

The Seat in International Arbitration: Rethinking the Role of Bangladesh

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Abstract

The seat of arbitration is undoubtedly important because of its supervision over the arbitration tribunal and the power to set aside the award. Most jurisdictions admit the territorial theory of international arbitration by adopting UNCITRAL Model Law. The delocalized theory of international arbitration is based on the doctrine of the enforcement of the annulled award. In fact, an annulled award does not exist and legally unenforceable. Bangladesh adopted the Model Law with an objective to become a center of international arbitration. It is evident that Bangladesh is yet to be considered an attractive place for international arbitration despite its adoption of the Model Law. On the other hand, Bangladesh deviated from the Model Law on some substantial issues of arbitration. These deviations badly affect the international arbitration regime in Bangladesh. While the Model law prescribes for minimum judicial intervention, the Arbitration Act of Bangladesh increases the scope of judicial intervention for arbitration seated in Bangladesh. The Model Law is the minimum standard of practice for international arbitration. A state can certainly deviate from the Model Law in accordance with its policy. However, this deviation should be for the improvement of the regime but not to shrink the international arbitration in the country. The significant developments in international arbitration over the past decades call for a rethinking of the present arbitration regime in Bangladesh.

Résumé

L'importance du siège de l'arbitrage est indéniable vu son contrôle sur le tribunal arbitral et son pouvoir d'écarter la sentence arbitrale produite au sein de son territoire. La plupart des juridictions suivent la théorie territoriale de l'arbitrage international en adoptant la Loi Type de la CNUDCI. La théorie délocalisée de l'arbitrage international est fondée sur la doctrine de l'exécution des sentences arbitrales annulées. En fait, une sentence arbitrale annulée n'existe pas et est légalement sans effet. Le Bangladesh a adopté la Loi Type avec pour objectif de devenir un centre pour l'arbitrage international. Il est évident que le Bangladesh n'est pas encore considéré comme un endroit attractif pour l'arbitrage international malgré son adoption de la Loi Type. D'un autre côté, le Bangladesh s'est écarté de la Loi Type sur des points essentiels de l'arbitrage. Ces écarts affectent négativement le régime de l'arbitrage international du Bangladesh. Alors que la Loi Type prescrit une intervention judiciaire minimale, la Loi d'arbitrage du Bangladesh augmente le champ de l'intervention judiciaire sur l'arbitrage ayant son siège au Bangladesh. La Loi Type établit les standards minimaux de la pratique de l'arbitrage international. Un État peut certainement s'écarter de la Loi Type selon sa politique. Cependant, cet écart devrait améliorer le régime et non déperir l'arbitrage international du pays. Les développements importants de l'arbitrage international durant ces dernières décennies pousse à repenser le régime actuel de l'arbitrage au Bangladesh.

List of Abbreviations

AD	Appellate Division (of the Supreme Court of Bangladesh)
AIR	All Indian Reports
Arb Int'l	Arbitration International
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am Rev Int'l Arb	American Review of International Arbitration
Am U L Rev	American University International Law Review
BERC	Bangladesh Energy Regulatory Commission
BIAC	Bangladesh International Arbitration Centre
BLC	Bangladesh Law Chronicles
BLD	Bangladesh Legal Decisions
Brook J Intl L	Brook Journal of International Law
BTRC	Bangladesh Telecommunication Regulatory Commission
Cambridge LJ	Cambridge Law Journal
Chic J Int Law	Chicago Journal of International Law
Colum J Transnat'l L	Columbia Journal of Transnational Law
DLR	Dhaka Law Reports
Duke J Comp & Int'l L	Duke Journal of Comparative & International Law
Melb J Intl L	Melbourne Journal of International Law
EJIL	European Journal of International Law
EWCA	England and Wales Court of Appeal
HKIAC	Hong Kong International Arbitration Centre
HCD	High Court Division (of the Supreme Court of Bangladesh)
ICC	International Chamber of Commerce
ICSID	International Centre for settlement of Investment Disputes

Int Comp Law	International Comparative law
Int Comp Law Q	International Comparative Law Quarterly
J Intl Arb	Journal of International Arbitration
LCIA	London Court of International Arbitration
McGill LJ	McGill Law Journal
MLR	Mainstream Law Reports
SAcLJ	Singapore Academy of Law Journal
SC	Supreme Court (of Bangladesh)
SCOB	Supreme Court Online Bulletin
SIAC	Singapore International Arbitration Centre
SRL	Singapore Law Reports
Tex Int'l LJ	Texas International Law Journal
Tul L Rev	Tulane Law Review
UK	United Kingdom
UNCITRAL	United Nation Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America

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Chapter One: Introduction

This study investigates the existing legal regime of international commercial arbitration in Bangladesh by examining the changing role of an arbitral seat in cross-border dispute resolution. The thesis is premised on the significance of the seat in international arbitration. It is contended that the seat of international arbitration is crucial because of its supervisory role and its power to set aside an arbitration award. Although the court of the seat of arbitration has substantial control over the functions of an international arbitration seated within its jurisdiction, modern arbitration statutes try to minimize this control. Contrast to this modern trend, the current statute of Bangladesh for international arbitration provides excessive scope for judicial intervention over the functions of international arbitration seated within the country.

Bangladesh enacted the *Arbitration Act 2001* to complete its obligations under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*¹ (the "*New York Convention*"). The Act created a single unified regime for both domestic and international arbitration seated in Bangladesh. The Act includes the rules regarding supervision of international arbitration and provision for enforcement of the foreign arbitral award. The Act is substantially based on the *UNCITRAL's (United Nations Commission on International Trade Law)* recommendation as Model Law, which has been adopted in 80 States in a total of 111 jurisdictions,² for settling commercial disputes through arbitration and enforcement award. This statute certainly includes Bangladesh in the modern trend of international commercial arbitration.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, United Nations Treaty Series [UNTS], vol. 330 at 3 (entered into force on 7 June 1959).

² See Status at UNCITRAL:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, last accessed on July 5, 2018.

Nearly seventeen years have passed since the adoption of the Act in 2001. Bangladesh is yet to succeed in becoming an attractive place for international arbitration. This study shows that though the Act 2001 is based on the Model Law, it deviates from the Model Law on many substantial issues. These deviations from the Model Law, in many cases, affect the potentiality of Bangladesh as a preferred seat of transnational arbitration. For example, in accordance with the recommendation made in the Model Law, Bangladesh designated the High Court Division (*HCD*) of the Supreme Court of Bangladesh to supervise the functions of an arbitration tribunal seated in Bangladesh. This designation of the *HCD inter alia* increased the scope to intervene on the smooth functioning of the international arbitral tribunal. While the purpose of the Model Law is to minimize the judicial intervention over the functions of the international tribunal, the present Act increases the scope of judicial intervention. Additionally, the common law nature of Bangladesh's legal system, with a written constitution, creates an overarching supervisory power over the functions of an international arbitration seated in Bangladesh.

Besides the contention on the scope of intervention in the functions of an international tribunal, the study states that the Model Law is the minimum standard of practice in international arbitration whose object is to ensure uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. It reflects worldwide consensus on critical aspects of international arbitration practice, having been accepted by the States of all regions and the different legal or economic systems of the world. However, adopting the Model Law is not enough for a country to attract foreign arbitration in its territory. It is evident that two-thirds of arbitration cases are seated in non-Model Law countries.³ Furthermore, the Model Law may be

³ Loukas Mistelis, "Seat of Arbitration and Indian Arbitration Law" (2015) IV:2 Indian J Arbitr Law 1 at 3.

found relatively old with the continuous changing jurisprudence of international arbitration. The study undertakes a comparative analysis among the arbitration statutes of some reputed seats of international arbitral and proposes amendments to the current legislation on arbitration and inclusion of modern method of arbitration in the present legislation in Bangladesh.

An arbitration friendly statute is crucial for the development of foreign trade and investment in Bangladesh. The *UNCTAD* report predicts more Foreign Direct Investments in Bangladesh in the next few years.⁴ The disputes arising directly out of investments may be settled at *ICSID*.⁵ However, the disputes arise out of the investment but not directly connected to the investment are usually settled through international commercial arbitration. Foreign trade and investment in a country have close ties with the legal regime for international dispute settlement. Foreign investors strongly consider the dispute settlement mechanism of a state before investing.⁶

Bangladesh cannot sustain its quest for global credibility and endeavor to become an attractive place for foreign investment unless it improves its legal regime for international arbitration. Being a developing country, Bangladesh can attract foreign arbitration in its territory only if it satisfies the needs and legitimate expectations of its foreign counterpart. An arbitration tribunal, as an alternative to the court, can provide the legal environment conducive to the economic development of a developing country even during the period before public legal

⁴ United Nation Conference on Trade and Development (UNCTAD) World Investment Report 2017 p. 56, available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf last accessed August 6, 2018.

⁵ International Centre for Settlement of Investment Disputes (ICSID), see <https://icsid.worldbank.org/en/Pages/default.aspx>, last accessed August 6, 2018.

⁶ See International Arbitration Survey, 2015 conducted by Queen Mary University of London (QMUL) in partnership with White & Case. available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf last accessed August 6, 2018.

institutions fully develop and mature.⁷ Additionally, hosting international arbitration can be an excellent mechanism for the country to contribute to its economy without bearing any cost for infrastructural development.

This study examines how Bangladesh can strengthen its role as a seat of international arbitration. Before going to the country-specific perspective, the study illustrates the debate as to the role of the seat in international commercial arbitration. It narrates both localized and delocalized theories of international arbitration. It denies the delocalized theory of international arbitration and contends that international arbitration cannot be operated in a legal vacuum. The seat of the arbitration acts as a safety valve where the victim of an improper award-resulting from an excess of authority, violation of due process or corruption- may seek redress against such an award. The court of the seat has a crucial role in determining the validity of the agreement. It interprets the arbitration agreement under the applicable law albeit that law may be different from the law of the seat. The primary significance of the seat is in the proceedings for setting aside of an award. Although the 'double exequatur' of the award under of the *Geneva Convention* is no longer required, the annulment of the award in its country of origin has been given effect under the *New York Convention* and the Model Law. Additionally, modern arbitration statutes admit the supervisory function of the court of the seat over the tribunal seated within its jurisdiction. The Model Law recognizes the supervisory jurisdiction of the seat over the arbitration proceedings and the scope to review an arbitral award at the seat.

On the other hand, the delocalized theory of international arbitration claims that the parties to the arbitration usually chose a seat because of its geographic aptness in the context of the

⁷ See e.g. Philip J McConaughay, "The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles" (2013) 1 Peking U Transnatl Rev 9.

domiciles of the parties.⁸ It is contended that the unique feature of international arbitration is that the jurisdiction of the arbitrator is originated from an agreement to arbitrate which is purely a private matter and not subject to the legal system of the seat. Thus, international arbitration is delocalized.

The wide adoption of the Model Law depicts the prevalence of the territorial theory of international arbitration. The seat of arbitration can provide judicial assistance to the arbitral tribunal functioning within its jurisdiction. Professor Park asserts that a defined degree of supervision by the court of the seat can promote efficiency in the arbitral process and expectations of the parties to the contract.⁹ As a Model Law jurisdiction, Bangladesh adopted the jurisdictional theory of international arbitration. Given the importance of the seat in arbitration, the study focuses on how Bangladesh can improve its present unsatisfactory status as a seat of international commercial arbitration.

International arbitration has changed significantly over the past decades. Yet, the Act 2001 is silent or incomplete on many vital issues of modern arbitration such as interim orders, expedited arbitration proceedings, confidentiality of the proceedings, the liability of the arbitrator, third-party involvement in the arbitration proceedings. The study compares some reputed jurisdictions and identifies some of the critical legal issues pertinent to the arbitration regime of Bangladesh. The Act 2001 should respond to these issues to take its place in the global market of dispute resolution.

⁸ See Jan Paulsson, “Delocalisation of international commercial arbitration: when and why it matters” (1983) Int Comp Law Q 53 at 55., Giorgio Bernini, *The enforcement of foreign arbitral awards by national judiciaries: a trial of the New York Convention’s ambit and workability* (na, 1982)., Berthold Goldman, *Les conflits de lois dans l’arbitrage international de droit privé* (MartinusNijhoff, 1963).

⁹ William W Park, *Why courts review arbitral awards* (Mealey, 2001) at 595.

Competition between foreign arbitrations has significantly increased among the recognized arbitration seats. New jurisprudence has evolved for effective resolution of international disputes through arbitration. On the other hand, Bangladesh is yet to be considered a preferable place for international arbitrations despite its adoption of the Model Law. The current arbitration law of the country has not been designed considering its potentiality as a future hub of international arbitration. Therefore, it is pertinent to rethink the international commercial arbitration regime of Bangladesh.

Literature specific to the international arbitration regime in Bangladesh is very limited. After the enactment of the Arbitration Act in 2001, Professor Maniruzzaman made an early evaluation of the new Act in 2004 comparing it with some other Model Law jurisdictions.¹⁰ He concluded that Bangladesh's legal regime had embraced the fundamental tenets of modernization of international arbitration.¹¹ In 2017, Professor Khan examined the jurisdictional issues and enforcement of the international award in Bangladesh.¹² Apart from these two doctrinal works, Sattar briefly stated a few challenges in enforcing foreign awards in Bangladesh.¹³ Nevertheless, none of this literature explored the impact of the constitution of Bangladesh over an arbitration seated in Bangladesh. The existing literature illustrates the potentiality of Bangladesh as a seat of international arbitration within the periphery of the Model Law. While current scholarship suggested a special bench of High Court Division (*HCD*) of the Supreme Court of Bangladesh to

¹⁰ A F M Maniruzzaman, "The new law of international commercial arbitration in Bangladesh: a comparative perspective" (2003) 14 *Am Rev Int Arbitr* 139.

¹¹ *Ibid* at 171.

¹² Maimul Ahsan Khan, "Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: A Bangladesh Perspective" in *Priv Int Law* (Springer, Singapore, 2017) 285.

¹³ Sameer Sattar, "Enforcement of Foreign Arbitral Awards in Bangladesh: The Law, Its Implementation and Challenges" in *Priv Int Law* (Springer, Singapore, 2017) 303.

assist and supervise arbitration seated in Bangladesh¹⁴, this study finds the *HCD* unsuitable to supervise the function of international arbitration seated in Bangladesh. The existing literature has failed to address the aptness of the statute to attract foreign arbitration in Bangladesh.

The thesis comprises five chapters, the first being the present one-an introduction to fit the study into an academic and country-specific perspective. Before going to the country-specific investigation that is the role of Bangladesh as a seat of international arbitration, Chapter 2 illustrates the theoretical framework of the role of the seat of international arbitration. This chapter argues for the role of the seat for ensuring validity, finality, and fairness of the award. It contends that the role of the seat is undeniable because of the supervision over the arbitration by the court of the seat and setting aside of an award. The only basis for the delocalized theory of arbitration is enforcement of the annulled award. Most of the states refuse to enforce an annulled award. The *New York Convention* and the *UNCITRAL* Model Law admit the localized theory of arbitration. Chapter 2 concludes that the proponents of the delocalized theory of arbitration cannot ignore the role of the seat in setting aside of an award since it is not certain whether or not the court of enforcement will enforce an annulled award.

By establishing the role of the seat of arbitration in Chapter 2, the next chapter explores the role of Bangladesh as a seat of international arbitration. Bangladesh enacted the new Arbitration Act in 2001 modeled upon the *UNCITRAL* Model Law.¹⁵ However, the Act deviates from the Model Law on some substantial points. Chapter 3 presents the weaknesses in the Act and explains the impact of these weaknesses on Bangladesh as a seat of international arbitration. It

¹⁴ Maniruzzaman, *supra* note 10 at 173.

¹⁵ The Act was enforced on April 20, 2001 Vide Notification No. SRO 87-Law/2001 dated 9-04-2001, published in Bangladesh Gazette Extraordinary, dated 10-04-2001.

argues that the Act unwisely designated the *HCD* to supervise the functions of the international arbitration tribunal seated in Bangladesh. *HCD*'s power over the function of the tribunal seated in Bangladesh leaves opportunity for delay tactics. The study critically analyzes the views of the Supreme Court of Bangladesh on the domains of arbitration and concludes that the Court holds a pro-arbitration attitude albeit the fact that the Act impairs the scope of the court to act in aid of international arbitration in some situations.

Taking into account the Bangladesh-specific analysis in Chapter 3, Chapter 4 proposes, keeping in mind the role of the seat sketched in Chapter 2, necessary amendments to the Act 2001 and explains the rationales behind the proposals for amending the act. Chapter 4 suggests to include modern jurisprudence of transnational arbitration for increasing the potentiality of Bangladesh to host more international arbitration in future days.

