Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

International Arbitration 2024

Definitive global law guides offering comparative analysis from top-ranked lawyers

Bangladesh: Trends and Developments

Mohammed Forrukh Rahman,
Ms Kamrunnaher and Mr Salauddin Kader (Hrid)
Rahman's Chambers

Trends and Developments

Contributed by:
Mohammed Forrukh Rahman, Ms Kamrunnaher and Mr Salauddin Kader (Hrid)
Rahman's Chambers

Rahman's Chambers is a leading international arbitration law firm with a global reach. With a strong focus on shipping, infrastructure construction, energy, aviation, and international trade, it provides comprehensive legal counsel and representation to clients worldwide. Its expertise extends beyond traditional cross-border disputes, encompassing both institutional and ad hoc arbitration matters in jurisdictions outside Bangladesh. Its team comprises of seasoned international arbitration practitioners and distinguished arbitrators, providing deep expertise in complex legal frameworks and procedures. The firm boasts extensive experience in shipping, international trade, and energy disputes, handling complex matters under various arbitration rules including LMAA, GMAA, SIAC, ICC, BIAC and ICA. Beyond representing clients in international forums, it provides comprehensive support in Bangladesh, including enforcing foreign awards and securing interim relief.

Authors

Mohammed Forrukh Rahman is a leading dispute resolution expert at Rahman's Chambers with a distinguished career. Admitted to Lincoln's Inn and the Bangladesh Supreme Court, Appellate Division, he possesses deep legal expertise. Renowned as an arbitrator and international arbitration practitioner, his practice covers arbitration, litigation, and mediation. Specialising in shipping, aviation, and commercial disputes, he handles complex cross-border matters involving international law, environment, IP and IT. His expertise extends to construction, energy, trade, customs, and company law disputes. Memberships in esteemed arbitration institutes, including the ICC Commission and his role at the SAARC Arbitration Council solidify his leadership in the field.

Ms Kamrunnaher is a seasoned arbitration specialist at Rahman's Chambers. Her extensive experience at Nishimura & Asahi, Japan, equips her with a global perspective on complex commercial disputes. As an Advocate of the Supreme Court of Bangladesh, she excels in providing strategic support for international arbitration cases. Her expertise lies in conducting in-depth legal research, crafting compelling arguments, and effectively managing case logistics. Her ability to navigate intricate legal challenges makes her a valuable asset to arbitration teams.

Contributed by: Mohammed Forrukh Rahman, Ms Kamrunnaher and Mr Salauddin Kader (Hrid), **Rahman's Chambers**

Mr Salauddin Kader (Hrid) is a dedicated legal professional with a focus on international trade and taxation law. As a member of the international and taxes and finance department at Rahman's Chambers, he contributes to the firm's practice by supporting due diligence processes and handles customs, VAT, and tax-related matters. His knowledge of international trade agreements, including EU GSP, WTO, and PTAs, provides valuable insights for the team. His enthusiasm and commitment to understanding complex legal frameworks make him a promising asset to the firm's international arbitration practice.

Rahman's Chambers

Suite 5B (4th Floor)
Ataturk Tower
22, Kemal Ataturk Avenue
Banani Commercial Area
Dhaka-1213
Bangladesh

Tel: +88 096 786 62666
Email: info@rahmansc.com
Web: www.rahmansc.com

Contributed by: Mohammed Forrukh Rahman, Ms Kamrunnaher and Mr Salauddin Kader (Hrid), **Rahman's Chambers**

Introduction

Bangladesh is experiencing rapid economic growth fuelled by sectors like garments, remittances and agriculture. Investments in infrastructure and the rise of the digital economy are transforming the business landscape. The country's young population presents both opportunities and challenges, with urbanisation and a growing middle class shaping consumer trends. Despite persistent challenges of climate change vulnerability and income inequality, Bangladesh has achieved robust economic growth and increasingly participates in regional and global cooperation.

Bangladesh has made significant strides in establishing itself as a favourable jurisdiction for international commercial arbitration. The enactment of the Arbitration Act, 2001 (the "Act") aligned with the United Nations Commission on International Trade Law (UNCITRAL) Model Law, marked a pivotal moment in the country's legal landscape. This legislation introduced modern arbitration principles, promoting party autonomy, minimal judicial intervention, and efficient dispute resolution.

