RAHMAN'S LAW in FOCUS
Banking, Finance, Corporate, Commercial, Property & Constitutional Legal Issues

ARTICLE:

LEGAL ASPECTS OF SUPPLY CHAIN CONTRACTS DURING COVID-19 PANDEMIC**

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Our supply chain is in many respectsdriven by banks. Majority of commercials mangers of different business houses heavily rely on banks for supply chain solution.Due to the prevailing culture of over dependency and lack of awareness of the commercial mangers many important aspect so of the commercials contracts are not really negotiated as LC is considered as the most important documents. COVID-19 pandemic clearly exposed various weaknesses of prevailing supply chain practice.

It is observed that many supply chain and commercial contract cancellation, delay in taking delivery notifications etc werein general handled very poorly. If any settlement reached, amendment of LC was the main objective of such negotations.

On the other hand, importers when they weresourcing from local or foreign sellers, are hardly relying on the power of contractsas signed e.g. sales contract/Proforma Invoices. This is exposing them to several risks.

Whenlocal exporters are at the receiving end of such cancellation, delay notification, they hardly relied on the terms of the contract and/or questioned the legality of such actions. Contractual terms hardly played any role at the negotiation table etc. In many cases knowingly or unknowingly many exporters simply waived their lawful rights. It is unfortunate that rights are waived accidentally and unconsciously.

Finally, many contracts were settled mutually by email without putting it in wring and without inserting an appropriate dispute resolution clause etc.

The problem associated with over reliance on banking system for supply chain solution can be illustrated below:

- In case of discrepancy where buyer deny waiving discrepancy, Bank cannot rescue the parties from the deadlock. It is only dispute resolution clause in the Profoma invoice/sales contact that plays the critical role.
- In case a party wants to exercise force majeure rights and delay in performing its contractual obligations, while LC or other parallel contact isstill continuing and cannot be altered, it is the contract between the buyer and seller which provides solution to deal with such parallel contracts.

Year 2020Volume 1

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The Uniform Customs and Practice for Documentary Credits (UCP), the International Standby Practices, Uniform Rules for Demand Guarantees etc., all known as best practices, never intended to replace the main contractual terms between the buyer and seller. Hence it intentionally does not deal many issues which should be covered in the main contacts. Obligation which are by nature applicable for buyers and sellers are not dealt in those best practices. For example, UCP does not provide any dispute resolution clause or mechanism as it is by nature dependent upon the main contact and main contract supposed to have a suitable dispute resolution clause.

The business houses are required to conduct due diligence and review their contracts to identify the contracts which are likely to be most vulnerable due to the impact of COVID-19; and determine what rights and remedies are available. Few important terms and conditions like event of default, force majeure, and frustration, change in law/illegality, material adverse change, suspension of performance/termination, notification obligations, mitigation obligation, transfer of title and risk, exclusivity, consequence of insolvency, etc. plays a critical role and may be inserted in suitable cases.

Besides, obligations under parallel contact like LC, Guarantees/indemnities/performance bonds are also required to be aligned with main contract.

In case of negotiation/variation of contract is required, it is important thatthings should be put in writing. Much importance is required to be given on ensuring that anyvariation of contract is valid and binding and appropriate dispute resolution clauses are inserted.

Appropriate dispute resolution mechanism may vary from one contract to another depending on the location of the parties, countries involved, cost and benefits associated with it. Generally, cross-border agreements are being signed with popular arbitration clauses of ICC, SIAC, and HKIAC etc. where the sit for arbitration is commonly outside Bangladesh. None of the above institutions are created by treaties. On the other hand, the arbitral institutions like ICSID and SAARCO are the creation of treaties. While the resolution of disputes mechanism will be more or less same for both types of institutions, once the award is passed, the arbitral institutions like ICSID and SAARCO provides additional enforcement mechanism which are not available to the former institutions.

For example, Asian Association for Regional Co-operation (SAARC), comprising the Member States Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka, created a separate arbitration institution by Agreement named SAARC Arbitration Council (SARCO) to resolve disputes allowing access to both member states and individual/corporation.

Under SARCO Rules of Procedure if at least one of the parties is a national of any of the member states of SAARC and a party to the arbitration agreement, the party can choose SARCO as a forum for dispute resolution with or without involving state. In suitable cases, parties may choose SARCO rule to incorporate in the agreement. This will not only expediate the dispute resolution process but also enable the parties to increase their chances of recovery by many folds.

The whole process of constituting an arbitral tribunal (both ad-hoc and institutional) and of passing an award by the tribunal so formed can be completed within a year. On the other hand, getting a first-hand judgment from ordinary civil court for the same matter may take on average 5 to 7 years. By reducing the entire fact finding and trial process by couple of years, the partiesput themselves in a much stronger position.

While execution process remains the same for both judgment or award, under arbitration mechanism, it is possible that the debtor's property may be attached and sold in auction and/or the court may issue a warrant of arrest for civil imprisonment in execution proceeding within one year of passing of an award. Not only that, under SARCO mechanism it is possible that the government machineries may be engaged through diplomatic channel to put pressure on debtor to comply with the award. This option of engaging diplomatic channel is not available for non-treaty-based arbitration e.g. SIAC, HKIAC arbitration.

There are local arbitration institution like BIAC in Bangladesh, Bhutan ADRC in Bhutan, CIICA in Pakistan, ICA of India, SLNAC in Sri Lanka, NEPCA in Nepal and so on. In fit cases inserting a national arbitration clause of such institutions may be more useful compared to treaty-based institutions or institutions like ICC, SIAC which are more of international nature.

Similarly, if one or more of the parties are from non-SAARC nationality, inserting the SARCO clause may not be suitable. Adding SARCO arbitration clause could be the best possible alternative in case parties are from one or more of the SAAARC countries.

Therefore, the need for strengthening contact by inserting suitable clause like an appropriate dispute resolution clause, avoiding exposure to unknown legal risks, and remaining persuasive at the negotiation table, cannot be underestimated.

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** The article was published in the 9th Edition Newsletter of **SARCO**.