Finally, Chapter 5 summarizes the findings and concludes the study. It reinforces the fact that the adoption of the Model Law is not enough to attract foreign arbitration in Bangladesh. More importantly, the chapter summarizes that Bangladesh should not be confined to the Model Law provisions. The significant development in international arbitration over the past decades call for a rethinking of the present arbitration regime in Bangladesh.

Chapter Two: Role of the Seat in International Commercial Arbitration

I. Introduction

The seat of arbitration is one of the core components of an international arbitration agreement. The law of the seat enjoys special significance in contemporary international arbitration conventions, and most arbitration statutes give broad effect to the parties' autonomy regarding the arbitral process.¹⁶ It has major practical importance in transnational arbitration and influences substantially many issues such as arbitrability, determination of governing law, determination of the place for the annulment proceedings of the arbitral award and so forth. The common law courts typically recognize the paramount importance of the seat in international arbitration.¹⁷

The seat of arbitration where an arbitration takes place in the eyes of the law must be distinguished from the place or venue of hearings where the arbitral hearings actually take place. Practically, it is possible for a case to be fully resolved without the arbitrators and/or the parties actually visiting the seat of arbitration chosen by the parties or determined otherwise. Whereas the place of hearings is mainly subject to the criterion of expediency and usually has no legal consequences, the seat of arbitration is the legal domicile of the dispute. The place of arbitration does not legally change even though the tribunal hears witnesses or does any other functions in relation to the arbitration in a different location.¹⁸

¹⁶ See Gary B Born, "Confidentiality in International Arbitration" in *Int Commer Arbitr*, 2nd ed (Kluwer Law International) at 1528–1635.

¹⁷ *Star Shipping AS v. China Nat'l Foreign Trade Transp. Corp.* [1993] 2 Lloyd's Rep. 445, 452 (English Ct. App.).

¹⁸ See *PT Garuda Indonasia v. Brigen Air* [2002] 1 SRL 393 at 399.

II. Role of the Seat of Arbitration

International arbitration is not without any attachment to any legal system rather it embraces more than one legal system. The agreement to arbitrate is governed by the law chosen by the parties. It does not exist in a vacuum and, therefore, is part of a specific legal system. The seat of arbitration represents a territorial connection between arbitration and the law of the place where the arbitration is formally (legally) happened. The seat, in fact, validates the arbitral authority over the dispute.¹⁹

The law of the seat is crucial for regulating the procedural conduct of the arbitral proceedings and the relationship between the arbitration and the national courts.²⁰ In many instances, the law of the seat provides default or ‘gap-filling’ rules on procedural matters which may apply in the absence of agreement between the parties. The *New York Convention* admits the role of the seat in international arbitration.

The Latin phrase ‘*lex arbitri*’ means the law of the arbitration. When the parties choose the seat of arbitration, consequently, ‘*lex arbitri*’ turns into ‘*lex loci arbitri*,’ i.e., the law of arbitration at the seat without any express words.²¹ The basis of *lex loci arbitri* is that the consequences of any activity taking place in a given country must be subject to the law of that country and, therefore, the functions of an arbitral tribunal are not beyond the jurisdiction of the country. Parties to a contract may choose the governing law of the contract, the procedural rules applied by the arbitrator. However, they cannot displace the law of the seat completely.²² There are two types of

¹⁹ William W Park, “The Lex Loci Arbitri and International Commercial Arbitration” (1983) Int Comp Law Q 21 at 21.

²⁰ Born, *supra* note 16 at 1531.

²¹ Simon Greenberg, Christopher Kee & J Romesh Weeramantry, *International commercial arbitration: an Asia-Pacific perspective* (Cambridge; New York: Cambridge University Press, 2011) at 58.

²² Park, *supra* note 19 at 23.

control in international arbitration. The first control is exercised by the seat through *lex loci arbitri* and the second control is exercised by the country in which the parties seek recognition and enforcement of the award.²³ Law of the seat sets out the scale of the procedure and support for international arbitration.²⁴

The binding effect of the arbitral proceedings comes from the law of the seat of arbitration. Professor Mann states that all individual's authority undoubtedly derives from the municipal law which is generally called *lex fori*, but in arbitration, it is actually the *lex arbitri*.²⁵ Professor Park concludes that even if the national court is reluctant to intervene, the law of the seat command itself to ensure fairness of the arbitral proceeding and respect the third party rights.²⁶ The role of the seat in validating the arbitral proceeding is acknowledged by the Convention.

The geographical position of the seat changes the nature of arbitration and invokes the application of the New York Convention in enforcing the award. The court of the seat has a crucial role in determining arbitrability and validity of the arbitration agreement. The public policy and mandatory norms of the seat are binding upon an arbitration tribunal functioning within it. The seat ensures the finality of the arbitral award. The supervisory role of the seat assists an arbitration tribunal to function effectively.

²³ Alexander J Belohlavek, "Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth" (2013) 31 ASA Bull 262 at 290.

²⁴ Greenberg, Kee & Weeramantry, *supra* note 20 at 59.

²⁵ F A Mann, "Lex Facit Arbitrum in International Arbitration" (1967) Liber Amicorum Martin Domke 157 at 159.

²⁶ See Park, *supra* note 19 at 22.

Internationalization of domestic disputes

The New York Convention is the most accepted international instrument, having 159 contracting states,²⁷ for the recognition and enforcement of foreign arbitral awards. The Convention applies to recognition and enforcement of *foreign awards* only. The territory of the seat of arbitration classifies the nature of arbitration under the Convention: domestic or international and determines the application of the law therefor. Article I of the Convention states that the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where recognition and enforcement of such awards is sought.

The seat of the arbitration is usually considered to be the place where the award is made. An award is considered as foreign under the Convention if the seat of arbitration, where the award is made, is in a state other than the state of enforcement. As a result, the Convention may be applied in a domestic dispute where the parties to the dispute choose their seat for arbitration in a state other than their state of domicile, registered office or habitual residence. Professor Bělohávek argues for the possibility of internationalization of otherwise domestic arbitration. He contends that a dispute which would otherwise be considered domestic could be settled through a foreign award if the parties to arbitration choose a foreign seat.²⁸ For example, A and B, both Bangladeshi nationals, entered into an agreement to settle any dispute that may arise in the performance of a contract within Bangladesh through arbitration, under Bangladeshi law. However, the parties agreed that Singapore would be the seat of this arbitration although the hearing might take place in Bangladesh for the convenience of the parties. In this example, only because of the seat, the

²⁷ See Status of the Convention at United Nations Treaty Collection: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en, last accessed on June 03, 2018.

²⁸ Belohlavek, *supra* note 23 at 286.

prospective award can be enforced in Bangladesh as a foreign award. The mere selection of a foreign seat of arbitration may cause the application of the *New York Convention* and change the nature of enforcement. Accordingly, the choosing foreign seat for arbitration has a legal consequence.

It may be argued that the *Convention* not only applies to the foreign award but also to the award considered as non-domestic in the State of enforcement. Therefore, the national legislation of an award-enforcing state has a key role in defining the award. Most national laws do not define domestic awards. It appears that “domestic award” means an award that is not foreign. An award may be foreign because of its origin or the nationality of the parties to the agreement. The national legislation may define an award as foreign where parties to the arbitration are foreign. The Model Law does not distinguish between domestic and international awards for the purpose of enforcing an award.²⁹ However, most model law jurisdictions do not adopt the Model Law recommendation on recognition and enforcement of award irrespective of the country in which it was made.³⁰ Thus, the geographical position of the seat of arbitration is still relevant in determining the origin of the award.

As to the Arbitrability

Arbitrability is the core concept of arbitration law and provides jurisdiction to the arbitrator. It refers to a general inquiry as to what types of dispute are ‘capable of settlement by arbitration’. An agreement involving pure private rights does not pose a problem with respect to arbitrability. The

²⁹ Article 35(1) of Model Law: “An arbitral award, *irrespective of the country in which it was made*, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.”

³⁰ See section 27 of the International Arbitration Act of Singapore, Section 44 of The Arbitration and Conciliation Act, 1996 of India, Section 100 of Arbitration Act of 1996 of UK.

issue of arbitrability often arises where the private right of action is entangled with elements of public interest.³¹

Article II(i) of the Convention states that each contracting State shall recognize an agreement *concerning a subject matter capable of settlement by arbitration*. The issue of arbitrability may arise before any national court in three situations: at the enforcement of the arbitration clause³², in setting aside or annulment of an award,³³ and at the enforcement of an award.³⁴ However, this section deals only with the role of the seat in determining subject-matter arbitrability at the pre-award stage.

Arbitrability can be challenged in two different ways: (a) arbitrability *ratione personae*, which is directly related to the legal ability of a person or entity to conclude an arbitration agreement; and (b) arbitrability *ratione materiae* which removes the subject matter of the dispute from the domain of arbitrable matters by the applicable national law.³⁵ Arbitrability *ratione personae* mainly arises in the case of a state or a state enterprise. Apart from the grounds to challenge the arbitrability of a dispute, the crucial question, in transnational arbitration, is the applicable law to determine the arbitrability of the dispute.

Many commentators believe that the issue of arbitrability should be resolved under the law of the court that deals with the question as to whether the subject matter of the arbitration

³¹ Karim Youssef, “The death of inarbitrability” (2009) 1 Mistelis Loukas Brekoulakis Stavros Arbitr Int Comp Perspect 47 at 50.

³² Article II (i) of the New York Convention 1958.

³³ See Article 34(2)(b)(i) of the Model Law.

³⁴ Article V(2)(i) of the New York Convention, 1958.

³⁵ Bernard Hanotiau, “The law applicable to arbitrability” (2014) 26 SAcLJ 874 at 875.

agreement is capable of settling through arbitration.³⁶ Others scholars submit that the issue of arbitrability should be decided in accordance with the law applicable to the arbitration agreement. Although the parties to the arbitration often chose the law applicable to their underlying contract, the parties do not furnish, in most cases, any express indication as to the governing law of the arbitration agreement itself.³⁷

At the pre-award stage, it is evident in the majority of the cases that the courts have determined the question of arbitrability according to their own national law.³⁸ Still, the law of the seat may be applied to determine arbitrability in some situations. The seat of arbitration may have a substantive rule of private international law that the issue of arbitrability arising in an arbitration seated within its jurisdiction shall be decided under the law of the seat.³⁹ Furthermore, an agreement to arbitrate is a civil matter like any other agreement. Arguably, the issue of arbitrability affects the validity of the agreement, and therefore, the validity of the agreement is to be governed by the procedural law of the seat.⁴⁰

Professor Hanotiau explained that in determining the arbitrability of a dispute, importance should be given to the nexus between the disputed situation and the legal system of the seat of the arbitration.⁴¹ In the absence of any indication as to the agreed proper law of the arbitration

³⁶ See Homayoon Arfazadeh, “Arbitrability under the New York Convention; the Lex Fori Revisited”, 17(1) Arb. Int'l (2001).

³⁷ Bernard Hanotiau, “What Law Governs the Issue of Arbitrability?” (1996) 12:4 Arbitr Int 391 at 394. See also Julian D M Lew, Stefan M Kröll & Loukas A Mistelis, *Comparative international commercial arbitration* (The Hague [u.a.: Kluwer Law International, 2003) at 120.

³⁸ Loukas A Mistelis, *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) at 12.

³⁹ Article 177 (1) of the Swiss Private International Law.

⁴⁰ Swiss Federal Court on ICC award no. 4604 of 1984 in Derains and Jarvin, ICC Arbitral Awards, at p. 549.

⁴¹ Hanotiau, *supra* note 36 at 396.

agreement, the seat determines the subject matter arbitrability.⁴² Furthermore, when the law applicable to the arbitration agreement conflicts with the law of the seat of arbitration, the latter has a substantial role to the extent that any award rendered in violation of the law of the seat could be set aside. The Model Law allows setting aside of an arbitral award if the court of the seat finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the seat. In determining inarbitrability, Professor Hanotiau claims that the law of the seat should prevail over the law governing the arbitration agreement if international public policy at the law of the seat would so hold.⁴³

Role of the Court of the seat in determining the validity of the agreement

An arbitration agreement is essentially a contract and must be treated as such. Like any other form of agreement, an arbitral agreement has to be valid and binding. The validity of the arbitration agreement includes issues regarding consent, error, duress, party's capacity to enter into an arbitration agreement, and revocation and termination of the agreement. The determination of validity may require the interpretation of the agreement; the ascertainment of parties bound by an arbitration agreement; and the scope of an agreement meaning whether the arbitration agreement covers non-contractual claims determined by means of interpretation of the agreement.

Article II (3) of the Convention specifically refers to the substantial validity of an arbitration agreement. The Convention states that the court of a contracting state shall, at the request of one of the parties to the arbitration agreement, refer the parties to arbitration, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed*. Here, the terms 'null and void', 'inoperative' and 'incapable of being performed' encompass various

⁴² Hanotiau, *supra* note 34 at 880.

⁴³ Hanotiau, *supra* note 36 at 396.

issues involving the validity of the arbitral agreement. In fact, the phrase ‘null and void, inoperative and incapable of being performed’ encompasses a broad range of reasons for invalidity of the arbitral agreement by reason of defects in consent through fraud, duress, misrepresentation, and mistake.⁴⁴ The contract with an arbitration clause is more susceptible to raise the issue of the substantial validity of the agreement than a separate arbitration agreement.

The court of the seat has the opportunity to review the validity of an arbitral agreement and may declare the arbitral agreement null and void, inoperative, or incapable of being performed at the pre-award stage. The jurisdiction of the arbitral tribunal depends on the existence and validity of the arbitration agreement. The arbitral tribunal can rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement.⁴⁵ However, this determination of the jurisdiction including the validity of agreement by the tribunal is not final. In an appeal against the tribunal’s decision on its jurisdiction, the court of the seat may determine the validity of the agreement again.⁴⁶ In a case of an application to refer a dispute to arbitration, the Supreme court of India held that serious allegations of fraud could only be inquired into by a court and not by an arbitral tribunal.⁴⁷ Since the jurisdiction of an arbitral tribunal depends on the validity of the arbitral agreement, the seat of arbitration, in fact, confirms the jurisdiction of the arbitral tribunal.⁴⁸

⁴⁴ Emmanuel Gaillard, Domenico Di Pietro & NanouL eleu-Knobil, *Enforcement of arbitration agreements and international arbitral awards: the New York Convention in practice* (London: Cameron May, 2008) at 276.

⁴⁵ Article 16 of Model law.

⁴⁶ Article 16(3) of the Model Law.

⁴⁷ *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte. Ltd.*, Supreme Court of India, Civil Appeal No. 895 of 2014 Case Date 24 January 2014.

⁴⁸ Article 8 of the Model Law, see also Frédéric Bachand, “Does Article 8 of the model law call for full or prima facie review of the arbitral tribunal’s jurisdiction?” (2006) 22:3 *Arbitr Int* 463 at 476.

Law applicable to the Validity of Arbitration Agreement

The Convention states that the validity of an arbitration agreement has to be determined in accordance with the law applicable to the agreement.⁴⁹ Therefore, the crucial question is which law is applicable to determine the validity of the arbitration agreement. The Model Law answers this question. It states that the validity of the arbitration agreement shall be ascertained under the law to which the parties have subjected it, or failing any indication thereon, under the law of the seat.⁵⁰

Although the parties to an arbitration agreement often choose the law governing the arbitration proceedings, they hardly mention any law governing the arbitration agreement itself.⁵¹ Professor Belohlavek contended that, in the absence of the agreement between the parties, the applicable law to a particular issue usually depends on how a state represents its role as a seat of arbitration.⁵²

The parties to the agreement may choose the law governing the main contract. Where the arbitration clause is one of the many clauses in a contract, the law applicable to the main contract is arguably the governing law of the arbitration clause.⁵³ It may be argued that a choice-of-law clause for the main contract does not automatically apply to the arbitration agreement since the agreement to arbitrate is a separate agreement to the main contract.⁵⁴ On this point, the Singapore High Court held that, in the absence of any choice-of-law for governing the arbitration agreement,

⁴⁹ Article V(1)(a) of the New York Convention.

⁵⁰ See Article 34(1) & 36(1) of the Model Law.

⁵¹ Lew, Kröll & Mistelis, *supra* note 36 at 120.

⁵² Belohlavek, *supra* note 23 at 266.

⁵³ Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, sixth edition ed (Oxford, New York: Oxford University Press, 2015) at 158.

