

# The Laws of Arbitration in Bangladesh



**Presented by**

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# Concept of Arbitration

- ▶ **Arbitration is form of ADR, whereby a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.**
- ▶ **In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.**
- ▶ **Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding.**
- ▶ **There are limited rights of review and appeal of arbitration awards.**

# Continued...

**In arbitration, the dispute is submitted to a third party (the arbitrator) who resolves the dispute after hearing a presentation by both parties. The presentation may be just documents submitted to the arbitrator by each side. More often, in addition to the documents submitted, each side will make an oral argument in person. Usually, each side will have an attorney to make the oral argument for them. Occasionally the presentation also includes witnesses who testify.**

# Continued... (Arbitration)

**Arbitration is a method of resolving disputes without going to court. Sometimes a attorney/ Lawyer will recommend arbitration to a client as the best means to resolve a claim.**

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# Why Arbitration?

Arbitration is the most formal alternative to litigation. In this process, the disputing parties present their case to a neutral third party, who renders a decision. Arbitration is widely used to resolve disputes in both the private and public sector.

Arbitration is generally considered a more efficient process than litigation because it is

- ▶ Quicker,
- ▶ Less expensive,
- ▶ And provides greater flexibility of process and procedure.
- ▶ The parties often select the arbitrator and exercise control over certain aspects of the arbitration procedure.
- ▶ Arbitrators typically have more expertise in the specific subject matter of the dispute than do judges. They may also have greater flexibility in decision-making.

# Advantages of Arbitration

There are numerous advantages to arbitration as a way to resolve a case.

- 1. The parties to the dispute usually agree on the arbitrator,** so the arbitrator will be someone that both sides have confidence will be impartial and fair.
- 2. The dispute will normally be resolved much sooner,** as a date for the arbitration can usually be obtained a lot faster than a court date. In Virginia, a trial date is normally about twelve months from the date the lawsuit is filed.
- 3. Arbitration is usually a lot less expensive.** Partly that is because the fee paid the arbitrator is a lot less than the expense of paying expert witnesses to come and testify at trial. (Most of the time the parties to arbitration split the arbitrator's fee equally). There are also lower costs in preparing for the arbitration than there are in for preparing for a trial. Partly this is due to the fact that the rules of evidence are often more relaxed than in a trial, so that documents can be submitted in lieu of having a witness come to trial and testify.

# Continued...

- 4. Unlike a trial, arbitration is essentially a private procedure,** so that if the parties desire privacy then the dispute and the resolution can be kept confidential.
- 5. If arbitration is binding, there are very limited opportunities for either side to appeal,** so the arbitration will be the end of the dispute. That gives finality to the arbitration award that is not often present with a trial decision.



# Disadvantages of Arbitration

There are, however, also some disadvantages to arbitration as a method of resolving a dispute.

- 1. If arbitration is binding, both sides give up their right to an appeal.**
- 2. If the matter is complicated but the amount of money involved is modest, then the arbitrator's fee may make arbitration uneconomical.**
- 3. Rules of evidence may prevent some evidence from being considered by a judge or a jury, but an arbitrator may consider that evidence.**
- 4. If certain information from a witness is presented by documents, then there is **no opportunity to cross-examine the testimony of that witness.****
- 5. Discovery may be more limited with arbitration.**
- 6. If arbitration is mandatory or required by a contract, then the parties do not have the flexibility to choose arbitration only when both parties agree.**
- 7. The standards used by an arbitrator are not clear.**



# Arbitration in Bangladesh

**“Arbitration” means any arbitration whether or not administered by permanent institution.**

**[U/S. 2(m)].**

**Institutional arbitration:** In an institutional arbitration, the arbitration agreement may stipulate that in case of dispute or differences arising between the parties, they will be referred to a particular institution such as:

The Permanent Court of Arbitration (PCA) is an **intergovernmental organization located in The Hague, Netherlands**. ... The organization is not a United Nations agency, but the PCA is an official United Nations Observer.

