justice delivery system in Bangladesh is limited by a huge logjam of cases, and high litigation costs. In this case, a paradigm shifting approach may be helpful to get rid of from this problem. The Government of Bangladesh may enact new arbitration law, like the Uniform Arbitration Act in the USA, or may modify the existing Arbitration Act as a paradigm shifting approach to ensure more access to justice to the parties in agreement.

⁵³ M Shah Alam, 'A possible way out of backlog in our judiciary' *The Daily Star* (Dhaka, 16 April 2000).

Besides the mentioned paradigm shifting approach there needs to solve the existing drawbacks in the Arbitration Act 2001 and the arbitral procedures in Bangladesh to ensure access to justice to the parties in arbitration. For resolving the current barriers within the arbitration mechanisms in Bangladesh, the following plausible things may be worth considering:

- a. At present, there are no arbitration rules of procedure for enforcing the domestic and international commercial arbitral award. Currently, if any award is challenged in the formal court system, the rules of civil procedure will apply. There are no special rules or procedures to enforce an international or domestic commercial arbitral awards in Bangladesh. The legislature should immediately enact the mentioned rules of procedure for ensuring access to justice in the Arbitration Act and arbitral tribunal in Bangladesh.
- b. Currently, there is no specified or specialized arbitration tribunal, or fast-track arbitration court to handle the disputes relating to arbitration. In addition, the dispensation of other types of cases, the same civil courts also perform the functions as an arbitration tribunal. This tendency creates extra burden to the concern courts and delays the whole justice delivery mechanism. So, immediately sufficient separate and specialized courts should be established both in the subordinate courts and in the Supreme Court of Bangladesh.
- c. Interestingly the Arbitration Act 2001 allows the High Court Division (HCD) to set aside any arbitral award held in Bangladesh without authorizing any enforcement mechanism (though the High Court Division inherently possess this power without any application, nevertheless the Arbitration Act 2001 does not authorize any enforcement power to the HCD). On the other hand, the District Judge's Court of Dhaka possesses the authority of recognition and enforcement of arbitral award (both domestic and foreign arbitral awards). This situation sometimes creates confusion to the District Judge's Court regarding enforcement mechanism because the opportunist party sometimes adopt the process of setting aside of arbitral award to the HCD intentionally to delay the whole arbitration process. So, both the HCD and also the private arbitral tribunal should have the power of enforcement of arbitral award. This procedural deficiency should be resolved immediately to ensure parties' access to justice in the arbitration mechanism in Bangladesh.
- d. Presently, though there are few private arbitration centers are established in Bangladesh, especially BIAC, nonetheless, they have no enforcement mechanism of arbitral award. If any arbitral award is issued from this center then for enforcing that award the winning/aggrieved party need to file application before the civil court, that is either the District Judge's Court of Dhaka, or the High Court Division of the Supreme Court of Bangladesh. In this circumstance, to keep pace with the Model Law, the private arbitral tribunal should also hold the same powers like the mentioned courts. In the same way,

the interim orders which were passed by the arbitral tribunal(s) should be enforceable as if they were issued for the said purposes from the mentioned courts. So, for improving the public confidence regarding arbitration process and existing conditions of the civil justice delivery system, and ultimately for ensuring access to justice of the parties in arbitration agreement, the mentioned drawbacks should be solved immediately through amending the Arbitration Act 2001.

- e. Now, there is no specified time limit in the Arbitration Act 2001 for enforcing the arbitral award. For this reason, the enforcement mechanism of the arbitration award is costly and time-consuming. Moreover, for enforcing the award, parties have to assume the civil court, which is already overburdened with 3.3 million cases.⁵⁴ So, definite time frame should be incorporated within the Arbitration Act 2001 to ensure access to fair justice to the parties in arbitration.
- f. Currently, there is no mandatory arbitration provision in the laws of Bangladesh for settlement of dispute through arbitration. For incorporating the mandatory arbitration procedure like USA, the parliament should immediately evaluate the mandatory arbitration provision in the context of Bangladesh, and if appropriate, then modify the Arbitration Act 2001 in this regard.
- g. At present, in Bangladesh, there is no central management system of the domestic or international commercial arbitration. So, for ensuring access to fair justice in the arbitral tribunal and the Arbitration Act 2001, there needs to set up a central data-based and management system both in terms of domestic and international commercial arbitration.
- h. Currently there is no ‘public policy’ definition in the Arbitration Act 2001. Due to this deficiency the parties, the arbitral tribunal, and the courts sometimes experience a serious confusion. So, the Government should introduce a set of principles, which would be considered as the principle of public policy through amending the current Arbitration Act 2001.
- i. At present, parties’ most often show their discontent or disagreement regarding appointment of arbitrator, and the issue of appointment ultimately goes to the civil court due to lack of special arbitral tribunal, and which consumes a huge time to select and appointment of an arbitrator. So, the selection of arbitrator through District Judge’s Court, there should have definite time frame to ensure more access to justice.