⁵⁴ Dorothee Schramm, Elliott Geisinger, et al, Article II, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kronk et al eds, 2010), at 54.

an express substantive law in the main contract would not in and of itself be sufficient to displace parties' intention to have the law of the seat be the proper law of the arbitration agreement.⁵⁵ In the absence of any choice-of-law for governing the arbitration agreement, it can reasonably be conceived the parties intended that their entire relationship is to be governed by the same system of law.⁵⁶

Parties' explicit choice of the seat arbitration can be presumed as the implied choice of the law governing the agreement.⁵⁷ Where there is no express choice of a proper law of the matrix contract nor of the arbitration agreement, but the seat of arbitration is specified, the law of that place may govern both the matrix contract and the arbitration agreement.⁵⁸ An express reference to the law of the seat may determine the law of the arbitration agreement even if the proper law of the contract is otherwise.⁵⁹ On the other hand, in any case, if the parties choose the law of the seat of arbitration to govern the main contract, courts have often interpreted this explicit choice of law to be an implicit choice of law for the arbitration agreement as well.⁶⁰ Therefore, as mentioned earlier, parties' choice of the seat of arbitration is not only a matter of convenience but also a choice of a legal system which will be relied on to provide assistance or settle any disputes related to the arbitration proceedings or the award if they arise.

⁵⁵ Singapore No. 13, *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd et al.*, High Court, Suit No. 915 of 2013 (Summons No. 5657 of 2013), 19 June 2014 Yearbook Commercial Arbitration 2014 - Volume XXXIX (Van den Berg (ed.); Jan 2014), para. 21.

⁵⁶ *Sulamérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors* [2012] EWCA Civ 638, at [11].

⁵⁷ Philippe Fouchard & Berthold Goldman, *Fouchard, Gaillard, Goldman on international commercial arbitration* (Kluwer law international, 1999) at 788. See India No. 47, *Coal India Limited v. Canadian Commercial Corporation*, High Court of Calcutta (Kolkata), AP No. 172 of 2002, 20 March 2012 Yearbook Commercial Arbitration 2012 - Volume XXXVII (van den Berg (ed.); Jan 2012).

⁵⁸ David St John Sutton et al, *Russell on arbitration.*, 2007 (23rd) ed (London: Stevens and Sons : Sweet and Maxwell, 1949) at 83.

⁵⁹ *Ibid.*

⁶⁰ Lew, Kröll & Mistelis, *supra* note 36 at 120.

It appears from the above that the law of the seat can determine the validity of the arbitral agreement in some situations. Contrary to this, many scholars suggest that the validity of the agreement shall be determined by *lex mercatoria* in the absence of any choice of law applicable to the arbitration agreement.⁶¹

The concept of *lex mercatoria*

In commercial law, *lex mercatoria* refers primarily to a body of substantive law applicable to international commercial contracts.⁶² Professor Goldman, a strong advocate of *lex mercatoria*, defines the *lex mercatoria* as “a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law”.⁶³ Other proponents of *lex mercatoria*, more or less, agree with Goldman’s concept of *lex mercatoria*. Professor Weil claims *lex mercatoria* as “the international law of contracts” and an autonomous third legal order which is a new branch of public international law specific to State contracts and the contract between parties.⁶⁴ From the widest sense, the *lex mercatoria* may be customary, conventional, non-conventional, contractual, codified and uncoded principles or it may be derived from the general principles of law or trade usages.

⁶¹ See generally Philippe Fouchard & Berthold Goldman, *Fouchard, Gaillard, Goldman on international commercial arbitration* (Kluwer law international, 1999) at 802, Berthold Goldman, “The applicable law: general principles of law—the *lexmercatoria*” in *ContempProbl Int Arbitr* (Springer, 1987) 113 at 125. Born, *supra* note 16 at 3462. Ning Jin, The Status of *lex mercatoria* in International Commercial Arbitration, 7 Am. Rev. Int'l arb. 163 (1996); Emmanuel Gaillard, “Thirty years of *lexmercatoria*: towards the selective application of transnational rules” (1995) 10:2 ICSID Rev 208.

⁶² Abul FM Maniruzzaman, “The *lexmercatoria* and international contracts: a challenge for international commercial arbitration” (1998) 14 Am U Intl Rev 657 at 659.

⁶³ Goldman, *supra* note 59 at 116.

⁶⁴ See Professor Weil, *Principes Généraux du Droit et Contrats D'Etat*, in *Le Droit Des Relations Economiques Internationales, Etudes Offertes A Berthold Goldman* 387, 406-07 (1982).

In arbitration law, the doctrine of *lex mercatoria* is based on party autonomy. The parties to the agreement can choose the governing law for their agreement. Therefore, it is argued that the parties may sometimes prefer not to have their contract governed by particular national law, but by the principles common to several legal systems, or transnational principles, which are often referred to collectively, together with trade usages, as *lex mercatoria*.⁶⁵

Contemporary arbitration laws and international instrument acknowledge freedom of parties to the contract by the use of the words “rules of law” as opposed to “the law” or “laws” when describing the rules which the parties are free to select pursuant to the principle of party autonomy.⁶⁶ For example, in French law⁶⁷ the parties are free to select the “rules of law” applicable to their contract. The Hague Principles on Choice of Law in International Commercial Contracts states that the parties to the transnational commercial contract may choose rules of law that are internationally accepted as a neutral and balanced set of rules to govern their contract.⁶⁸ Therefore, apart from any national law, the parties may choose transnational rules or *lex mercatoria* to govern their arbitration agreement. The key advantage of choosing transnational rules as the governing the law of an agreement is that the national court may apply the rules where the state is not in a position to adopt the rules as positive law albeit the rules are salutary.⁶⁹

⁶⁵ Fouchard & Goldman, *supra* note 55 at 802., Michael Pryles, “Application of the *lex mercatoria* in International Commercial Arbitration” (2008) 31 Univ New South Wales Law J 319 at 326.

⁶⁶ Fouchard & Goldman, *supra* note 55 at 805.

⁶⁷ Article 1496 of French New Code of Civil Procedure.

⁶⁸ Article 3, Full text of the Principles available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135#text>, last accessed June 06, 2018.

⁶⁹ Genevieve Saumier, “The Hague Principles and the Choice of Non-State Rules of Law to Govern an International Commercial Contract” (2014) 40 Brook J Intl L 1 at 28.

Can *lex mercatoria* be applied to validate the arbitration agreement?

The significance of *lex mercatoria*, developed from the practices of a medieval guild,⁷⁰ has been lessened due to the emergence of international treaties, and modern domestic legislation with the sophisticated legal framework. The present contractual practice shows parties' preference in conflict-of-law rules rather than *lex mercatoria* which may lead the arbitration into the lengthy process, uncertain outcome, uncertain enforceability, and enormous costs.⁷¹

Among the jurists, there remains strong disagreement about the sources, methodology, and contents of *lex mercatoria*. Professor Lando termed *lex mercatoria* as transnational commercial law.⁷² Professor Goode distinguishes *lex mercatoria* from the transnational commercial law. He states that transnational commercial law consists of "the totality of principles and rules, whether customary, conventional, contractual or derived from any other source, which are common to a number of legal systems" while the *lex mercatoria* is that part of transnational commercial law which is uncodified and consists of customary commercial law, customary rules of evidence and procedure and general principles of commercial law, including international public policy.⁷³ The normative character of *lex mercatoria* is weaker than transnational commercial law. In fact, *lex mercatoria* is a set of general principles. Lord Mustill compiled a list of 20 principles as *lex mercatoria*.⁷⁴ Conversely, Professor Berger contends that the list of the *lex mercatoria* principles may extend from time to time.⁷⁵

⁷⁰ Harold J Berman, *Law and revolution: the formation of the Western legal tradition* (Cambridge, Mass.: Harvard University Press, 1983) at 333.

⁷¹ Georges R Delaume, "Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria" (1988) 63 Tulane Law Rev 575 at 609.

⁷² See Ole Lando, "The *lex mercatoria* in international commercial arbitration" (1985) 34:4 Int Comp Law Q 747.

⁷³ Roy Goode, "Usage and its reception in transnational commercial Law" (1997) 46:1 Int Comp Law Q 1 at 2–3.

⁷⁴ Justice Mustill, "The new *lexmercatoria*: the first twenty-five years" (1988) 4:2 Arbitr Int 86 at 110.

⁷⁵ Klaus Peter Berger, *The Creeping Codification of the New lexmercatoria* (Kluwer Law International, 2010) at 212.

Lex mercatoria as general principles of international trade are vague, incomplete, unstructured and fail to provide predictable results.⁷⁶ It cannot be itself the proper law of international commercial contract.⁷⁷ It may, at best, be subsidiary rules for the settlement of a transnational commercial dispute. Because of its open-ended character, *lex mercatoria* cannot be considered as law.⁷⁸

An agreement has to be defined by a stable legal system. One commentator said that the *lex mercatoria* is not a complete legal system but rather a source of public international law derived from national legal systems.⁷⁹ In the absence of any international treaty or international custom, it is difficult to regard *lex mercatoria* as a free-standing category of mandatorily-applicable international law.⁸⁰ *Lex mercatoria* is the general usage of international trade. The binding force of international trade usage is only so far as recognized by municipal law.⁸¹ The binding force of *lex mercatoria* does not derive from any State authority. *Lex mercatoria* is not a sufficiently substantial and solid system.⁸² The general principles are not law or a legal system that can be applied or referred to.⁸³ Since *lex mercatoria* is not a law but some principles, it cannot validate an agreement to arbitrate.

⁷⁶ See Born, *supra* note 16 at 2664. See also Emmanuel Gaillard, “Transnational Law: A Legal System or a Method of Decision Making?” (2014) 17:1 *Arbitr Int* 59.

⁷⁷ Maniruzzaman, *supra* note 60 at 732.

⁷⁸ See Berger, *supra* note 73 at 210.

⁷⁹ Paul Lagarde, *Approche Critique de la lex mercatoria*, in *Le Droit Des Relations Economiques Internationales, Etudes Offertes A Berthold Goldman* 125, 131-32 (Philippe Fouchard et al. eds., 1982). See also Germany No. 49, Bank A v. Bank B, Landesgericht [Court of First Instance], Hamburg, 18 September 1997, in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2000 - Volume XXV, Yearbook Commercial Arbitration, Volume 25* (© Kluwer Law International; Kluwer Law International 2000) pp. 641 – 1164.

⁸⁰ See Born, *supra* note 16 at 2761.

⁸¹ Roy Goode, “The role of the *lex loci arbitri* in international commercial arbitration” (2014) 17:1 *Arbitr Int* 19 at 29.

⁸² See Michael J Mustill & Stewart C Boyd, *The law and practice of commercial arbitration in England* (London; St. Paul Minn.: Butterworths ; Butterworths Legal Publishers, 1989) at 81.

⁸³ *Contra* See Berthold Goldman, *Lex mercatoria* (Kluwer Law and Taxation Publ., 1983).

It appears from the above that, in the absence of a choice-of-law governing the arbitral agreement, the validity and scope of the arbitral agreement should not be evaluated through some principles that override the agreement.⁸⁴ In this juncture, the law of the seat, since parties are agreed on it, may be applied to validate an arbitration agreement. Conversely, where parties to the agreement simply refer to *lex mercatoria* as the governing law without incorporating a particular rule of *lex mercatoria*, it can reasonably be conceived that they lack the necessary knowledge of its content.⁸⁵ In that case, a national court can apply the legal system most closely related to the contract, that is the law of the seat which the parties have chosen as a third legal system to settle their dispute.⁸⁶

III. Supervisory role of the seat

Both courts and scholars acknowledge the necessity of supervision by the seat over arbitration within its jurisdiction.⁸⁷ By choosing the seat of arbitration, the parties agreed to the supervisory jurisdiction of the courts of the seat of their arbitration.⁸⁸ The supervisory role of the seat is sometimes necessary to make the arbitration agreement workable.⁸⁹ Supervision over arbitration may be required during the arbitration or even before the arbitration begins.

⁸⁴ Fouchard & Goldman, *supra* note 55 at 799.

⁸⁵ Celia Wasserstein Fassberg, “Lex Mercatoria - Hoist with Its Own Petard The Empirical and Theoretical Underpinnings of the Law Merchant” (2004) 5 *Chic J Int Law* 67 at 76.

⁸⁶ Hanotiau, *supra* note 36 at 396.

⁸⁷ Singapore No. 13, *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd et al.*, High Court, Suit No. 915 of 2013 (Summons No. 5657 of 2013), 19 June 2014 *Yearbook Commercial Arbitration* 2014 - Volume XXXIX (van den Berg (ed.); Jan 2014), See e.g. Nigel Blackaby et al, “Role of National Courts during the Proceedings” in *Redfern Hunt Int Arbitr*, sixth edition ed (Oxford, New York: Oxford University Press, 2015) 415. Gerold Herrmann, “Does the World Need Additional Uniform Legislation on Arbitration?: The 1998 Freshfields Lecture” (1999) 15:3 *Arbitr Int* 211.

⁸⁸ UK No. 80, *C v. D*, High Court of Justice, Queen’s Bench Division, Commercial Court, 28 June 2007 and Court of Appeal (Civil Division), 5 December 2007 *Yearbook Commercial Arbitration* 2008 - Volume XXXIII (van den Berg (ed.); Jan 2008) p. 754 (para. 11).

⁸⁹ See Giulia Carbone, “The Interference of the Court of the Seat with International Arbitration Symposium” (2012) 2012 *J Dispute Resolut* 217.

The seat may have a role in the formation of the tribunal. In many instance parties to the dispute fail to specify the nature of arbitration or rules of arbitration, or to refer to a particular institution for arbitration. In the absence of any agreement between the parties on an issue, the court of the seat can settle the issues. The court of the seat is the only forum to grant emergency relief, such as maintaining the *status quo* during the arbitration, to a party before the formation of the tribunal.

The court of the seat may appoint an arbitrator if the parties to the agreement fail to agree on the process of appointing an arbitrator. Most arbitration legislations authorize the court to appoint an arbitrator in case of disagreement between the parties.⁹⁰ During the arbitral proceedings, particularly in ad hoc arbitration, the court of the seat is the only forum to challenge that the arbitrator has not been appointed in accordance with the procedure agreed by the parties. The court of the seat can also remove an arbitrator because of impartiality, corruption or otherwise.⁹¹ It may guide an arbitrator to find out the true intention of the parties in the existence of a pathological clause.⁹²

Although the tribunal has jurisdiction to settle the dispute in accordance with the agreement between the parties and the rules framed thereunder, it does not have any coercive power to protect rights of the parties or preserve evidence. Most arbitration statutes include provisions for court intervention such as court assistance in discovery and taking of evidence,⁹³ interim relief, an

⁹⁰ See e.g. Article 11 of Model Law, Section 18 Arbitration Act of England; Article 179(2) of Private International Law of Switzerland.

⁹¹ Carbone, *supra* note 87 at 226. Born, *supra* note 16 at 1924.

⁹² See Carbone, *supra* note 87.

⁹³ Article 27 of Model Law.

extension of time limit⁹⁴, settling a preliminary point of law.⁹⁵ Scholars categorize the form of intervention by the court of the seat into three : (i) the ordering of purely procedural steps which cannot be ordered or enforced by the arbitrators; (ii) orders for maintaining the *status quo*; and (iii) measures to ensure that the award has the intended practical effect and can be enforced.⁹⁶

An arbitration tribunal, being privately arranged dispute settlement forum, cannot summon any person to appear in person or produce any document before the arbitrator during the hearing of evidence. The court of the seat can assist an arbitrator in taking evidence. The role of the seat of arbitration is crucial in giving effect to interim measures of protection ordered by the arbitral tribunal. For effective arbitration proceedings, the tribunal may require attachment of any property or issue injunctions affecting third parties. However, the tribunal cannot do so because of the lack of coercive power. Article 17 of the Model Law authorizes the tribunal to grant interim relief. Article 17H of the amended model law in 2006⁹⁷ obliges the national court to recognize and enforce interim measures issued by an arbitral tribunal *irrespective of the country in which it was issued*. Although many jurisdictions adopted the amendments made to the Model Law in 2006; they did not adopt verbatim the Model Law provision. More specifically, the words ‘irrespective of the country in which it was issued’ has not been endorsed in all jurisdictions.⁹⁸

The court at the seat can intervene in arbitration by issuing an anti-suit injunction over whom it has personal jurisdiction. In common law systems, the court of the seat may issue anti-

⁹⁴ *Infra* note 99, 101.

⁹⁵ For example, Article 184(2) of Swiss Private International Law Act, 1987.

⁹⁶ Lew, Kröll&Mistelis, *supra* note 36 at 369.

⁹⁷ UN General Assembly Resolution 61/33 (4 December 2006).

⁹⁸ *See* Arbitration Act 1996 of British Columbia (Canada), Arbitration Act 1991 of Ontario (Canada); literally adopted in Commercial Arbitration Act 2013 Queensland (Australia).

suit injunctions against a party to the dispute, where such party is a national of the seat, to prevent him from initiating foreign litigation or restraining from proceeding with an already filed claim.⁹⁹ The court of the seat generally issues an anti-suit injunction since the same issue between the same parties is being arbitrated within its jurisdiction. The seat of arbitration may also issue an anti-suit injunction to prevent enforcement of an award.