While the Act provides a solid foundation, the international arbitration landscape in Bangladesh is dynamic and evolving. This contribution explores the key trends, challenges, and opportunities shaping the country's arbitration landscape.

Regulatory Regime

Bangladesh's regulatory framework for international commercial arbitration is primarily governed by the Act aligned with the UNCITRAL Model Law. The Act provides the overarching legal framework for arbitral proceedings, emphasising party autonomy, minimal judicial intervention, and efficient dispute resolution.

The High Court Division of the Supreme Court is the primary judicial authority overseeing arbitration in Bangladesh. A dedicated single bench handles a wide range of arbitration-related matters to support the arbitration process, including determining the arbitrability of disputes, resolving jurisdictional issues, appointing or replacing arbitrators, addressing fee disputes, granting interim relief and annulling awards. In contrast, the District Courts are responsible for enforcing final arbitral awards.

Ad Hoc Arbitration

Ad hoc arbitration in Bangladesh is governed by the Act. It offers flexibility as parties control the process and select arbitrators and procedures. While cost-effective, some delays may arise from High Court intervention in arbitrator appointment. The UNCITRAL Rules are commonly adopted, with the Permanent Court of Arbitration (PCA) the default appointing authority. Parties can also designate alternative authorities, such as the Bangladesh International Arbitration Centre (BIAC) for the purpose of appointing arbitrators, if needed.

Statutory Arbitration

Bangladesh law mandates arbitration in both the real estate and power and energy sectors. While the Act governs the former, the Bangladesh Energy Regulatory Commission (BERC) oversees the latter. This dual regulatory framework has led to uncertainties about the precedence of contractual arbitration clauses over statutory mandates.

A recent landmark case clarified this issue in the context of the power sector. The Supreme Court decisively ruled that a contractually agreed-upon arbitration clause under the International Chamber of Commerce (ICC) rules superseded BERC's jurisdiction. This decision established a

crucial precedent, affirming the primacy of contractual arbitration agreements over statutory mandates.

Institutional Arbitration

International contracts commonly incorporate arbitration clauses referencing established institutions like ICC, the Singapore International Arbitration Centre (SIAC), UNCITRAL or the International Centre for Settlement of Investment Disputes (ICSID). By selecting these institutions, parties prioritise predictability and minimise procedural delays often associated with ad hoc arbitration.

Government contracts often impose rigid dispute resolution mechanisms, typically mandating arbitration through predetermined channels such as ICC, SIAC, UNCITRAL or ICSID. Unlike commercial agreements, which allow for greater flexibility in selecting dispute resolution methods, including multi-tiered approaches like mediation or dispute resolution boards (DRBs), few government contracts prioritise standardised processes. This rigidity is often attributed to public interest, risk management and policy considerations.

Multi-tiered dispute resolution mechanisms, such as DRBs followed by arbitration, or mediation proceeding arbitration, are increasingly common.

Arbitration Under Treaty

Bangladesh is demonstrating growing sophistication in navigating international frameworks. A noteworthy example is the UN Convention on the Law of the Sea (UNCLOS). This comprehensive legal framework for ocean governance includes provisions for dispute resolution through the International Tribunal for the Law of the Sea. Bangladesh has successfully utilised this mechanism to resolve maritime boundary disputes with both India and Myanmar. The arbitration with India was conducted under the auspices of the PCA, while the dispute with Myanmar was adjudicated by the International Tribunal for the Law of the Sea itself. These cases highlight Bangladesh's strategic use of UNCLOS and its dispute resolution mechanisms for managing complex maritime issues.

Bangladesh has concluded numerous bilateral investment treaties (BITs) and is a party to multilateral investment agreements containing investor-state dispute settlement (ISDS) provisions. ISDS provisions allow foreign investors to initiate arbitration against the host state for alleged treaty violations. ICSID is a primary forum for these cases.

A notable example involves a dispute arising from an energy sector project where an investor initiated an ICC arbitration. Faced with enforcement challenges, the investor turned to ICSID, alleging expropriation due to the host state's interference. The ICSID tribunal upheld the investor's claim, emphasising the importance of ISDS in protecting foreign investments.