# For Instance...

## **Bangladesh Accord Arbitrations:**

**The Permanent Court of Arbitration (PCA) has been administering two arbitrations arising under the Accord on Fire and Building Safety in Bangladesh signed on 15 May 2013 (*Accord*). The Accord is an agreement between global brands and trade unions created in the aftermath of the Rana Plaza building collapse, to establish a fire and building safety programme for workers in the textile industry in Bangladesh. Industrial Global Union and UNI Global Union (Claimants) commenced arbitrations under the Accord and the UNCITRAL Rules of Arbitration 2010 against a global fashion brand (Respondent in PCA Case No. 2016-36) on 8 July 2016, and against another global fashion brand (Respondent in PCA Case No. 2016-37) on 11 October 2016. On 17 July 2018, the Tribunal constituted in the two arbitrations issued termination orders the settlement by the Parties of both sets of claims.**

# The objectives of Arbitration laws in Bangladesh

The introductory words of the Arbitration Act, 2000 starts as...

**“An Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations.”**

- ▶ **International commercial arbitration;**
- ▶ **Recognition and enforcement of foreign arbitral award; and**
- ▶ **and other arbitrations.**

# International Commercial Arbitration

**“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 —**

- (i) “an individual who is a national of or habitually resident in, any country other than Bangladesh; or**
- (ii) A body corporate which is incorporated in any country other than Bangladesh; or**
- (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or**
- (iv) the Government of a foreign country; [U/S. 2(c)]**

# Foreign Arbitral Award

**“Arbitral award” means a decision made by the arbitral tribunal on the issue in dispute. [U/S. 2(p)].**

**“Foreign arbitral award” means an award which is made in pursuance of an Arbitration agreement in the territory of any state other than Bangladesh but it does not include an award made in the territory of a specified state. [U/S. 2(k)].**

# The Laws on Arbitration

**Arbitrability of the dispute [u/s.10].** (1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filing a written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration,

(2) Thereupon, the Court shall, if it is satisfied that **an arbitration agreement exists**, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

# Arbitration Agreement

**“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. [u/s. 2(n)]**



# Form of arbitration agreement [u/s. 9]

**(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.**

**(2) An arbitration agreement shall be in writing and an arbitration agreement shall be deemed to be in writing if it is contained in –**

**(a) a document signed by the parties;**

**(b) an exchange of letters, telex, telegrams, Fax, e-mail or other means of telecommunication which provide a record of the agreement; or**

**(c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.**



# Composition of Arbitral Tribunal [u/ss.11-16]

Number of arbitrators [u/s.11] (1) Subject to the provisions of sub-section (3), **the parties are free to determine the number of arbitrators.**

(2) Failing the determination of a number referred to in sub-section (1) the tribunal shall consist of three arbitrators.

(3) 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.**

# Appointment of arbitrators [u/s.12].

(1) Subject to the provisions of this Act, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(2) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. (3) Failing any agreement referred to in sub-section (1). (a) in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitration within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made upon request of a party-

(i) by the District Judge in case of arbitration **other than international commercial arbitration**, and

(ii) in case of **international commercial arbitration** with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall be Chairman of the arbitral tribunal.

# Continued...

**(4) If the appointment procedure in sub-section (3) applies and**

**(a) a party fails to appoint an arbitrator within thirty days of the receipt of a request to do so from the other party or,**

**(b) the appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon the application of a party –**

**(c) by the District Judge except in case of international commercial arbitration, and**

**(d) by the Chief Justice or by any other Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration.**

**(5) The third arbitrator appointed under clause (b) of sub-section (4) shall be the Chairman of the said tribunal.**

# Continued...

**(6) If more than one arbitrator are appointed under sub-section (4) the District Judge, or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, shall appoint one person from among the said arbitrators to be the Chairman of the arbitral tribunal.**

**(7) Where, under an appointment procedure agreed upon by the parties - (a) a party fails to act as required under such procedure; or**

**(b) the parties, or the arbitrators, fail to reach an agreement under the same procedure; or**

**(c) a person or any third party fails to perform any function assigned to him under that procedure, unless the agreement on the appointment procedure provides other means to take the necessary measure for securing the appointment a party may apply to-**