Parties to the dispute often agree on time limits for starting the arbitration, the appointment of arbitrators or the rendering of an award. However, if the required action has not been taken within the agreed time limit, the whole arbitration agreement may become ineffective, and there will be no forum in which the parties' disputes can be determined. The parties may not agree on an extension; therefore, the court's intervention is necessary.¹⁰⁰ In case of disagreement regarding the extension of time during the arbitration proceedings, none other than the seat of arbitration is legally entitled to grant an extension of time. As to the extension of time, English law and French Law differ to some extent. While English courts can extend the times agreed by the parties to the dispute even after the expiration of the time,¹⁰¹ French courts only intervene for the extension of statutory or contractual time to conclude the arbitration before the expiration of the time.¹⁰² Apart from the extension of the time limit, the seat of arbitration determines any question of law of general or public interest in some jurisdictions.¹⁰³

⁹⁹ Margaret L Moses, *The principles and practice of international commercial arbitration*, 3rd ed (Cambridge, UK: Cambridge University Press, 2017) at 100.

¹⁰⁰ Model Law does not have any express provision regarding extension of the time limit agreed by the parties.

¹⁰¹ Section 12, 50, 79 of Arbitration Act, 1996 (England); See also Section 20 of Arbitration Act, 2018, British Columbia (Canada).

¹⁰² Article 1456 of New Civil Procedure Code, 1981.

¹⁰³ Section 34 of the Arbitration Act, 2018 (British Columbia, Canada); See also *Reliance Industries Ltd and Amor v Enron Oil and Gas India Ltd*. [2002] 1 All ER (Comm.) 59.

IV. Role of the seat in the post-award situation

The impact of the seat of arbitration is profound in the post-award situation. After the award is rendered by the arbitral tribunal, the court of the seat of arbitration can set aside, annul, or vacate the award. Although there are differences among the legal systems regarding standards with respect to the grounds for review and the ability to dispute parties to modify or exclude review, almost all legal systems allow applications to set aside. The Model Law permits applications for setting aside of an arbitral award.¹⁰⁴ Most national legal systems refuse to enforce an award where there are blatant breaches of procedural fairness, major procedural irregularities, or a lack of jurisdiction of the arbitrator. Typically, the court of enforcement does not review the merits of the award.

The involvement of the public judicial system in the arbitration ensures the minimum standard of due process and fairness.¹⁰⁵ The arbitral seat acts as a safety valve where the victim of an improper award—resulting from an excess of authority, violation of due process or corruption—may seek redress against such award. This significance of the seat is admitted in the Convention. It is argued that the fundamental purpose of the Convention is to regulate transnational arbitration by empowering seat courts to set aside arbitral awards with universal effect.¹⁰⁶ Indeed, the 'double exequatur' of the *Geneva Convention* is no longer required, but the annulment of an award in its country of origin has nevertheless been given effect.¹⁰⁷ The recognition and enforcement of the award may be refused if the award has not yet become binding on the parties, or has been set aside

¹⁰⁴ See Article 34 of Model Law.

¹⁰⁵ Moses, *supra* note 97 at 92.

¹⁰⁶ W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* ch. 4 (Duke University Press 1992); Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 (1) *Arb. Int'l* 19 (2001).

¹⁰⁷ See Article V(1)(e) of the New York Convention Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding Local Standard Annulments" (1998) 6:2 *Asia Pac Law Rev* 1 at 9.

or suspended by a competent authority of the country in which, or under the law of which, that award was made.¹⁰⁸ The Convention obliges the court of enforcement to adjourn the decision on the enforcement of the award where an application for the setting aside or suspension of the award has been made.¹⁰⁹

The Convention recognizes the significance of the seat at the enforcement stage of an award. Like at the stage of the arbitration proceeding, the law of the seat of arbitration is also relevant at the enforcement stage. Article V(1)(a) of the Convention states that the recognition and enforcement of the award may be refused where the parties to the agreement referred to in article II were, *under the law applicable to them*, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, *failing any indication thereon, under the law of the country where the award was made*. In the previous section, it has been argued that the law of the seat determines the validity of the arbitral agreement in certain cases. The court of enforcement considers the law of the seat before enforcing an award. An award based on an arbitration agreement that is valid according to the law of the seat will avoid the risk of non-enforceability since an award can be set aside or refused to enforce, under the Convention and the Model Law, because of its invalidity under the law of the seat.¹¹⁰ In one case, the US Court of Appeals for the Second Circuit held that “the law of the seat ordinarily provides the procedural law of the arbitration, and the courts of the jurisdiction in which an award is rendered have greater

¹⁰⁸ Article V(1)(e) of the New York Convention.

¹⁰⁹ Article VI of the Convention.

¹¹⁰ Singapore No. 13, *First Link Investments Corp Ltd v. GT Payment Pte Ltd et al.*, High Court, Suit No. 915 of 2013 (Summons No. 5657 of 2013), 19 June 2014 Yearbook Commercial Arbitration 2014 - Volume XXXIX (van den Berg (ed.); Jan 2014).

authority to decline confirmation of an arbitral award under the New York Convention than do the courts of other jurisdictions”.¹¹¹

However, the proponents of delocalized arbitration deny the impact of the seat on the post-award situation. They claim that a foreign award can be enforced despite it having been set aside at the seat of arbitration. It is argued that the refusal to enforce an award is discretionary under the Convention since the Convention states that the recognition and enforcement of an award *may be refused* [...].¹¹² The attachment of arbitration to its seat depends on how the country of enforcement defines the nature of the award. The role of the seat varies according to the degree of respect the courts of a particular state are willing to accord to the decisions of courts of other states of competent jurisdiction.¹¹³ English judges give the greater significance of *lex loci arbitri* than French or American judges.¹¹⁴ The French position as regards to the role of the seat of arbitration is paradoxical. The place of arbitration is legally irrelevant when a French court enforces an award rendered abroad or in international arbitration. But, an international award rendered within France may be set aside.¹¹⁵ Thus, the place of arbitration is legally relevant in France.

V. The view against the role of the seat

Many scholars argue that the agreement to arbitrate forms basis of international arbitration where the parties typically chose the seat of arbitration for its geographic aptness in relation to the habitual

¹¹¹ US No. 550, *JSC Surgutneftegaz v. President and Fellows of Harvard College*, United States District Court, Southern District of New York, 3 August 2005 and United States Court of Appeals, Second Circuit, 15 February 2006 Yearbook Commercial Arbitration 2006 - Volume XXXI (van den Berg (ed.); Jan 2006) p. 1224.

¹¹² Article V of the Convention 1958.

¹¹³ Goode, *supra* note 79 at 24.

¹¹⁴ A Mistelis Loukas, “Delocalization and its Relevance in Post-Award Review” (2013) 167 UNCITRAL Model Law Twenty-Five Years Glob Perspect Int Commer Arbitr at 175.

¹¹⁵ Article 1502 of the French Code of Civil Procedure states that the action for setting aside is available against arbitral awards rendered in France in international arbitration, on the grounds of Art. 1502.

residence of the parties to the agreement.¹¹⁶ These scholars contend that international arbitration is purely a private matter and that it has no connection to the legal system of the seat; accordingly, international arbitration is delocalized. It is argued that the parties merely chose a seat because of its geographic position and without any intention to be governed by the law of the seat. The proponents of delocalized arbitration claim that the award produced under international arbitration has no nationality since it has no connection to the territory where it is made. Furthermore, the court of enforcement can enforce an award even if it has been set aside at the place of arbitration.

The French Court recognized the delocalized theory of international arbitration in the case of *Gotaverken Arendal AB v. Libyan General National Maritime Transport Co.*¹¹⁷ The court held that although the award was produced in Paris, it had no connection to the French legal system since the parties were foreigners and the contract had no relation to France. Relying on *Gotaverken* case Professor Paulsson concluded that the binding force of international arbitration does not come from the legal system where the award materialized.¹¹⁸

The delocalized theory of international arbitration, as argued by the scholars, is based on two grounds. The first is the parties' capacity to delocalized arbitration. The second one is the enforcement of annulled (set aside or vacated) awards.¹¹⁹ It is contended that the parties to the dispute can delocalize their arbitral proceedings by agreeing on a-national rules governing their arbitral proceedings. Moreover, the law of the seat governs arbitration only in the absence of an

¹¹⁶ See Paulsson, *supra* note 7 at 55., Bernini, *supra* note 7., Goldman, *supra* note 7.

¹¹⁷ *General National Maritime Transport Co. v. Société Gotaverken Arendel A.B.*, Court of Appeal of Paris, 21 February 1980', *Revista Brasileira de Arbitragem*, (© Comitê Brasileiro de Arbitragem CBAr & IOB; Comitê Brasileiro de Arbitragem CBAr & IOB 2013, Volume X Issue 39) pp. 223 – 234.

¹¹⁸ Jan Paulsson, "Arbitration unbound: award detached from the law of its country of origin" (1981) 30:2 *Int Comp Law Q* 358 at 27.

¹¹⁹ See Paulsson, *supra* note 7.

agreement between the parties. Article V(1)(d) of the Convention states that the recognition and enforcement of an award may be refused where the formation of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, or, in the event that *failing such agreement*, the procedure was not in accordance with the law of the country where the arbitration took place. In other words, the law of the seat is relevant only when there is no agreement between the parties on the governing law. Accordingly, an award is not subject to the legal system of the seat. Refusal to enforce or suspension of an award under Article V(1)(e) and VI, as the case may be, applies only to cases where the parties or the arbitrators designate a country as the seat of arbitration. However, Paulsson argues that the Convention applies even if the parties have not designated a place for their arbitration.¹²⁰

On the parties' Capacity to Delocalized Arbitration

International arbitration is based on the autonomy of parties, and party autonomy allows arbitration proceeding to be detached from any particular legal system. But, this party autonomy is not absolute. Professor Maniruzzaman explains that the parties' freedom of choice is, albeit a general principle of private international law, limited by public policy.¹²¹ It may be argued that an agreement to arbitrate provides the binding force of an award. Nevertheless, the parties' voluntary choice of seat means that legal system must be respected.¹²² Professor Goode criticized the selective application of party autonomy in international arbitration.¹²³ For example, although the mandatory elimination of judicial review is recognized in many legal systems, the parties'

¹²⁰ *Ibid* at 372.

¹²¹ Abul FM Maniruzzaman, "International arbitrator and mandatory public law rules in the context of state contracts: an overview" (1990) 7 J Intl Arb 53 at 54.

¹²² Goode, *supra* note 79 at 31.

¹²³ *Ibid*.

agreement to the compulsory judicial review of the award produced through arbitration is not recognized.

The reciprocal promises made by the parties do not *ipso facto* create a binding agreement unless a legal system recognizes such promises. Therefore, the parties cannot delocalize their arbitration agreement and their arbitration. Governance of arbitration by the seat does not affect party autonomy since the parties voluntarily choose the legal system of the seat.

Should Annulled Awards be Enforced?

The proponents of delocalized arbitration ignore the significance of the seat of arbitration claiming that a foreign arbitral award can be enforced by the court notwithstanding its annulment at the seat of arbitration. Paulsson argues that the refusal to enforce an award under Article V(1) is discretionary. The provision is not a bar to enforce an award annulled at the seat.¹²⁴ In his opinion, Article V(1) allows any objection against the enforcement of a foreign award, but it does not compel the court to refuse the enforcement under any of the five grounds mentioned in Article V. It is asserted that Articles III and IV of the Convention confirms that proof of the finality of the award is no longer required to enforce an award under the convention. The Convention provides paramount importance of party autonomy in defining the law governing the arbitration. The national law comes into play only on the issues not covered by the arbitration agreement. Careful drafting of an arbitration agreement can avoid any impact of the national law. Professor Paulsson further contends that an enforcing court can enforce an award under its own law under Article VII of the Convention, and can thus bypass the procedure stipulated under Article V.

¹²⁴ Paulsson, Jan, “Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment” (1998) 9/Vol. 1 ICC International Court of Arbitration Bulletin 14;

Professor Van den Berg denies any scope to enforce an annulled award under the Convention.¹²⁵ He submits that the legal regime of international arbitration comprises not only of arbitration law but is also applicable to the courts. The court of enforcement shall determine if there is any irregularity in the arbitral process. The holder of an annulled award should be refrained from shopping around the world to find a suitable court which will enforce such an award.¹²⁶ The underlying rationale of Article V(1)(e) is the concentration of judicial control over the arbitral process. According to Professor Van den Berg, Paulsson totally ignores Article VI of the Convention. An annulled award does not exist and is legally impossible to enforce through a court of law.¹²⁷

Article VII allows an interested party to take resort to more favorable domestic legislation for the enforcement of the award. Nevertheless, an interested party can rely on the domestic law for the enforcement of a foreign award by excluding the Convention entirely.¹²⁸ A party cannot rely on the provision of the Convention for the recognition of the arbitration agreement and the domestic legislation for the enforcement of the award simultaneously. Moreover, Article VII can be applied only if the concerned country of enforcement has a domestic statutory law or precedent in enforcing the foreign awards. Apart from France, many countries do not have any domestic law for the enforcement of foreign award disregarding the setting aside of the award at its seat.¹²⁹

¹²⁵ See Albert Jan van den Berg, "Should the Setting Aside of the Arbitral Award be Abolished?" (2014) 29:2 ICSID Rev 263.

¹²⁶ *Ibid.*

¹²⁷ See Van den Berg, Jan, "Enforcement of Annulled Awards?" (1998) 9/Vol. 2 ICC International Court of Arbitration Bulletin 18.

¹²⁸ *Ibid.*

¹²⁹ *Ibid* at 21.

The enforcement of annulled award promotes the creation of ‘floating awards’ which cannot set aside conclusively. It depicts the enforcing state’s pro-entity stance over the foreign interests.¹³⁰ In this doctrine, an unfairly treated party in arbitration proceeding has nothing but to wait for the enforcement steps taken by the award holder in different countries and has no opportunity to challenge the recognition in each country.¹³¹ The enforcement of the annulled award is against the principle of private international law.¹³² It contravenes the implied sharing of jurisdiction between the court and the arbitration tribunal under international arbitration law.¹³³

The awards set aside at the seat should not be enforced to respect parties’ choice, avoid cost and inconvenience, and the risk of inconsistent decisions resulting from a multiplicity of proceedings.¹³⁴ The enforcement of annulled award will damage the international business community’s growing confidence in international arbitration. The failure to obtain global recognition of the decision rendered by the court of the seat could discourage users from resorting to international arbitration in the future. Finally, the court of enforcement should not enforce an annulled award to foster rather than damage mutual respect and co-operation among courts of different states.¹³⁵

¹³⁰ Emmanuel Gaillard, “The enforcement of awards set aside in the country of origin” (1999) 14:1 ICSID Rev 16 at 41.

¹³¹ *Ibid* at 40.

¹³² *Ibid*.

¹³³ William Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press, 1992).

¹³⁴ Goode, *supra* note 81 at 39.

¹³⁵ *Ibid*.

VI. Deference to the mandatory rules and public policy of the seat

The arbitral tribunal must defer to the mandatory rules and public policy of the seat.¹³⁶ This deference is particularly important when the seat of arbitration is a model law jurisdiction. Mandatory rules are some defined norms that purport to apply irrespective of a contract's proper law or the procedural regime selected by the parties.¹³⁷ Mandatory rules of the seat get a strong claim to be applied because of the enforceability concerns. Mandatory rules reflect a states' domestic and international public policy and generally protect the economic, social or political interest.¹³⁸ The role of mandatory rules in international commercial arbitration may put the interests of states and parties in direct conflict.¹³⁹ Additionally, two or more states may have either conflicting mandatory rules or interests in the outcome of arbitration where their corporate citizens are involved.

Mandatory rules may be a piece of legislation that incorporates fundamental values of the country with a defined scope of its application in both territorial and personal.¹⁴⁰ The English Arbitration Act 1996 listed mandatory rules in its schedule I for matters relating to arbitration in the UK. For example, an agreement regarding the payment of the cost of arbitration is not valid before the dispute in question has arisen.¹⁴¹ An arbitration agreement cannot disparage the mandatory provisions of the Act.¹⁴²

¹³⁶ See e.g. Laurence Shore, "Applying Mandatory Rules of Law in International Commercial Arbitration" (2007) 18 Am Rev Int'l Arb 91.

¹³⁷ Pierre Mayer, "Mandatory rules of law in international arbitration" (1986) 2:4 Arbitr Int 274 at 275.

¹³⁸ Marc Blessing, *Impact of the extraterritorial application of mandatory rules of law on international contracts* (Helbing & Lichtenhahn, 1999) at 5.

¹³⁹ Andrew Barraclough & Jeff Waincymer, "Mandatory rules of law in international commercial Arbitration" (2005) 6 Melb J Intl L 205 at 207.

¹⁴⁰ Catherine Kessedjian, "Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?" (2007) 18 Am Rev Intl Arb 147 at 148.