Regional cooperation and dispute resolution mechanisms are increasingly integrated into multilateral investment treaties (MITs). Examples include the South Asian Association for Regional Cooperation (SAARC) Development Fund (SDF) and the Energy Charter Treaty (ECT), both of which mandate the SAARC Arbitration Council for dispute resolution among member states, including Bangladesh. These regional frameworks aim to facilitate cooperation while providing effective dispute resolution channels.

Bangladesh's graduation from least developed country (LDC) status is likely to increase its

engagement with the World Trade Organisation (WTO). As a more active participant in global trade, Bangladesh can expect a rise in trade-related disputes. The WTO's dispute settlement mechanism, which involves consultations, panel rulings, and potential appeals, will become increasingly important for resolving these trade disagreements.

International Arbitrators and Professionals

Bangladesh has cultivated a burgeoning pool of arbitration talent. Several prominent local legal experts have distinguished themselves on the international stage, serving as arbitrators for prestigious institutions like the PCA. This growing cadre of arbitrators, coupled with a cohort of internationally qualified legal practitioners based in Bangladesh, has significantly enhanced the country's arbitration landscape.

These professionals, many affiliated with renowned arbitration institutions, are not only equipped to handle domestic disputes but also actively participate in international arbitration cases unrelated to Bangladesh. Their involvement has not only elevated the country's arbitration profile but also positioned Bangladesh as a potential hub for international dispute resolution. As the country continues to integrate into the global economy, its arbitration sector is poised for further growth and recognition.

Physical Location and Virtual Arbitration

The arbitration landscape in Bangladesh has evolved to accommodate both domestic and international disputes through hybrid and online proceedings. While most arbitrations seated in Bangladesh incorporate a blend of physical and virtual hearings, the trend extends to foreign-seated arbitrations as well.

Many international arbitration cases involving Bangladeshi parties or interests are conducted in a hybrid format, leveraging technology to facilitate efficient dispute resolution. While crucial stages such as witness examinations and final arguments typically occur in-person, preliminary matters and procedural hearings are often conducted virtually. This hybrid approach allows for remote participation, reducing costs and logistical challenges. However, for crucial stages such as witness testimony or final arguments, parties often opt for in-person proceedings.

The popular physical locations for these in-person sessions include BIAC-provided arbitration rooms, law firm conference rooms, chambers of commerce meeting spaces and even Supreme Court arbitration rooms. This flexibility in venue selection has contributed to the growth of arbitration in Bangladesh.

Popular Institutions

International contracts commonly feature arbitration clauses referencing established institutions like ICC, SIAC, and occasionally ad hoc UNCITRAL rules, prioritising efficiency and predictability. In contrast, domestic disputes, especially those involving foreign investment companies operating in Bangladesh, often utilise BIAC or opt for ad hoc arbitration under the Act. This divergence reflects the evolving legal landscape and the specific needs of different contractual arrangements.

Popular Industry

Dispute resolution through arbitration is increasingly prevalent in Bangladesh's dynamic business landscape. Key sectors witnessing a surge in arbitration cases include aviation, capital goods/engineering, construction/building products, oil and gas, power and energy, real estate, services, shipping, telecom and textiles. These

industries' complex transactions and potential for disagreements often necessitate efficient dispute resolution mechanisms like arbitration.

Interim Relief

Bangladesh has grappled with inconsistent court rulings regarding jurisdiction over foreign-seated arbitrations. Courts were initially divided on granting interim relief for disputes seated outside the country. Cases like HRC Shipping Ltd. v MV X-Press Manaslu and Others and STX Corporation Ltd. v Meghna Group of Industries Limited highlighted the conflicting views on granting interim relief for disputes seated outside the country. This inconsistency hindered the development of arbitration as a preferred dispute resolution method in Bangladesh.

A larger bench of the High Court later clarified the Act's scope, emphasising its primary application to arbitrations seated in Bangladesh. However, a recent landmark decision in Italian Thai Development Public Company Ltd. v The Export-Import Bank of China and others significantly altered the landscape. The Appellate Division ruled that Bangladeshi courts possess the authority to grant interim measures for both domestic and foreign-seated arbitrations. This decision brings much-needed clarity and aligns Bangladesh with international arbitration standards, fostering a more conducive environment for businesses operating in the country.