**(d) the District Judge except in case of international commercial arbitration and the District Judge shall appoint the Chairman of the tribunal along with the other arbitrators,**

**(e) the Chief Justice or any Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration and the Chief Justice or the Judge of the Supreme Court as designated by the Chief Justice shall appoint the Chairman of the tribunal along with other arbitrators.**

# Continued...

**(8) The appointment of the arbitrator or arbitrators under sub-sections (3), (4) and (7) shall be made within sixty days from the receipt of the application thereof.**

**(9) The Chief Justice, or a Judge of the Supreme Court as designated by the Chief Justice, or the District Judge, as the case may be, in appointing an arbitrator under this section, shall have due regard to any equal required to the arbitrator under the agreement between the parties, and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.**

**(10) 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.**

# Continued...

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**(9) The Chief Justice, or a Judge of the Supreme Court as designated by the Chief Justice, or the District Judge, as the case may be, in appointing an arbitrator under this section, shall have due regard to any equal required to the arbitrator under the agreement between the parties, and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.**

**(10) 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.**

# Continued...

**(11) The Chief Justice or the District Judge, as the case may be, may make such scheme as he may deem appropriate for dealing with matters under this section.**

**(12) The decision under sub-sections (3), (4) and (7) of the Chief Justice or the Judge of the Supreme Court designated by the Chief Justice or the District Judge, as the case may be, shall be final.**

**(13) The Chief Justice may entrust a Judge with the duties for a particular case or cases or for discharging the entire duties and may fix up the tenure of that Judge for the purposes of this section.**

# Grounds for challenge [u/s. 13]

- (1) When a person is requested to accept appointment as an arbitrator, he shall first disclose any circumstances likely to give rise to justifiable doubts as to his **independence** or **impartiality**.
- (2) An arbitrator, shall from the time of his appointment and **throughout the arbitral proceedings**, without delay, disclose to the parties any circumstances referred to in subsection (1) unless they have already been so informed by him.
- (3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his **independence or impartiality**, or he **does not possess the qualifications agreed to by the parties**.
- (4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.



# Challenge procedure [u/s. 14]

- (1) Subject to sub-section (6), the parties shall be free to agree on a procedure for challenging an arbitrator.
- (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, **within thirty days after becoming aware of the circumstances** referred to in sub-section (3) of section 13, send a written statement of the reasons for the challenge to the arbitral tribunal.
- (3) Unless the arbitrator challenged under sub-section (2), withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge **within thirty days from the date of filing the written statement referred to in sub-section (2)**.
- (4) Any party aggrieved by the decision of the arbitral tribunal under sub-section (3), **may prefer an appeal to the High Court Division within thirty days from the date of the said decision**,
- (5) The High Court Division shall decide the matter **within ninety days** from the date on which it is filed.
- (6) If a challenge under any procedure agreed upon by the parties or under the procedures under sub-section (3) or the appeal preferred against the decision is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an award.

# Termination of arbitrator's mandate [u/s.15]

(1) The mandate of an arbitrator shall terminate.- (a) he withdraws himself from office; (b) he dies; (c) all the parties agree on the termination of his mandate; or (d) he is unable to perform his functions of his office or for other reasons fails to act without undue delay and withdraws from his office or the parties agree on the termination of his mandate.

(2) If any arbitrator has incurred disqualifications referred to in clause (d) of subsection (1) fails to withdraw himself from his office and all the parties fail to agree on his termination, then on the application of any party within the prescribed period by rules —

(a) the District Judge, in case of other arbitrations **excepting international commercial arbitration**;

(b) the **Chief Justice or a Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration** may terminate the said arbitrator

(3) Where the parties are agreed upon, the termination shall be enforceable by the person agreed by the parties,

(4) If an arbitrator withdraws himself from his office or where all the parties agree on the termination of the mandate of an arbitrator under the circumstances as referred to in clause(d) of sub-section (1), it shall not imply acceptance of the validity on any ground referred to in this clause or in sub section (3) of section 13.