¹⁴¹ Article 60 of the Arbitration Act 1996 (U.K).

¹⁴² Section 4 of the Act 1996 (U.K).

Professor Kessedjian draws a distinction between mandatory rules and public policy where, unlike public policy, mandatory rule possesses three distinctive features, i.e., 1) it cannot be precedent; 2) its values are narrow; 3) its scope is very specific.¹⁴³ Nevertheless, mandatory rules and public policy share the common values of the state. The concept of public policy is typically expansive and varies from case to case. In arbitration, the concept of mandatory rules encompasses all kinds of norms from which the parties cannot derogate, and, therefore, it does not leave room for party autonomy, irrespective of their source.¹⁴⁴

Arbitration proceedings cannot disregard any constitutional provision of the seat. The provisions of the constitution are mandatory and reflect public policy of the concerned country. Article 34(2)(ii) of the Model Law states that an arbitral award may be set aside by the court where the court finds that the award is in conflict with the public policy of the seat of arbitration.¹⁴⁵ Under French law, an award may only be set aside, *inter alia*, where due process was violated, or recognition or enforcement of the award is contrary to international public policy.¹⁴⁶ An award rendered in Switzerland can be challenged if the award is incompatible with Swiss public policy.¹⁴⁷ These references to public policy include the mandatory norms of the seat.

VI. Conclusion

It appears from the above illustration that the legal system of the seat of arbitration has a substantial role in international commercial arbitration. An agreement to arbitrate is the heart of transnational arbitration. The binding force of an agreement does not originate from the promises between the

¹⁴³ Kessedjian, *supra* note 130 at 148.

¹⁴⁴ *Ibid* at 147.

¹⁴⁵ Legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions. See Status at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, last accessed on April 24, 2018.

¹⁴⁶ Article 1520 of the French Code of Civil Procedure.

¹⁴⁷ Article 190 of Swiss Private International Law Act, 1987.

parties to the agreement but from a legal system. That legal system, in many cases, is the law of the seat which is voluntarily chosen by the parties. The seat of arbitration determines the validity of that agreement in some situations. It is crucial both in the pre-award and post-award stage. It ensures validity, finality, and fairness of the award.

International arbitration mechanism requires assistance from the legal system of the seat for its effective functioning. Almost all legal systems possess rules regarding setting aside of arbitral awards that are produced within their jurisdiction. The arbitral tribunal should respect the mandatory rules and public policy of the seat, at least, to avoid setting aside of award at the seat.

The doctrine of delocalized arbitration entails the possibility of enforcement of the annulled award. The idea of stateless award disregards the annulment of the award at the seat of arbitration. It states that a foreign award can be enforced notwithstanding its annulment at the seat of arbitration. Apart from France, most prominent legal systems do not admit the concept of the stateless award. The wide adoption of the Model Law, which includes the substantial role of the seat of arbitration, by the states alternatively denies the delocalized theory of international arbitration. Professor Paulsson concedes the complete avoidance of the seat would be problematic since the international arbitral system would collapse if no state could be called upon to recognize and enforce awards.¹⁴⁸

Actually, the place of enforcement of the award is uncertain in most cases and may not be limited to a single jurisdiction. The enforcement of annulled award will encourage forum shopping by the award holder. Additionally, inconsistent decisions resulting from a multiplicity of proceedings will damage mutual respect and co-operation among courts of different states. Most

¹⁴⁸ Paulsson, *supra* note 8 at 54.

importantly, the New York Convention does not provide scope to enforcement of the annulled award. The enforcement of annulled awards humiliates the courts of the place of arbitration. It is contrary to the principle of comity of nations. Alternatively, respecting the decision of a foreign court by the court of enforcement will foster international co-operation among courts. Article VII of the Convention is damaging to the process of internationalization which the Convention itself has done so much to foster.¹⁴⁹

The Convention, as well as the Model Law, acknowledges the substantial roles of the seat of arbitration. Professor Goode rightly concluded that ‘if there is to be a single decision which is in principle to have effect *erga omnes*, it should be the court of the seat’.¹⁵⁰ The law of the seat protects the legitimate expectations of the parties to arbitration. The parties to arbitration will suffer injustice if their reasonable reliance on the law of the seat is frustrated. Nevertheless, excessive intervention by the court of the seat may undermine international arbitration as a private dispute settlement mechanism. A balance between the scope of judicial review and party autonomy is required. Thus, the choice of the seat of arbitration is essential in international commercial arbitration. The Model Law takes a moderate territorial approach by regulating the court’s intervention in exclusive cases only.¹⁵¹ An efficient and harmonized regime of judicial review which could exclusively be exercised by the competent courts at the seat of arbitration will streamline and expedite the enforcement process and thereby increase the efficiency and reliability of international arbitration.¹⁵²

¹⁴⁹ Goode, *supra* note 79 at 39.

¹⁵⁰ *Ibid.*

¹⁵¹ Loukas, *supra* note 111 at 175.

¹⁵² Hossein Abedian, “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review” (2011) 28 J Intl Arb 553.

Chapter Three: The Legal regime of Commercial Arbitration in Bangladesh

I. Introduction

Chapter two examines the role of the legal system where an international commercial arbitration takes place. This chapter examines the legal framework for international arbitration in Bangladesh with a specific emphasis on the role of Bangladesh as a seat of international arbitration. It is already argued that the co-relation between the court and the arbitral tribunal is significant for effective settlement of a transnational dispute. Before the discussion on the law that regulates international arbitration in Bangladesh, a brief description of the court system of Bangladesh is relevant to understand the interrelationship between national courts and arbitral tribunal.¹⁵³

The Supreme Court of Bangladesh comprises of High Court Division (*HCD*) and Appellate Division (*AD*). The court derives its jurisdiction from the constitution of Bangladesh. The Appellate Division hears appeals against the decision of *HCD* on the matters specified in the constitution or by way of granting leave. It has no original jurisdiction. On the other hand, *HCD* has original, appellate and other jurisdictions under the constitution and other statutes.¹⁵⁴ Notably, the law declared by the *AD* is binding on *HCD* and the law declared by either division is binding on all courts and tribunals subordinate to it.¹⁵⁵ The *HCD* is vested with the matters involving international commercial arbitration except for the enforcement of an award. The court of District Judge is the next to the *HCD* in the hierarchy of courts with civil jurisdiction. It secures enforcement of the award within its territorial jurisdiction.

¹⁵³ Bangladesh is a sovereign republic with unitary form of Government.

¹⁵⁴ Article 101 of the Constitution of the People's Republic of Bangladesh, 1972

¹⁵⁵ Article 111, *Ibid*.

II. Background of Arbitration Law in Bangladesh

Bangladesh inherited the colonial legacy in arbitration law. During the British regime, as a presidency of the then government, arbitration was governed in this region by the Bengal Regulation 1772. Later on, the *Civil Procedure Code, 1908* includes the rules regarding arbitration. At the time of the partition of British-ruled India in 1947, there were two laws on arbitration—the *Arbitration (Protocol and Convention) Act, 1937*; and *the Arbitration Act, 1940*. Both the Acts continued in the post-independence period of Bangladesh. Being a party to the *New York Convention*¹⁵⁶, Bangladesh enacted the Arbitration Act, 2001 modeled upon *UNCITRAL Model Law*.¹⁵⁷ By adopting the Act 2001, Bangladesh largely admits the jurisdictional theory of international arbitration. Nevertheless, the Act deviates from the Model Law in many respects. This chapter mainly focuses on the deviations made to Act and their impact on arbitration seated in Bangladesh.

The Act 2001 repealed the Act 1937 and Act 1940. The latest amendments to the Act were made in 2004 on interim measures issued by the court. Although the Act empowers the Government and the Supreme Court to frame rules for carrying out the purposes of this Act; no rules, neither from the Government nor the Supreme Court, have been framed yet. The original text of the statute is in Bangla language. The official English text is yet to publish. This study used an unofficial English text of the statute.¹⁵⁸

¹⁵⁶ Bangladesh accessed the New York Convention in May 06, 1992, see UN Treaty Collection at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=en, last accessed on July 25, 2018.

¹⁵⁷ The Act was enforced on April 20, 2001 Vide Notification No. SRO 87-Law/2001 dated 9-04-2001, published in Bangladesh Gazette Extraordinary, dated 10-04-2001.

¹⁵⁸ Unofficial English Text is available at Metropolitan Chamber of Commerce and Industry (MCCI), Dhaka, Bangladesh: http://www.mccibd.org/images/uploading/act_and_policy/corporate_governance/The-Arbitration-Act-2001.pdf, last accessed on July 24, 2018.

III. The object of the Law

The preamble of the Act states that the Act enacts the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations. Although the Act 2001 specifically refers to international commercial arbitration in its preamble, it essentially created a single and unified arbitral regime for both domestic and international arbitration. With the enactment of Act 2001, Professor Maniruzzaaman commented that Bangladesh had kept pace with the trends in the field of international commercial arbitration in the rest of the world.¹⁵⁹

Unlike many preferred jurisdictions for international arbitration,¹⁶⁰ the Act 2001 made no reference to the New York Convention or Model Law either in its preamble or the text. This reference is crucial pursuant to Bangladesh's international obligation under the New York Convention. In *Saipem v. Bangladesh*¹⁶¹, it was claimed that Bangladesh breached its international obligation by not respecting Article II of the New York Convention through issuing an anti-arbitration injunction against an ICC tribunal seated in Bangladesh.¹⁶² In response to that, Bangladesh stated that the country had not yet passed an Act of parliament pursuant to its obligation under the Convention.¹⁶³ Therefore, the court had no obligation to recognize an arbitration agreement. Notably, Bangladesh possesses a dualist approach in enforcing international law within its territory. In the *Saipem* case, the ICSID tribunal held that *Saipem*'s right to arbitrate the dispute in Bangladesh under the International Chamber of Commerce (ICC) Arbitration Rules

¹⁵⁹ Maniruzzaman, *supra* note 9 at 140.

¹⁶⁰ See Preamble of the Indian Arbitration Act, 1996; International Arbitration Act, 1994 of Singapore; see text of Arbitration Ordinance of Hong Kong.

¹⁶¹ *SAIPEM S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award on June 30, 2009.

¹⁶² *Ibid* para 163.

¹⁶³ *Ibid.* para. 164.

had been expropriated by Bangladesh through the undue intervention of its courts.¹⁶⁴ The tribunal reasoned that Bangladesh had not disputed that it was not bound by the Convention, though the Convention might not be binding on its courts.¹⁶⁵ *Saipem*'s decision is landmark in the jurisprudence of investment arbitration where *ICSID* tribunal held a country responsible for the first time for the conduct of its judiciary. It appears from this case that a specific reference to the Convention in the preamble of the Act would certainly bind the court.

III. The scope of the Law

While the arbitration laws of many preferred seats widen the scope of its application,¹⁶⁶ the Act 2001 has limited application in commercial arbitration. The Act 2001 includes only a few provisions specific to international commercial arbitration. In its scope, the legislation states that it shall apply where the place meaning 'seat' of arbitration is within Bangladesh.¹⁶⁷ In other words, the statute limits its scope regarding arbitration seated outside of Bangladesh. It is evident that the Act 2001 follows the *English Arbitration Act 1996* on different issues, but it fails to broaden its application like the English Arbitration Act. The Act 2011 follows the Indian approach regarding the scope of application of the statute.¹⁶⁸

Section 3(1) of the Act unequivocally states that the Act shall apply where the place of arbitration is in Bangladesh. The Act further states that where the place of arbitration is outside Bangladesh, sections 45,46 and 47 of the Act shall apply. Therefore, it may be reasonably

¹⁶⁴ *Ibid* para. 204.

¹⁶⁵ *Ibid* para 165.

¹⁶⁶ See section 5 of International Arbitration Act, 1994 (Singapore); Section 2 of Arbitration Act, 1996 (England); Section 2 of the New Arbitration Law of UAE; Section 7 of Dubai International Financial Centre (DIFC) Arbitration Law, 2008.

¹⁶⁷ Section 3 of the Arbitration Act, 2001.

¹⁶⁸ See Section 2(2) of Arbitration and Conciliation Act, 1996 (India).

concluded that the Act has no application in foreign seated arbitration except for recognition and enforcement of the award.

Judicial decisions on the application of the Act 2001 are not consistent. In *Unicol Bangladesh Blocks Thirteen and Fourteen and another vs. Maxwell Engineering Works Ltd. and another*¹⁶⁹ an application for leave to appeal was filed before the *AD* against a judgment and order of the *HCD*. In this case, *AD* held that section 3(1) and 3(4) of the Act limits the application of the Act as to the arbitration held within Bangladesh.¹⁷⁰ However, in *HRC Shipping Limited v. MV X-Press Manashu and others*¹⁷¹, where an application filed under section 10 of the Act 2001, the *HCD* distinguished the case from *Unicol* on law point.¹⁷² The court held that:

It is evident that section 3(1) provides that 2001 Act apply where the place of arbitration is in Bangladesh. It does not state that it would not apply where the place of arbitration is not in Bangladesh. *Neither does it state that the 2001 Act would 'only' apply if the place of arbitration is Bangladesh.*¹⁷³ (emphasis added)

In this case, the court kept an eye on Articles 1(2) and 8 of the Model Law¹⁷⁴ which, in essence, provides that the court proceedings regarding the subject matter of the arbitration will 'only' be stayed if the arbitration seated within the territory of the state. In the absence of any specific emphasis on the territorial application of the Act as well as any express negation, the court presumed the possibility of application of the Act in case arbitration seated outside Bangladesh. In this case, the court heavily relied on the decisions of the Indian courts in the case of *Bhatia*

¹⁶⁹ 56 DLR (AD) [2004] 166.

¹⁷⁰ *Ibid.* para 15, see also *Canada Shipping v. TT Katikaayu* 54 DLR (2002) 93 para. 7, 8 & 11.

¹⁷¹ 12 MLR [2007] 265.

¹⁷² *Ibid.* para. 25.

¹⁷³ *Ibid.* para. 32.

¹⁷⁴ *Ibid.* para. 11.

*International vs. Bulk Trading S.A. and others*¹⁷⁵ and *OlexFocas v Skoda Export*¹⁷⁶ where the courts granted interim relief albeit the arbitration had been seated outside India.

The view of the HCD regarding the scope of the Act 2001 in *HRC case* did not sustain a very long time. In 2014, in *STX Corporation Ltd. v Meghna Group of Industries Ltd. and Ors*,¹⁷⁷ HCD reversed its previous position on the scope of the Act 2001. Mamnoon Rahman J. held that section 3(2) of the Act specifically excludes the application of this law when the place of arbitration is outside Bangladesh.¹⁷⁸ In *STX case*, the court was bound by the decision of *Unicol Case*. Later on, the decision in *STX case* has been reaffirmed in a number of cases.¹⁷⁹ Therefore, it is clear that the Act 2001 is *only* applicable to the international arbitration seated in Bangladesh. This study later examines that the territorial limitation of the Act 2001 is problematic particularly in enforcing interim measures issued by a foreign seated tribunal.¹⁸⁰

IV. Definition of international commercial arbitration

Although the Act 2001 is based on Model Law, it deviates from the Model law in defining international arbitration. Whereas the Model Law defines internationality of arbitration in terms

¹⁷⁵ AIR 2002 (SC) 1432. The court emphasizes on the object of the Act 1996 and noted that the Act 1996 establish a uniform legal framework for the fair and efficient settlement of dispute arising in International commercial arbitration. The court held that the Act makes no distinction between International Commercial Arbitration held in India or outside India. Therefore, the court can grant interim relief in a proper case even if the tribunal is seated outside India.

¹⁷⁶ 2000 AIR (Delhi) 171, In this case the court held that the Act 1996 leads to the clear conclusion that sec. 2(2) is an inclusive definition and it does not exclude the applicability of Part I to the arbitration seated outside India. The other clause of section 2 confirms that the court can grant interim relief in appropriate cases. Similar to Act 2001, sec. 2(2) of the Arbitration and Conciliation Act, 1996 states ‘this Part shall apply where the place of arbitration is in India’.

¹⁷⁷ [2012] 32BLD 400.

¹⁷⁸ *Ibid.* para 18.

¹⁷⁹ See *Project Builders Ltd. (PBL) vs. China National Technical Import and Export Corporation*, 69 DLR [2017] 290; *Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited Arbitration Application No. 11 of 2010* before the HCD of Supreme Court of Bangladesh [unreported]

¹⁸⁰ See *Infra* ‘Interim Measure’ of this Chapter.

of location of the business of the parties or of the subject matter of the dispute, the Act 2001 defines international arbitration in terms of nationality or juridical status of the parties.¹⁸¹ According to section 2(c) of the Act 2001,

“International Commercial Arbitration” means [...] where at least one of the parties is: an individual who is a national of or habitually resident in, any country other than Bangladesh; or a body corporate which is incorporated in any country other than Bangladesh; or a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or the Government of a foreign country. All other arbitration, by implication, is considered to be domestic arbitration.