⁵⁴ UNB. ‘Law minister: Over 3.3m cases pending in courts’ Dhaka Tribune (Online, January 16, 2018) < <https://www.dhakatribune.com/bangladesh/court/2018/01/16/law-minister-3-3m-cases-pending-courts>> Accessed 07 April 2019.

- j. As per Section 7A of the Arbitration Act 2001, the arbitral tribunal has sufficient powers to issue interim order in necessary and proper circumstances. Nevertheless, it does not provide any specific guidelines, or limitations regarding issuing of the same. Regarding this interim measure, the judiciary of Bangladesh has pronounced contradictory decisions. So, unless getting any revised order from the apex court of Bangladesh, or any amendment in the legislation is done regarding the interim measures, presently, there is no scope for the Bangladeshi Courts or arbitral tribunal to issue the interim order in a foreign-seated arbitration proceeding. Therefore, immediate action is required in this regard for ensuring access to justice in the arbitration mechanism in Bangladesh.
- k. The ambit of the Arbitration Act 2001 is much narrower than either the Model Law or the New York Convention because at present, if any applicant wants to file an application under this Act to execute a foreign seated arbitral award, then the applicant has to submit additional documents such as the original or authenticated copy of the arbitral award, an original or certified copy of the arbitration agreement and duly certified translations of such documents to ensure that the award is a foreign award. This process sometimes delays the enforcement mechanism. The legislature may consider this issue after sufficiently scrutinizing the pros and cons of the stakeholder's interest.
- l. To ensure the greater efficiency and effectiveness in the existing arbitration procedure in Bangladesh, the views and perception of the Bar, Benches, and other stakeholders should be more focused and gripping regarding the international standard, values, norms and principles while settlement of dispute through arbitration. Moreover, during interpretation of arbitration clause, the concern courts should be more conscious about the spirit of Arbitration Act 2001 to keep pace with the global standard of arbitration. In this regard, not only the judiciary but also the other stakeholders should change their traditional mind-set of court adjudication.
- m. To enhance the efficiency of the arbitration procedures in Bangladesh, the Government and other related bodies should come forward to promote the arbitration mechanism as a speedy, fair and easy accessible ADR mechanism. In this regards, some awareness programs like, training, seminar, symposium, and education regarding arbitration may be significantly helpful to the stakeholders.
- n. Finally, as a modern law, the Arbitration Act 2001 would be an effective and efficient mechanism to settle the disputes through arbitration when all the mentioned stakeholders would do their jobs honestly and sincerely for the ultimate wellbeing of the disputants and their access to fair justice in the arbitration mechanism in Bangladesh.

8. Conclusion

As Bangladesh is a potential destination for foreign investment, so, for ensuring access to justice in the arbitration procedure in Bangladesh, now it is the perfect time to revise the Arbitration Act for resolving the existing challenges within the mechanism of arbitration. Of course, it's a matter of appreciation that Bangladesh has already made a significant development in the arena of arbitration through enacting the Arbitration Act, 2001; nonetheless it is not sufficient only to enact a law on arbitration. It's effective and efficient application to ensure access to justice in the domestic and international commercial arbitration process is much needed than its enactment. For overcoming the existing challenges and for ensuring access to justice in the Arbitration Act 2001 and the arbitral tribunal of Bangladesh, the Government of Bangladesh should incorporate the paradigm shifting approach along with other plausible recommendations in a coordinating way. So, the authority of Bangladesh, especially the Ministry of Law, Justice and Parliamentary Affairs should consider arbitration as a model approach in addition to the existing traditional dispute resolution mechanism to make the justice delivery system more meaningful, fair and easy accessible to all the stakeholders. In this regard, the every organs of the Government of Bangladesh along with other related stakeholders should come forward with coordinating mind to ensure access to fair justice in the whole fabrics of arbitration in Bangladesh. Moreover, for making the Arbitration Act 2001 and arbitral tribunal more effective and efficient, if needed, a real-world experience may be gathered from the existing arbitration mechanism of the USA. Finally, an advance research may also be done on the issues of cost and delays in the arbitration procedures in Bangladesh for making the arbitration mechanism as an efficient one, which in fact, would be beneficial to the people at large.