Appointment and Removal of Arbitrator

The Act provides a framework for arbitrator appointment, allowing for both institutional and ad hoc arbitration. The arbitration institutions offer a structured process for arbitrator selection, while ad hoc proceedings rely on contractual agreements or court intervention. Cases such as Genesis System Ltd. v Clapp & Mayne Inc. highlight the importance of adhering to contractual pre-arbitration procedures to ensure a valid appointment. In Industrialisation Fund for Developing Countries (IFU) v Northern Corporation Limited, the court addressed a dispute over the applicable arbitration clause, determining the correct procedure for arbitrator appointment.

The case of Bangladesh Power Development Board (BPDB) v Summit Industrial and Mercantile Corporation (Pvt) Ltd. provides a valuable illustration of the challenges that can arise in the appointment of arbitrators in Bangladesh. In this case, the dispute centred on the formation of the arbitral tribunal. BPDB challenged the appointment of the sole arbitrator on the grounds of potential bias due to the arbitrator's shareholding in the respondent's holding company.

This case underscores the importance of ensuring arbitrator independence and impartiality. The court's decision to remove the arbitrator due to a perceived conflict of interest highlights the critical role that impartiality plays in the arbitral process. This case serves as a stark reminder of the potential pitfalls that can occur when there are doubts about an arbitrator's neutrality. It emphasises the need for careful consideration when selecting arbitrators to avoid delays, disputes, and ultimately, the need for court intervention.

Despite these challenges, the growing number of international commercial arbitrations seated in Bangladesh indicates a maturing arbitration landscape, with parties increasingly opting for both institutional and ad hoc arbitration mechanisms.

Court Intervention and Support

Writ jurisdiction

The case involving Energis Power Corporation Ltd. and Bangladesh Power Development Board (BPDB) illustrates a limited instance of court

intervention in an arbitration proceeding. While the initial dispute was resolved through arbitration conducted by BERC, the High Court intervened due to a specific issue: the lack of clarity in the arbitral award regarding the calculation of the amount payable by the petitioner.

In another writ petition, the High Court Division dismissed the writ petitions on the ground that they were not maintainable. The court held that the petitioner had agreed to arbitration by signing the contracts and was bound to raise any dispute for arbitration. The court also observed that the existence of an effective alternative remedy, such as arbitration, was a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 102 of the Constitution.

This approach reflects a cautious and limited interference in the arbitral process, aiming to uphold the integrity of the arbitration while addressing a specific procedural deficiency.

Parallel proceedings

The interplay between courts and arbitration in Bangladesh is complex. However, in Green Town LP Gas Ltd. v FMC Group (Bangladesh) Ltd, the court declined to stay criminal proceedings despite the existence of an arbitration clause, emphasising the distinct nature of criminal matters. Therefore, the court allowed both arbitration and criminal proceedings to continue in parallel.

The case of Maico Jute and Bag Corporation v Bangladesh Jute Mills Corporation underscores the court's role in enforcing arbitration agreements. The court stayed a parallel money suit in favour of arbitration, affirming the principle of party autonomy.

These cases highlight the evolving role of courts in arbitration. While courts are generally reluctant to interfere, they may intervene in specific circumstances. However, the boundaries of judicial intervention remain subject to interpretation, and the interplay between arbitration and litigation continues to shape the Bangladeshi legal landscape.

Civil appeal and revision

Appeal or revision against court orders arising from arbitration in Bangladesh is generally limited and can significantly delay dispute resolution. While the principle of finality of arbitral awards is paramount, the Code of Civil Procedure (CPC) provides some avenues for challenging execution orders and arbitrator appointment decisions. However, judicial intervention is typically restricted to procedural irregularities and not the merits of the award. This approach aligns with the international trend, as exemplified by the UNCITRAL Model Law, which emphasises finality and limits judicial review. Despite these limitations, the availability of appeals and revisions can prolong arbitration proceedings, undermining the efficiency and cost-effectiveness of the process. Such delays have detrimental impacts on businesses and parties involved, highlighting the need for careful consideration before pursuing these remedies.

Award

Enforcement

Under Section 45 of the Act, a foreign arbitral award, can be executed in the same manner as a court decree. The specific procedure is outlined in the Act. Generally, the trend towards enforcing arbitral awards in Bangladesh is positive. Courts have shown increasing recognition of the finality of arbitral awards and have generally been supportive of their enforcement.