Therefore, a commercial dispute between two Bangladeshi nationals may not be international even if their place of business is outside Bangladesh.¹⁸² Section 2(c), actually, restricts the scope of internationalization of a domestic dispute.¹⁸³

The Act 2001 creates a conceptual conflict among the sections 2(c), 2(k) and 3 of the Act. As mentioned above, an arbitration between two Bangladeshi nationals in a foreign seat is a domestic arbitration proceeding under section 2(c) of the Act. But, as per section 3, the Act 2001 is not applicable to this arbitration since the seat of arbitration is beyond Bangladesh.¹⁸⁴ Nonetheless, the award produced through this arbitration becomes a foreign award and enforceable under section 45 of the Act.¹⁸⁵ Therefore, an award produced through domestic arbitration turns into a foreign award. This discrepancy creates a possibility of setting aside an award produced in a foreign state. The issue is particularly crucial since the grounds for setting aside of an arbitral award differ, to some extent, from the grounds for refusal to enforce a foreign award.¹⁸⁶

¹⁸¹ Maniruzzaman, *supra* note 9 at 141.

¹⁸² *Ibid.*

¹⁸³ See ‘Internationalization of domestic dispute’ in Chapter 2.

¹⁸⁴ The Act 2001 section 3

¹⁸⁵ The Act 2001 section 2(k): “Foreign arbitral award” as an award made in the territory of any state other than Bangladesh.

¹⁸⁶ *Ibid.* section 43 and Section 46.

V. Domain of Arbitration

Arbitration Agreement

In defining ‘Arbitration Agreement,’ the Act 2001 followed the prescription of Model law. According to section 2(n), “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. Section 9 of the Act incorporates the features of an arbitration agreement. Like Article II of the convention, the Act stipulates that an arbitration agreement shall be in writing and includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The Act specifically mentions “fax” and “e-mail” as the modes of writing amongst others.¹⁸⁷ It also includes a record of the agreement or exchange of statement of claim and defense in which the existence of the agreement alleged by one party and not denied by the other.¹⁸⁸ Furthermore, where any reference of a document containing arbitration clause has made in a contract constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the main contract.¹⁸⁹

Separability

Bangladesh admits autonomy of the arbitration clause meaning the arbitration agreement contained in the main contract is considered to be a separate agreement which is legally independent of the main contract.¹⁹⁰ Therefore, the arbitration clause is given an enclave status.¹⁹¹ Regarding the separability of the arbitration agreement, the Act 2001 is relatively improved than the Model Law.

¹⁸⁷ *Ibid* Section 9(2) (b).

¹⁸⁸ *Ibid* Section 9(2) (c) *Ibid*.

¹⁸⁹ *Ibid* Explanation of Section 9.

¹⁹⁰ *Ibid*. section 9 (1) and 9 (Explanation).

¹⁹¹ Maniruzzaman, *supra* note 9 at 149.

Model Law does not admit the survival of the arbitration clause unequivocally when the main agreement of which it forms of part never came into being or was nullity *ab initio*.¹⁹² While Model Law states that a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause the provision regarding,¹⁹³ the Act 2001 clearly states that an arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement while giving decision for determining the jurisdiction of the arbitral tribunal. Thus, the validity of the main contract does not affect the validity of the arbitration agreement. The Supreme Court of Bangladesh reaffirms the doctrine of severability of an arbitral clause from the main contract. It was held that merely because the contract has come to an end by its termination or repudiation, the arbitration clause does not get perished nor rendered inoperative.¹⁹⁴ Bangladesh took inspiration from the English Arbitration Act, 1996 and authorized the arbitral tribunal in broad terms to have jurisdiction on the validity of the arbitral agreement.¹⁹⁵ Section 17 of the Act includes the jurisdiction of arbitral tribunal to rule on question involves the existence of a valid arbitration agreement.

Arbitrability

In general, all civil disputes may be settled by arbitration. Criminal matters are not usually arbitrable in Bangladesh. The Act 2001 does not affect any bar on the arbitrability of any disputes.¹⁹⁶ Section 10(2) of the Act 2001 states that if the court is satisfied that an arbitration agreement exists, it shall refer the parties to arbitration unless it finds that the arbitration agreement is void, inoperative or *incapable to settle through arbitration*. However, unlike many Model law

¹⁹² *Ibid* at 150.

¹⁹³ Article 16 of the Model Law.

¹⁹⁴ *Drilltec-Maxwell Joint Venture v. Gas Transmission Company Limited* 21 BLC (2016)122.

¹⁹⁵ Khan, *supra* note 11 at 290.

¹⁹⁶ Section 3(3) of the Act 2001.

jurisdictions,¹⁹⁷ the Act does not provide enough guidance as regards to the arbitrability of the subject-matter of the dispute. Section 3(3) of the Act merely states that Act shall not affect any other law for the time being in force by which certain disputes may not be submitted to arbitration. On the other hand, section 54 of the Act states that the Act is not applicable for any matters under any other law provides special provisions for arbitration. Therefore, the Act does not have any overriding effect when a particular Act includes a settlement procedure relating to a dispute under that Act.

In determining the arbitrability of the subject-matter of the dispute, the precedents under the old Arbitration Act, 1940 may be relevant. Under the Act 1940, the Court usually decided in each case whether sufficient cause had existed or not to refer the dispute in Arbitration.¹⁹⁸ Notably, the court refused to refer a dispute that required investigation into the charge of fraud to arbitration. Earlier, the complex questions of law were decided by the court.¹⁹⁹

The Act does not explain the term commercial either. It merely states ‘commercial under the law in force in Bangladesh’. No legislation of Bangladesh defines the term commercial. Therefore, it is not clear whether a consumer dispute or rights under the anti-trust legislation is arbitrable in Bangladesh. It is also unclear whether the jurisdiction of a court on a matter does *ipso facto* constitute a bar on the arbitrability of the matter or not. This position is difficult for a foreign party to find what matters are not arbitrable in Bangladesh.

The Act 2001 is not applicable for resolving disputes in two major foreign investment sectors of Bangladesh: energy and telecommunication. Bangladesh Energy Regulatory

¹⁹⁷ Section 11(2) of International Arbitration Act, 1994 of Singapore.

¹⁹⁸ Dr. Kamal Hossain and Associates at <http://sarco.org.pk/bangladesh.html>, last accessed on July 10, 2018.

¹⁹⁹ *Ibid.*

Commission (BERC) is the regulatory body of the energy sector in Bangladesh established under the Bangladesh Energy Regulatory Commission Act, 2003. *BERC* issues license under the Act 2003 for generation of electricity, transmission, marketing, distribution, storage and supply of energy. Foreign investors and companies are the licensees in most cases. Section 40 of the Act 2003 states that notwithstanding anything contained in Arbitration Act, 2001 all disputes between licensees or in between a consumer and a licensee shall be submitted to the *BERC* and *BERC* shall arbitrate the disputes under the Act 2003. On the other hand, the telecommunications industry in Bangladesh is regulated by the Bangladesh Telecommunication Regulatory Commission (*BTRC*). The licenses issued by the *BTRC* to the mobile phone operators, which are mostly foreign companies, typically mentions *BTRC* as a forum for resolution of dispute/s between an operator and a subscriber or in between the operators.²⁰⁰ The Act 2001 may not be applicable to arbitration before the *BTRC*.

Competence-Competence

The Act 2001 allows the arbitral tribunal to rule on its jurisdiction. Unlike Model law²⁰¹, section 17 of the Act lists five issues on which the tribunal may exercise its power of competence-competence. The provision empowers explicitly the tribunal to decide: (a) validity of arbitration agreement; (b) on proper constitution of the arbitral tribunal; (c) compliance of the arbitration agreement with public policy; (d) capability of the arbitration agreement to be performed and (e) whether subject-matter of the dispute falls within the arbitration agreement. However, the list is

²⁰⁰ Kamal Hossain, Sharif Bhuiyan, et al., 'National Report Bangladesh (2016)', in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International 1984, Supplement No. 89, June 2016) at 8

²⁰¹ Article 16 of the Model Law.

not exhaustive since the section uses the expression ‘including’. The tribunal may rule on its jurisdiction beyond these five matters accordingly.²⁰²

The Act 2001 allows raising objection against the tribunal’s rule on its jurisdiction. In this regard, Bangladesh followed the Model Law prescription. According to Section 19(1) of the Act 2001, a party to the arbitration may object to the jurisdiction of the arbitral tribunal no later than the submission of the statement of defense.²⁰³ On the other hand, the objection about exceeding the scope of arbitral authority shall be raised as soon as the alleged matter goes beyond the scope of arbitral authority. However, the tribunal may admit a delayed petition in both of the cases if it considers the delay justified.

In contrast to many prominent jurisdictions,²⁰⁴ following the Model law, *HCD* finally decides the jurisdiction of the tribunal. Section 20 of the Act states that, on the application of any of the parties to the arbitration agreement, *HCD* may determine any question as to the jurisdiction of the arbitral tribunal. Unlike an appeal against the decision of the tribunal on its jurisdiction, the application for determining the jurisdiction of the tribunal is a parallel proceeding. However, the statute limits the scope to rule on the jurisdiction of the tribunal with some stipulations. In determining the question of jurisdiction of the tribunal, the *HCD* shall consider whether (a) the determination is likely to save substantial costs; (b) the application was submitted without any delay, and (c) there is a good reason why the matter should be decided by the Court.²⁰⁵ The applicant is required to state the reasons on which the *HCD* should decide the matter.²⁰⁶ Nonetheless, the arbitral authority may continue the arbitral proceedings and make an award, to

²⁰² Maniruzzaman, *supra* note 9 at 148.

²⁰³ Section 19(1) of the Act, 2001.

²⁰⁴ For example: France, The Netherlands, Spain, Switzerland, Korea, Japan and India.

²⁰⁵ Section 20(2) of the Act 2001.

²⁰⁶ Section 20(3) of the Act 2001.

expedite the proceedings, despite the application before the *HCD*. Pertinently, Bangladesh acknowledges parties' capacity to exclude, through agreement, the scope to raise objection against the tribunal's rule on its jurisdiction. The *HCD* held that it has no jurisdiction to determine tribunal's jurisdiction where parties through their agreement ousted the jurisdiction of the court except proceedings for recognition and enforcement of the award.²⁰⁷

Converse to the position of Bangladesh, as well as Model Law, the Indian Arbitration Act 1996 maintains no judicial intervention against the tribunal's rule on its jurisdiction. Therefore, an aggrieved party has no option but to wait until the production of an award. Many commentators criticized the Indian approach.²⁰⁸ It will be a wastage of money and resources if the arbitral award is set aside at the end due to lack of arbitrator's jurisdiction. However, the Model law approach to the judicial scrutiny of the tribunal's jurisdiction during the proceedings is not beyond criticism. It takes a party to an arbitration to litigate the matter in two forums simultaneously and creates an additional burden on local judiciary. The Model Law, as well as Act 2001, does not prescribe any timeframe to the court to render its decision on tribunal's jurisdiction. The court proceedings are usually dilatory compare to arbitral proceedings, particularly in South Asia. Therefore, in many instances, it might happen that the tribunal makes award pending a decision on the tribunal's jurisdiction before the court. In that case, application for determination of tribunal's jurisdiction would become redundant since where tribunal makes an award through an erroneous exercise of its jurisdiction, the aggrieved party can always apply for setting aside of the award.

²⁰⁷ *Bangladesh Power Development Board (BPDB) vs Summit Industrial and Mercantile Corporation (Pvt.)*, 19 BLC 284.

²⁰⁸ See Vikram Raghavan, "New Horizons for Alternative Dispute Resolution in India-The New Arbitration Law of 1996" (1996) 13 J Intl Arb 5.

VI Supervision over arbitration

Chapter two discussed the significance of seat in supervising arbitration. The role of the seat is undeniable in international arbitration due to its assistance during the proceedings of arbitration. Following the Model Law, the Act 2001 incorporates provisions to aid arbitration seated in Bangladesh. In the absence of any contrary agreement, the Act prescribes procedures on composition, and functions of the tribunal, conduct of the arbitral proceedings, interim measures, and so forth. It designates the *HCD* to supervise arbitration seated in Bangladesh.

Composition of Tribunal

The Act recognizes parties' freedom to constitute an arbitration tribunal. It allows the parties to determine the number of the arbitrators and choose the procedure for appointing an arbitrator. If the parties fail to agree on the number, the tribunal shall be composed by three arbitrators of which each party will nominate one arbitrator, and the two arbitrators thus shall appoint the third arbitrator. Where a party fails to appoint the arbitrator within thirty days from the date of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty (30) days of their appointment, in case of international commercial arbitration, the chief justice of Bangladesh or any other judge of the supreme court shall appoint the arbitrator or third arbitrator, as the case may be, of any nationality.²⁰⁹ Section 12(13) of the Act states that the Chief Justice may entrust a Judge for discharging the entire duties and may fix up the tenure of that Judge for the appointment of an arbitrator. Section 12(10) of the Act suggests to appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

²⁰⁹ Section 12 of the Act 2001.

Professor Maniruzzaman raised the question whether the act of appointing an arbitrator by the Chief Justice or any other Judge of the Supreme Court is a judicial act or an administrative function.²¹⁰ The Chief Justice delegated his functions under the Act including the power to appoint an arbitrator under section 12A to a regular bench of the *HCD*.²¹¹ Thus, an act of appointing an arbitration is certainly a judicial function of a judge of the supreme court. An appeal against such appointment may lie before the *AD* subject to the leave grants by that Division.²¹² An additional prayer for stay on any decision of the *HCD* in the application for leave to appeal is a common practice in Bangladesh. The Supreme court frequently grants the stay order pending the hearing on an application for leave to appeal. This process may cause a substantial delay in appointing an arbitrator.

Challenge against Arbitrator and Removal

In the absence of an agreement between the parties on the procedure for challenging an arbitrator, a challenge against an arbitrator may be made in accordance with the law of the seat. Model Law suggests that a challenge against an arbitrator may file only if there is a justifiable doubt as to his impartiality or independence. It is a continuing obligation of an arbitrator through the arbitral

²¹⁰ Maniruzzaman, *supra* note 9 at 146.

²¹¹ See the Cause list of the High Court Division of the Supreme Court of Bangladesh at http://www.supremecourt.gov.bd/web/?page=bench_list.php&menu=00&div_id=2, last accessed on July 18, 2018. Under section 12, in case of non-international commercial arbitration, the District Judge having territorial jurisdiction over the subject matter shall appoint the arbitrator. In *RAJUK Karmachari Bahumukhi Samabaya Samity vs. Al-Razib Traders*, 18 BLC 285 the HCD held that when a District Judge acts pursuant to section 12 of the Act 2001, *he acts as a judge of the civil jurisdiction*. This view is equally applicable in an appointment of arbitrator for international commercial arbitration.

²¹² According to Article 103(3) of the Constitution of the People's Republic of Bangladesh, 1972 an appeal to the Appellate Division of the Supreme Court of Bangladesh from a judgment, decree, order or sentence of the High Court Division shall lie only if the Appellate Division grants leave to appeal.

proceedings to disclose any circumstances which may cause reasonable doubt as for his impartiality or independence.²¹³

Like Model Law, the Act 2001 states that the intended party to challenge an arbitrator may initially send a written statement of reasons for the challenge to the arbitral tribunal. Upon receipt of the written objection, the tribunal shall decide the challenge within thirty (30) days if the arbitrator does not remove himself from his office or the other party or parties agrees on the challenge. An aggrieved party to the decision may appeal to the *HCD* against the decision of the tribunal within thirty days. The Act deviates from the Model law regarding the challenge against an arbitrator on the point of continuation of the arbitration proceedings pending the decision on the challenge. Whereas the Model Law prescribes that the arbitral tribunal, including the challenged arbitrator, may continue arbitral proceedings and make an award pending a request to decide on challenge before a court; the Act authorizes the continuation of the proceedings and make an award only when the challenge or an appeal or both, as the case may be, becomes unsuccessful. Therefore, under the Act, an arbitral tribunal has to wait until the final settlement of the challenge against an arbitrator.²¹⁴ In addition to that, while Model Law prescribes the decision of the court shall be non-appealable, the Act mentions nothing on appealability. The obvious reason is that an application for leave to appeal may lie to the *AD* against all decisions of the *HCD* under the constitution of Bangladesh. Nevertheless, the Act takes a positive effort by limiting the time to 90 days for the disposal of the challenge by *HCD* although the 90 days are quite unreasonable in international commercial context. The *HCD* may remove the arbitrator where an

²¹³ Article 12(1) of the Model Law.