# **Substitution of an arbitrator whose mandate has been terminated [u/s.16]**

**(1) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the provisions applicable to the appointment to the arbitrator whose mandate has been terminated.**

**(2) In the absence of any agreement between the parties –**

**(a) the substitute arbitrator shall, at the discretion of the arbitral tribunal continue the hearings from the stage at which the mandate of the arbitrator has been terminated.**

**(b) Any order or decision of the arbitral tribunal shall not be Invalid before the termination of the mandate of an arbitrator due to such termination.**

# **Jurisdiction of Arbitration Tribunals [u/ss.17-23]**

**The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties. ... Under the theory of party autonomy, if two parties have the legal right to settle a dispute between themselves, then they can give jurisdiction to a third party to settle it for them.**

**It would not be appropriate to say that an arbitral tribunal has statutory jurisdiction. The tribunal determines its jurisdiction to adjust the needs of the parties. The arbitral agreement mainly determines the ambit of jurisdiction of the arbitral tribunal. The focal of party-autonomy declares that when the two parties have the remedy to resolve their disputes on their own then they have the remedy to show this right to any third party, to determine overt that squabble.**

# Competence of arbitration tribunal to rule on its own jurisdiction[u/s.17]

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely –

- (a)** whether there is existence of a valid arbitration agreement.
- (b)** whether the Arbitral Tribunal is properly constituted;
- (c)** whether the arbitration agreement is against the public policy;
- (d)** whether the arbitration agreement is incapable of being performed; and,
- (e)** whether the matters have been submitted to arbitration in accordance with the arbitration agreement.

# Severability of agreement[u/s.18]

**An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement while giving decision for the purpose of determining the jurisdiction of the arbitral tribunal.**



## Objection as to the jurisdiction of the arbitral tribunal[u/s.19]

- (1) An objection that the tribunal does not have jurisdiction shall be raised not later than the submission of the **statement of defence**.
- (2) An objection during the course of the arbitral proceedings that the tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority occurs.
- (3) The arbitral tribunal may in either of the cases referred to in sub-sections (1) and (2), admit a later plea if it considers the delay justified.
- (4) The arbitral tribunal shall decide on an objection referred to in sub-sections (1) and (2), and where the arbitral tribunal takes a decision rejecting the plea, it shall continue with the arbitral proceedings and make an award.
- (5) A party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

## **Powers of the High Court Division in deciding jurisdiction [u/s.20]**

**(1) The High Court Division, may on the application of any of the parties to the arbitration agreement, after serving notice upon all other parties, determine any question as to the jurisdiction of the arbitral tribunal.**

**(2) No application under this section shall be taken into account, unless the High Court Division is **satisfied** that-**

**(a) the determination of the question is likely to produce substantial savings in costs;**

**(b) the application was submitted without any delay; and**

**(c) there is good reason why the matter should be decided by the Court.**

**(3) The application shall state— the reasons on which the matter should be decided by the High Court Division.**

**(4) Unless otherwise agreed by the parties, where any application is pending before the High Court Division under this section the arbitral tribunal shall continue arbitration proceedings and make an arbitral award.**



## **Powers of the arbitration tribunal to make interim orders [u/s.21]**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, and no appeal shall lie against this order.**
- (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).**
- (3) No order under this section shall be passed without giving a notice to the other parties:**

**Provided that the arbitral tribunal may, where it appears that the object of taking interim measure under this section would be defeated by the delay, dispense with such notice.**

- (4) An order of an arbitral tribunal requiring the taking of interim measures may be enforced by the court, on an application made therefor, by the party requesting the taking of such interim measures.**
- (5) The application filed before the Court for the enforcement of the interim measures under sub-section (4) shall be deemed not to be incompatible with section 7 or with arbitration agreement or a waiver of the agreement.**

# Settlement other than Arbitration [u/s.22]

(1) 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 anytime during the arbitral proceedings to encourage settlement.**

(2) If during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms,

(3) An arbitral award on agreed terms shall be made in accordance with section 38 and shall state that it is an arbitral award on agreed terms.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award made in respect of the dispute.



# Questions Session