Power Sector Related Arbitration in Bangladesh

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Globally Autonomous Theory (Sui Juris) is gaining prominence for arbitration, which basically implies that Arbitration is a private procedure mostly based on agreement between the parties, devoid of any intervention from the national law or legal system. Closely supported by the International Community due to strong business demands, different International Conventions has been adopted over the years and Model law has been issued and subsequently ratified in such a manner that gradually arbitration became partly delocalized and a matter of international law to a large extent. In practice however, the national law has no major part to play in the arbitration proceedings. In the recent past, cases like Société Hilmarton v Société O.T.V (1995), Himpurna California Energy Ltd. V. P.T. (Persero) Perusahaan Listruik Negara (1999), Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (2001) have demonstrated Arbitral Tribunals initiating bold measures to deny application of national law of the seats of arbitration. Moreover, as seen in Hilmarton, the award had been enforced in a different country altogether wherein the losing party had assets, hence effectively, not only defying the national law but also national enforcement procedure of the seat. International laws and procedure may soon replace the supporting roles now played by local court with some kind of uniform system.

The latest trend suggests there is no scope for binding arbitration by a Tribunal composed by a statutory commission, who will finally adjudicate a dispute between parties. Besides, the law cannot compel the parties to a final arbitration award which is composed of arbitrators, who are not selected by the parties themselves, as this is contrary to the very concept of Arbitration.

In terms of energy related arbitration, the situation is bit more complex in Bangladesh. As per Bangladesh Energy Regulatory Act 2003, Bangladesh Energy Regulatory Commission (BERC) framed a regulation, BERC Regulation No. 1/2015, wherein, regulation 12 states that,

"An Arbitral Tribunal shall consist of such odd number of arbitrators as may be determined by the Commission from time to time. Where the Commission appoints more than one arbitrator, one of the arbitrators shall be designated as the Chairman of the Tribunal."

It's clearly identifying the tribunal as "Arbitral Tribunal", even though Arbitrators are appointed by the commission without the need for any consultation with parties. This form of adjudication, at times, is internationally referred to as "adjudication", where the parties enter into a non-binding adjudication process as per the national law requirements. In such processes, statutory institutions try to amicably resolve the disputes. Upon the failure of such procedure, parties are at liberty to commence contractual and binding arbitration proceedings by appointing arbitrator as per their agreement.

In Bangladesh, the Arbitration Act 2001, section 12 clearly defines "the parties are free to agree on procedure for appointing arbitrators/arbitrator." On the contrary, section 40 of BERC Act of 2003 states "Notwithstanding anything contained in the Arbitration Act, 2001 (Act No. 1 of 2001) or any other Act, any dispute arising between the licencees, or licencees and consumers, shall be referred to the Commission for its settlement....." Furthermore section 40(5) states, "Award or order given by the Commission shall be deemed to be final." There is nothing wrong in such statutory initiatives in resolving disputes by appointing arbitrators of their own choice. However, such initiatives are not arbitration but mere adjudication.

It cannot be binding and final as this will be leaving no scope for the parties to refer the matter to a properly constituted Arbitral Tribunal. This undermines the concept of arbitration, fair trial and also is in restraint of trade and business.

Since jurisdiction of BERC is wide covering almost all power and energy related companies, for being licensee, therefore amendment of such laws in this regard is pertinently required.

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" Not only is mediation swift, cheap and efficacious, it is a far less scarring process than court action. At the end of mediation the parties might still trade with each other again and even remain on friendly terms. "