²¹⁴ Maniruzzaman, *supra* note 9 at 145.

arbitrator fails to remove himself from the position of an arbitrator although he becomes *de jure* or *de facto* unable to perform.

Conduct of Arbitral proceedings

Chapter 6 of the Act 2001 incorporates the conduct of arbitral proceedings which is not essentially different from the Chapter V of the Model Law. It admits complete autonomy of the parties to determine rules of procedure of arbitration. In the absence of an agreement between the parties on rules of procedure, the tribunal is empowered to decide the procedure. The Arbitration seated in Bangladesh is not bound to comply with the local procedural law on taking evidence. The Act states that the Code of Civil Procedure, 1908 and the Evidence Act, 1872 is not binding upon the tribunal.²¹⁵

The Act endorses certain common principles of natural justice such as fair and impartial treatment by the tribunal, a reasonable opportunity to present case and reasonable opportunity to examine all evidence produced by the other party. It may be argued that while Model law prescribes ‘equality and full opportunity to present case’²¹⁶, the Act directs the tribunal to provide ‘reasonable opportunity to present case’²¹⁷. In the arbitration context, the term ‘reasonable opportunity’ ensures the expediency of the proceeding where the tribunal is allowed to particular circumstances of the case.²¹⁸ Contrast to the Model Law; the Act also obliges the tribunal for the speedy settlement of the dispute submitted to it which is not found in the Model Law.²¹⁹

²¹⁵ Section 24 of the Act 2001.

²¹⁶ Article 18 of Model Law.

²¹⁷ Section 23(a) of the Act 2001.

²¹⁸ Maniruzzaman, *supra* note 9 at 161.

²¹⁹ Section 23(2) of the Act 2001.

The Act follows the Model Law provisions verbatim about the place of arbitration, statements of claim and defense, and hearings and proceedings.²²⁰ In taking evidence, the tribunal's position is similar to an ordinary civil court. Nevertheless, the tribunal may need assistance from the court in the issuance of summon against any person. A tribunal or a party to the proceedings with the approval of the tribunal may apply to the court of District judge for issuance of summon upon any person necessary for the proceedings in taking evidence, and the court will issue summon accordingly.

Interim Measures

An interim measure may require to protect the subject-matter of the dispute during the arbitral proceedings, after the declaration of an award and even before the constitution of the tribunal. This section discusses the interim measures before the constitution of the tribunal and during the continuance of the tribunal. The interim measures at the stage of enforcement of award have been discussed later in the section titled 'Enforcement of Award'.

Both court and the arbitration tribunal are authorized to grant interim relief under the Act 2001. In the original version of Act, the court did not have scope to issue interim measures regarding the matters under tribunal's jurisdiction. Section 7A²²¹ of the Act was inserted in 2004 through an amendment which authorizes the court to grant an interim order, regarding a dispute capable of settling through arbitration, before the constitution of the tribunal, during the continuance of proceedings under a tribunal and until the enforcement of the award. The Act provides paramount importance of party autonomy regarding the issuance of interim measures.

²²⁰ Maniruzzaman, *supra* note 9 at 161.

²²¹ Inserted through Section 2 of the Arbitration (Amendment) Act, 2004 (Act No. II of 2004).

Section 7A states that ‘unless otherwise agreed by the parties’ which alternatively states that the parties to the dispute through agreement may reserve the jurisdiction of the court regarding interim measures.²²² The interim measures under the Act are substantially different from the Model Law since the amendment has been made to the Act before *UNCITRAL*’s adoption of amendments to the Model Law in 2006.²²³ Bangladesh is yet to adopt the amendments made to the Model Law on interim measures in 2006.

Surprisingly, the Act does not have any provision similar to Article 9 of the Model Law concerning interim measures. Therefore, the question might arise regarding the compatibility of the court issued interim measure with the arbitration agreement. Nevertheless, the expression ‘notwithstanding anything contained in Section 7’ in section 7A provides an overriding effect of section 7A. Therefore, although the jurisdiction of the court in respect of matters covered by arbitration agreement is ceased by section 7 of the Act, request for interim measures by a party is not incompatible with an arbitration agreement.

The object of section 7A is to protect and preserve the subject-matter of arbitral proceedings. It ensures effective execution of any future award.²²⁴ Section 7A of the Act authorizes the court to take any interim appropriate protective measure including (a) appointment of guardian for minor or insane; (b) taking interim custody of or sale of or other protective measures in respect of subject-matter of the arbitration agreement; (c) prohibition to transfer certain property or issue injunction on transfer of certain property; (d) authorization of any person to seize, preserve, inspect, to take photograph, collect specimen, examine, to take evidence of any goods or property

²²² Maniruzzaman, *supra* note 9 at 155.

²²³ UN General Assembly Resolution 61/33 (4 December 2006).

²²⁴ *Crown Maritime Co. Ltd. Vs Royal Boskalis Westminster, NV*, 16 BLC 140.

included in arbitration agreement and for that purpose to enter into the land or building in possession of any party; (e) issuance of ad interim injunction; and (f) appointment of receiver. However, the interim measures, under section 7A, are not exhaustive.²²⁵ Furthermore, the *HCD* shall have to serve notice upon the other party before issuance of an order under section 7A, unless the court is satisfied that if the order is not passed instantaneously, the purpose of making interim measures shall be frustrated.²²⁶

A tribunal may also grant interim relief under section 21 of the Act. The provision empowers the tribunal to take appropriate security from the party that requests for interim measures.²²⁷ However, an interim measure issued by a foreign seated arbitral tribunal is not enforceable under the Act.²²⁸ As alluded above, section 3 of the Act limits the application of the Act by stating that the Act shall apply where the place of Arbitration is in Bangladesh.

Although Bangladesh is yet to adopt the amendments made to the Model Law in 2006, Article 17 of the amended Model law is pertinent here for future guidance. Under Article 17, an interim measure may be in the form of an award or otherwise. An interim measure in the form of an award by a foreign seated tribunal is enforceable under section 42 of the Act since the Act does not distinguish between interim and final award.²²⁹ Section 2(k) of the Act defines “Foreign arbitral award” as an award made in the territory of any state other than Bangladesh. However, interim

²²⁵ Section 7A(g) states ‘to take any other interim protective measures which may appear reasonable or appropriate to the court or the High Court Division.’

²²⁶ Section 7A(3) of the Act 2001.

²²⁷ Section 21(2) of the Act 2001 which is similar to Model Law Article 17E (1). However, Section 21(2) exist even before the adoption of the amendments to the Model Law in 2006.

²²⁸ See *Unicol Bangladesh Blocks Thirteen and Fourteen and another vs. Maxwell Engineering Works Ltd. and another* 56 DLR (AD) [2004] 166; *STX Corporation Ltd. vs Meghna Group of Industries Ltd.* 64 DLR [2012] 550.

²²⁹ Maniruzzaman, *supra* note 9 at 155.

measure *in the form of an order* is not enforceable under the present Act.²³⁰ Moreover, the Act 2001 does not contain any provision regarding interim measures affecting third parties.

One may suggest that Bangladesh could take a lesson from the Singapore High Court.²³¹ In *Multi-Code Electronics Industries v Toh Chun Toh and others*²³² the Singapore High Court granted injunctions in aid of a foreign-seated arbitral proceeding in accordance with its general statutory power under section 4 (10) of the *Civil Law Act*. However, the position of the *HCD* of Bangladesh is substantially different from the High Court of Singapore. The *HCD*, in general, does not have any original jurisdiction in civil matters.²³³ Either, it does not have any scope to issue an interim injunction on matters under arbitration in its appellate or revisional jurisdiction. The Act 2001 vests all issues relating international commercial arbitration on the *HCD* by limiting its scope to the arbitration seated in Bangladesh. The *HCD* does not get an opportunity to grant an injunction under its appellate jurisdiction since the Act 2011 bars civil court's jurisdiction on matter falls under international arbitration. Furthermore, section 7 of the Act 2001 provides an overriding effect of the Act on all other existing laws by stating that no judicial authority shall hear any legal proceedings except in so far as provided by this Act. Thus, unless specifically empowered by the Act 2001, the *HCD* cannot issue an interim injunction, even under its statutory power, regarding a matter under international commercial arbitration seated beyond Bangladesh. However, the *HCD*

²³⁰ See 'Scope of the Act'.

²³¹ Sattar, Sameer, The Asia-Pacific Arbitration Review 2016: Bangladesh, Global Arbitration Review (GAR), available at <https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2016/1036904/bangladesh>, last accessed on July 19, 2018.

²³² *Multi-Code Electronics Industries (M) Sdn Bhd and Another v Toh Chun Toh Gordon and Others* [2009] 1SLR 1000.

²³³ Section 15 of the Code of Civil Procedure, 1908

may issue an interim order under its supervisory power under the Constitution of Bangladesh,²³⁴ but usually not for the protection of subject-matter of the dispute or any assets.

Anti-arbitration and Anti-suit injunctions

Anti-arbitration injunction is a profound threat to the viability of international commercial arbitration.²³⁵ Bangladesh's court was highly criticized for the issuance of an anti-arbitration injunction in the case of *Petro-Bangla v. Saipem S.p.A* (1997).²³⁶ However, a national court's erroneous interpretation of the New York Convention may not amount to a denial of justice.²³⁷ The principles of international arbitration law, as reflected in Model Law, grant significant discretion and supervisory power to the court of the seat.²³⁸

As alluded above, arbitration was governed by the *Arbitration Act 1940* before the Act 2001 came into force. In *Saipem* case, the power of the court was not restricted under the then Arbitration Act 1940. The Act 2001 repealed the Act 1940 altogether. After adoption of the Act 2001, there is no scope to issue an anti-arbitration injunction by the court under a statutory power.

Unlike England, a model law jurisdiction, the court of Bangladesh cannot issue an anti-arbitration injunction under the Act 2001. English Arbitration Act says the court *should* not intervene in arbitration pursuant to an arbitration agreement.²³⁹ English Act pursues the courts not

²³⁴ See later 'Supervisory power under constitution'.

²³⁵ Stephen M Schwebel, "Anti-Suit Injunctions in International Arbitration-An Overview" (2005) 2:5 Transnatl Dispute Manag TDM at 1.

²³⁶ On 24 November 1997, the Supreme Court of Bangladesh issued an injunction restraining Saipem from proceeding with the ICC Arbitration seated in Dhaka, Bangladesh. (cited in *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award on June 30, 2009, Para. 37).

²³⁷ Richard Garnett, "National Court Intervention in Arbitration as an Investment Treaty Claim" (2011) 60:2 Int Comp Law Q 485 at 490.

²³⁸ *Ibid* at 489.

²³⁹ Section 1(c) of the English Arbitration Act, 1996. The provision is corresponding to Article 5 of Model Law which uses the expression 'shall'.

to intervene in arbitration but does not prohibit the intervention absolutely.²⁴⁰ English High Court may grant an anti-arbitration injunction when it appears to the court just and convenient.²⁴¹ Conversely, the Act 2001 restricts any power to issue an anti-arbitration injunction absolutely. Section 7 of the Act 2001 states that *notwithstanding anything contained in any other law* for the time being in force that no judicial authority shall hear any legal proceedings except in so far as provided by this Act. Therefore, the non-obstante provision of section 7 of the Act prohibits the courts in issuing an anti-arbitration injunction regarding a matter under arbitration. However, as will be discussed later, the *HCD* may issue an anti-arbitration injunction under its constitutional power.²⁴²

Contrary to the anti-arbitration injunction, anti-suit injunction, in fact, enforces an arbitration agreement. Where one of the parties to an arbitration agreement commences a proceeding in a foreign court, the other party of that proceeding may seek an anti-suit injunction from the court of the seat of arbitration, subject to the court having personal jurisdiction over the party commences proceedings in the foreign court, to restrain him from continuing the foreign court proceedings. Actually, an anti-suit injunction cannot restrain a foreign suit rather restrain the party that initiated the proceedings.²⁴³ Supreme Court of Singapore, a court of Model Law Jurisdiction, being a court of the seat issued an anti-suit injunction in *R I International Pte Ltd. v. Lonstroff AG*²⁴⁴ to restrict *Lonstroff AG* to continue a court proceeding in Switzerland.

²⁴⁰ *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 at [33].

²⁴¹ Section 37 of the Senior Courts Act 1981 (England).

²⁴² Next section discusses the supervisory power of the HCD under the Constitution. In *Petro-Bangla v. Saipem S.p.A.* (1997), HCD issued injunction against Saipem S.p.A to proceed in an ICC arbitration seated in Dhaka, Bangladesh. See *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award on June 30, 2009, para. 37.

²⁴³ *Turner v Grovit* [2002] 1 WLR 107 at 23.

²⁴⁴ [2015] 1 SLR 521 at 77.

Under the Act 2001, the *HCD* may issue, where Bangladesh is the seat of arbitration, an anti-suit injunction against a party to an arbitration agreement over whom it has personal jurisdiction. Section 7A of the Act deals with the power of *HCD* to issue an interim order. The *HCD* can issue an interim injunction under Section 7A(1)(e) of the Act. It can issue an anti-suit injunction as an interim injunction under the Act. However, the court can issue an anti-suit injunction against a foreign national only when it can exercise personal jurisdiction over that foreign party under section 20 of the Code of Civil Procedure, 1908. Section 20 of the Code states that every suit shall be instituted in a Court within the local limits of whose jurisdiction the defendant at the time of the commencement of the suit, actually or voluntarily resides, or carries on business, or personally works for gain. Notably, the section 7A(1)(e) empowers the Court to issue an interim injunction only. The *HCD* has no power to issue a permanent injunction under its ordinary statutory power.²⁴⁵

Supervisory Power under the Constitution

Apart from the power under the Act 2001, the *HCD* has arguably a constitutional jurisdiction over the tribunal seated in Bangladesh. According to Article 109 of the Constitution of Bangladesh, the *HCD* shall have superintendence and control over all courts and tribunals subordinate to it.²⁴⁶ The crucial the question is whether an international tribunal seated in Bangladesh is subordinate to the *HCD* or not. The answer to this question depends on how the subordination of a tribunal can be

²⁴⁵ Permanent injunction is generally provided by way of a decree of a regular civil court under section 53 of the Specific Relief Act, 1877

²⁴⁶ Article 9: Superintendence and control over courts: “The High Court Division shall have superintendence and control over all courts and tribunals subordinate to it.” See Constitution of the People’s Republic of Bangladesh available at http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367§ions_id=24666, last accessed July 19, 2018. Similar provision exists in Indian Constitution. Article 227(1) of the Constitution of India states: Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

inferred. Neither the Constitution nor the General Clauses Act 1897 defines ‘tribunal’. A court or tribunal is subordinate to the *HCD* where *an appeal or revision* against its decision lies to the *HCD*.²⁴⁷ According to section 14(5) of the Act 2001 an appeal against the decision of the tribunal on the challenge against an arbitrator may lie to the High Court Division.²⁴⁸ The *HCD* can appoint arbitrator where the parties or the tribunal fails to appoint an arbitrator or third arbitrator, as the case may be.²⁴⁹ It can also remove an arbitrator.²⁵⁰ It determines any question as to the jurisdiction of the arbitral tribunal finally.²⁵¹ Therefore, an arbitral tribunal is subservient to the *HCD* on various matters relating to its functions including its formation. Additionally, an application for setting aside of award lies to the *HCD*. Although the application for setting aside of an award is not an appeal,²⁵² the grounds for setting aside of award is similar to the grounds of an application for revision, i.e., on the point of law. Thus, it can reasonably conclude that an arbitral tribunal seated in Bangladesh is subordinate to *HCD*.

The proponents of the delocalized (contractual) theory of international arbitration may not agree on the above role of the court of a seat of arbitration. Chapter 2 argued for the role of the seat in international arbitration. It was contended that the wide acceptance of Model Law by the members of the *New York* Convention confirms the localized theory of international arbitration. Interestingly, the *ICSID* tribunal admits the localized theory of international commercial arbitration in *Saipem S.p.A. v. Bangladesh*²⁵³. The tribunal held that

²⁴⁷ Mahmudul Islam, *Constitutional law of Bangladesh*, 3rd ed (Dhaka, Bangladesh: Mullick Brothers, 2012) at 871.

²⁴⁸ The provision is similar to Article 13(3) of Model Law.

²⁴⁹ Section 12 of the Act corresponding to Article 11 of the Model Law.

²⁵⁰ Section 15 of the Act corresponding to Article 14 of the Model Law.

²⁵¹ Section 20 of the Act corresponding to Article 16 of the Model Law.

²⁵² *Helm Dungenmittel GmbH vs BCIC*, 16 BLC 783; *Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited*, Arbitration Application No. 11 of 2010 [Unreported] paragraph 4.

²⁵³ ICSID Case No. ARB/05/07, Award on June 30, 2009, Garnett, *supra* note 226 at 496.