The case of Smith Co-Generation (Bangladesh) Private Limited v Bangladesh Power Develop-

ment Board (BPDB) is a significant precedent in the enforcement of ICC arbitration awards in Bangladesh. This case underscores the judiciary's supportive stance towards upholding the finality of arbitral awards, even when the opposing party is a government entity.

The successful enforcement of the ICC award in favour of Smith Co-Generation against the BPDB is a testament to the growing recognition of arbitration as a viable dispute resolution mechanism in the country. The court's rejection of the BPDB's dilatory tactics through pending title suits reinforces the principle of finality in arbitration and discourages parties from employing such strategies to delay or avoid fulfilling their obligations under an arbitral award.

Moreover, the court's clarification on the correct legal channel for challenging arbitral awards, directing parties to Section 46 of the Act, provides much-needed clarity and contributes to the efficient enforcement process. This case serves as a positive development in the enforcement landscape of ICC awards in Bangladesh, encouraging confidence in the arbitral process and promoting its use as a preferred dispute resolution mechanism.

The Roads and Highways Department (RHD) ICC arbitration is another notable case and involved a dispute over additional costs incurred during road maintenance projects. The RHD's unsuccessful attempt to challenge the award due to a missed deadline underscores the significance of adhering to procedural timeframes in arbitration. The court's decision to uphold the award reinforces the finality principle and the importance of substantive grounds for challenging arbitral decisions.

Furthermore, the case of Ferdous Alam v Warnaco Global Sourcing Limited showcases the enforceability of arbitration clauses in commercial leases. The court's decision to uphold the arbitral award despite challenges related to the Premises Rent Control Act reinforces the autonomy of parties to agree to arbitration and the broad scope of arbitrable disputes.

However, the case of Louis Dreyfus Commodities Suisse SA v Php Spinning Mills Limited exemplifies the challenges that can arise in this process. Despite securing a favourable award from the International Cotton Association tribunal, the appellant faced obstacles in enforcing the award in Bangladesh due to the expiration of the statutory limitation period. This case underscores the importance of timely enforcement and potential hurdles in executing foreign awards within the country's legal framework.

Annulment

Section 42 of the Act outlines the procedure for applying to set aside or correct an award. The application must be made to the High Court Division within 60 days of the receipt of the award.

An arbitral award can be set aside if a party can prove incapacity or invalidity of the arbitration agreement, improper notice, exceeding the scope of the arbitration, procedural irregularities, or if the award conflicts with applicable law, public policy, or was tainted by fraud or corruption.

In Cottonex Anstalt v Comilla Spinning Mills Ltd, a dispute arose from a cotton sale contract containing an arbitration clause under the International Cotton Association (ICA). The ICA arbitral tribunal issued an award in favour of Cottonex. However, when Cottonex sought to enforce the award in Bangladesh, Comilla successfully challenged its enforceability. The court determined

that the award violated public policy by disregarding a domestic court injunction and potentially facilitating over-invoicing in contravention of the import policy order.

This case underscores the challenges of enforcing foreign arbitral awards and the importance of considering local laws and public policy when conducting international arbitration.

Conclusion

Bangladesh has made notable strides in establishing itself as a preferred venue for arbitration. The enactment of the Act provided a robust legal framework and subsequent case law has contributed to a growing recognition of arbitration as an efficient dispute resolution mechanism. The increasing willingness of domestic courts to enforce arbitral awards, as demonstrated in cases like Smith Co-Generation (Bangladesh) Private Limited v Bangladesh Power Development Board (BPDB), and Italian Thai Development Public Company Ltd. v The Export-Import Bank of China and others is a positive development.

Parties engaged in international arbitration in Bangladesh should prioritise careful contract drafting, including well-defined arbitration clauses. Selecting a reputable arbitral institution and understanding local laws are crucial. During the arbitration, strong legal representation, procedural compliance, and effective evidence presentation are essential. Post-award, prompt enforcement action, familiarity with local procedures, and anticipation of potential challenges, as exemplified by the case of Cottonex Anstalt v Comilla Spinning Mills Ltd, are vital.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com