Indeed, *it is generally accepted that national arbitration law can provide for a solution which is different from the ICC Rules*. For instance, as mentioned by both parties, Dutch arbitration law provides that the local courts have mandatory jurisdiction over a challenge and revocation of the authority of arbitrators and no one would think of claiming that the courts of the Netherlands breach international law by asserting jurisdiction over a request to challenge or revoke an ICC arbitrator.²⁵⁴ (emphasis added)

The basic premise of an arbitral tribunal is an agreement to arbitrate between parties. Additionally, an arbitral tribunal is constituted by the parties to the agreement rather than the state's law. Chapter two argued that an agreement to arbitrate is not valid merely because of the parties to the agreement consent to it. An arbitral agreement gets its validity from the law to which the parties have subjected it or under the law of the seat. The difference between a judge of the civil court and an arbitrator is while a judge is appointed by the state, an arbitrator is appointed by the parties to a dispute. In the case of institutional arbitration, the parties merely delegate their power to appoint an arbitrator to an institution.²⁵⁵ The institution substitutes the parties to the agreement.

The parties to the agreement are able to constitute a tribunal because of the law of their agreement, or the law of the seat empowers them to do that.²⁵⁶ If that is not the case, an award produced by a tribunal has no legal existence, and hence it is not enforceable by a court of law. A losing party voluntarily comply with the award not because the tribunal made the award but because the award is enforceable under the law.

Counter to above; one may validly argue that law of the arbitral agreement may not be the law of the seat, and, therefore, the parties' power to constitute tribunal may not come from the law of the seat. The law of the arbitration agreement may not be the law of the seat indeed. Nevertheless, the seat has to declare that the tribunal validly constituted by the parties is a tribunal

²⁵⁴ *Ibid.* para. 138

²⁵⁵ Section 4 of the Act 2001

²⁵⁶ See Section 12(1) of the Act [corresponding to Article 12(2)] states that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

under its law. Certainly, a tribunal cannot function legally in a seat unless the seat confers the status of a tribunal to it.²⁵⁷ A tribunal *de facto* constituted by the parties to the agreement becomes the *de jure* tribunal in the seat. This turning is an integration to the seat rather than a mere recognition of a tribunal constituted by the parties. Notably, the court of the seat is empowered to constitute a tribunal by appointing an arbitrator where the parties fail to exercise their pre-emptive right for such appointment. The statute primarily designates the parties to appoint their arbitrator; if they fail, the court of the seat will appoint the arbitrator. Therefore, it can be reasonably concluded that a tribunal seated in Bangladesh gets its legality to function from the Act 2001, i.e., the from the State, and, accordingly, subject to the supervision of the *HCD*.

It may be contended that section 7 of the Act may bar the supervisory power of the *HCD*. Section 7 states notwithstanding anything contained in *any other law* no judicial authority shall hear any legal proceedings except in so far as provided by the Act. The supervisory jurisdiction of the *HCD* is a constitutional jurisdiction. Any ordinary legislation, even by using a non-obstant expression, cannot restrict a constitutional provision.²⁵⁸ Furthermore, a statute cannot supersede the Constitution. Thus, the term ‘any other law’ in section 7 does not include the Constitution.

Notably, whereas the Model Law uses the expression ‘shall intervene’²⁵⁹, the Act uses ‘shall hear.’ This deviation from the Model Law by the legislature may not be merely incidental rather intentional. It suggests that although a party to the arbitration agreement cannot invoke the

²⁵⁷ For example: A court of District Judge shall issue summon against any person pursuant an application for such issuance by a tribunal. Moreover, the court will enforce an interim measure taken by a tribunal pursuant to an application by a party made the request before the tribunal. The court cannot ascertain the validity of the agreement at the time of issuing summon or enforcing interim measures. The court will respect the decision of the tribunal not because the parties constitutes the tribunal, but because the law gives it the status of a tribunal.

²⁵⁸ *Iftekhar Afzal v. Pubali Bank*, (1998) 50 DLR 623; *United Commercial Bank Ltd. v. Freshner Bucket*, (1998) 3 BLC 430

²⁵⁹ Section 7 of the Act corresponds to Article 5 of the Model Law

jurisdiction of a court to hear his matter except in accordance with this Act, a court can intervene in arbitration on its own volition. The *HCD* can *suo motu* exercise its supervisory jurisdiction under the constitution.²⁶⁰ The *HCD* generally uses this power to see that the court or the tribunal functions within the limits of its authority, any failure to exercise jurisdiction, violation of any mandatory procedure or the principle of natural justice, findings based on no materials, or an order resulting in manifest injustice.²⁶¹

In addition to the above jurisdiction, plausibly, the *HCD* has power to judicial review (commonly known as ‘writ’) the functions of a tribunal seated in Bangladesh according to the Article 102 of the Constitution. In exercising the power of judicial review, the fundamental question is whether an arbitral tribunal is a tribunal established by the Act 2001. As argued above, the tribunal constituted by the parties to an agreement is presumably a tribunal under the Act. Therefore, the *HCD* may exercise its power to judicial review a decision of the tribunal. In *Energy Prima Limited v. Bangladesh*,²⁶² *HCD* held that:

[...] section 7 of the Arbitration Act, 2001 restricts judicial intervention in matters covered by arbitration agreement. Petitioner is trying to interpret the contract in the *writ petitions which is impermissible, particularly when the petitioner is having a remedy to go for arbitration* under the contract signed by the petitioner. Petitioner having signed contract with open eyes after reading the terms and conditions, it is unconscionable to raise these kinds of contention in the writ petitions. (emphasis added)

It appears from this decision that although the Court said that the writ jurisdiction was ‘impermissible’ since there was a remedy for the petitioner.²⁶³ But the court did not say that it had

²⁶⁰ Fazl-E-Haq v. State, (1960) 12 DLR (SC) 254

²⁶¹ Islam, *supra* note 236 at 872.

²⁶² 8 SCOB [2016] HCD 84 Para 25.

²⁶³ *HCD* exercise power to judicial review usually in the absence of an equally efficacious under any law. Article 102(2)(a) of the Constitution of Bangladesh: The High Court Division may, *if satisfied that no other equally efficacious remedy is provided by law* on the application of any person aggrieved, make an order [...]. (emphasis added).

been *coram non judice* in a matter covered by an arbitration agreement. Thus, it may be concluded that the *HCD* has writ jurisdiction over an arbitral tribunal. The *HCD* can exercise power to judicial review the function of arbitration tribunal irrespective of the question whether the tribunal is subordinate to the *HCD*.²⁶⁴ Notably, there is hardly any case where the *HCD* exercised its power to judicial review against an international arbitral tribunal.

VIII Setting Aside of Award

The Act 2001 designates the *HCD* for setting aside of award made in Bangladesh under an international commercial arbitration.²⁶⁵ Compared to the Model Law, the Act reduces the time limit to take recourse against an award produced in Bangladesh. The Act provides fourteen (14) days for the correction and/or interpretation of an award, or an additional award and sixty (60) days for the application of setting aside an arbitral award from the date of receipt of the award. The grounds for setting aside of an arbitral award under the Act is identical to the Model law provision for setting aside of an award. On the application of a party, an award may be set aside if the applicant furnishes proof that a party to the arbitration agreement was under some legal incapacity; the arbitration agreement was not valid under the law to which parties have subjected it; the applicant was not given any notice of the appointment of an arbitrator or of the arbitral proceedings; or a party was prevented by sufficient reason from presenting his case before tribunal; or the award is made on matters not submitted to the tribunal; or that the composition of the tribunal was not in accordance with the provisions of the Act.²⁶⁶ An award may also be annulled if the court is satisfied that the subject matter of the dispute is not arbitrable, or the award is *prima facie* opposed to the law or conflict with the public policy of Bangladesh. Unlike the Model Law, the

²⁶⁴ Islam, *supra* note 236 at 871.

²⁶⁵ Section 42(i) of the Act, 2001.

²⁶⁶ Section 43 of the Act 2001.

Act 2001 adds fraud or corruption as one of the reasons for setting aside of an arbitral award.²⁶⁷ Furthermore, Bangladesh includes protection against the losing party's any attempt to frustrate the arbitral award. In an application for setting aside an award, the Act authorizes the court to order that any money payable by the award be deposited with the court or otherwise secured, pending the determination of the application.²⁶⁸

The recourse against an award under section 42 of the Act 2001 is exclusive albeit the Act does not use the term 'only', like the Model Law.²⁶⁹ Contrast to the many Model Law jurisdictions, there is no scope of appeal on law point against an award produced in Bangladesh.²⁷⁰ An appeal is a statutory right in Bangladesh legal system, and the Act 2001 does not include any right of appeal either on the merits or a point of law from an award. It appears from section 39 read with section 42 of the Act 2001 that an arbitral award is final and binding except annulment of an award under the Act. The apex court of Bangladesh endorsed the exclusive nature of recourse against an award under section 42 of the Act. The court held that application for setting aside of arbitral award within sixty days is the only remedy available to a party who wants to set aside an arbitral award and after the expiration of the time limit the award is enforceable and, thus, the jurisdiction of the court is barred.²⁷¹ It was also held that the *HCD* cannot act as a court of appeal in exercising its jurisdiction under Sec. 42 as a court forum for setting aside of an award.²⁷²

²⁶⁷ Section 43(1)(b)(iv), *Ibid*.

²⁶⁸ Section 43(2), *Ibid*.

²⁶⁹ Khan, *supra* note 11 at 298.

²⁷⁰ See Sec. 69 of the Arbitration Act, 1996 (England); Sec. 45(1) of Ontario Arbitration Act, 1991 (Canada); Sec. 31 of Arbitration Act, RSBC 1996, British Columbia (Canada); See also Kamal Hossain, Sharif Bhuiyan, et al., 'National Report Bangladesh (2016)', in Jan Paulsson and Lise Bosman (eds), ICCA International Handbook on Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 1984, Supplement No. 89, June 2016) p. 40;

²⁷¹ *Md. Nurul Abser v. Alhaj Golam Rabbani and others* 68 DLR [2016] AD 4.

²⁷² *Tata Power Company Ltd. v M/S Dynamic Const. (Tata case)* [2015] 2 SCOB 15 (AD) para. 23; *Helm Dugemittel GmbH vs BCIC*, 16 BLC 783; *Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited*, Arbitration Application No. 11 of 2010 [Unreported] paragraph 4.

IX Enforcement of Foreign Awards

Regarding the enforcement of a foreign award, the Act 2001 deviates from both Model Law and the *New York Convention*. The Act took a different approach in defining an award produced through international arbitration. Model Law prescribes a broader definition of international award considering the limited importance of the place of arbitration. It classifies awards in terms of ‘international’ and ‘non-international’. It admits that the grounds for refusal to enforce an award are important for all awards rendered in international commercial arbitration regardless of the place of the arbitration.²⁷³ On the other hand, Bangladesh distinguishes award on the basis of the territory of the award: domestic and foreign. The Act defines ‘foreign arbitral award’ as an award which is made *in the territory of any state other than Bangladesh*.²⁷⁴ Section 46 of the Act does not include the expression ‘irrespective of the country in which it was made’ as it appears in Article 36 of the Model Law. Therefore, where two foreign parties to an arbitration agreement choose Bangladesh as their seat of arbitration, the award produced through the arbitration will not be a foreign award. Accordingly, the remedy against such an award is under section 42 of the Act (setting aside of award) but not in section 46 of the Act. The procedural requirement for the purpose application for the enforcement of the award is similar to Article IV of the New York convention and Article 35(2) of the Model Law.

Although the Act designates the *HCD* to set aside an award produced through international commercial arbitration seated in Bangladesh, it empowers a court of District judge to enforce all awards whether domestic or foreign. A foreign award will be enforced by the court

²⁷³ See Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration (A/CN.9/264), para. 50.

²⁷⁴ Section 2(k) of the Act 2001.

of District Judge Dhaka under the Civil Procedure Code in any manner as if it were a decree of the court.²⁷⁵ Therefore, Dhaka court of District is empowered to enforce a foreign award although the assets of the award debtor may situate in any other Districts of Bangladesh. Even though Dhaka court of District Judges is vested with the responsibility of enforcement of a foreign award; it cannot take interim measures in relation to the enforcement of a foreign award. The *HCD* is empowered to issue interim order pending the proceedings for enforcement of a foreign award.²⁷⁶

The grounds for refusal to enforce an award are similar to Model Law and the Convention. Judicial view regarding the grounds for refusal to enforce award is vital since there are many opportunities to interpret the grounds broadly. The Supreme Court of Bangladesh generally defers to the jurisprudence on international arbitration in matters relating to the enforcement of the foreign award. The court reaffirmed that the District Judge shall consider a foreign award like its own decree in an application for enforcement. It was held that the Act 2001 as a special law²⁷⁷ and, therefore, the remedy against the enforcement is not in the *Civil Procedure Code* but the Act 2001.²⁷⁸ The court considers that there is a limited scope to review a foreign award under section 46 of the Act. The *AD* held that an arbitral award is generally not open to review by the courts for any error in finding fact and/or applying the law, for a reason is that it would frustrate the very purpose of arbitration.²⁷⁹

²⁷⁵ *Canada Shipping and Trading SA v. TT Katikaayu and another* (2002) 54 DLR (HCD) 93.

²⁷⁶ Section 7A of the Act 200: '[...] upon prayer of either parties, before or during continuance of the proceedings or until enforcement of the award under section 44 or 45 in the case of international commercial arbitration the High Court Division and in the case of other arbitrations the court may pass order in the following matters...' (emphasis added)

²⁷⁷ See *Tata Supra* Note 271.

²⁷⁸ *Smith Co-Generation (BD) Pvt. Ltd. v Bangladesh Power Development Board*, (2010) 15 BLC (HCD) 704, para 24.

²⁷⁹ *Tata Supra* Note 271 para. 20.

Having sincere effort in the Act for prompt enforcement of the foreign award, the old Code of civil procedure causes a delay in enforcing an award. This delay sometimes frustrates the very purpose of arbitration. Under the legal system of Bangladesh, a judgment-debtor has many opportunities to play tricks to delay the execution. The civil proceeding of Bangladesh is criticized highly for its mode of executing a court decree.²⁸⁰ In one case the petitioner holds three *ICC* awards against the Bangladesh Power Development Board (PDB) for breaches of contract, but *PDB* filed an application against the petitioner's execution suit in the District Court and challenged the legality of the arbitral proceedings. In this occasion, the *HCD* rightly noted it would take ten (10) years before the petitioner's award was upheld.²⁸¹

X Judicial views

It was argued elsewhere that the correlation between the Court and the tribunal is crucial for the smooth functioning of arbitration. The stakeholders of international arbitration do consider the attitude of the judiciary of a seat of arbitration before choosing a place for arbitration. After the *Saipem* incident, the Supreme Court hardly intervened in international arbitral tribunal seated in Bangladesh. Conversely, the court shows its pro-arbitration views in many occasions. The *HCD* defers to the spirit and ethos of the New York Convention.²⁸² It tried to aid international arbitration in *HRC* case²⁸³ by expanding the scope of the Act to the arbitration seated outside Bangladesh, though the court applied the law erroneously. It endorses the modern principles of international

²⁸⁰ See e.g. Muhammad S Hossain and Mohammad I Hossain, 'Causes of Delay in Administration of Civil Justice: A Look for Way Out in Bangladesh Perspective' (2012) 6 *ASA University Review* 103, 107.

²⁸¹ *Smith Co-Generation (BD) Pvt. Ltd. v PDB* (2010) 15 BLC (HCD) 704.

²⁸² See *Smith Co-Generation (BD) Pvt. Ltd. v PDB* (2010) 15 BLC (HCD) 704.

²⁸³ 12 MLR [2007] 265.

arbitration such as separability of arbitral agreement²⁸⁴ and doctrine of competence-competence.²⁸⁵ The court held that it cannot act as a court of appeal while exercising its jurisdiction as a forum for setting aside of an award.²⁸⁶ The *HCD* refused to exercise its writ jurisdiction under the constitution in the presence of an agreement to arbitrate. The court held that the Act 2001 restricts judicial intervention in matters covered by arbitration agreement and writ petitions is impermissible, particularly when the petitioner has a remedy to go for arbitration under the contract signed by the petitioner.²⁸⁷ In this decision, the court considered that arbitration as an alternative to the court can provide an equally efficacious remedy.²⁸⁸ Nevertheless, on a few occasions, it failed to understand that an agreement to arbitrate ousts the jurisdiction of the civil court. In case of a domestic arbitration, it was held that the plea of the bar on civil court's jurisdiction should ordinarily be decided on evidence in the course of the trial of the suit.²⁸⁹

Though the view of the *HCD* varied in a few instances, the *AD* consistently depicted its pro-arbitration attitude. In *Nurul Abser (Md) v. Golam Rabbani*²⁹⁰, the *AD* noted the Act 2001 as a special law and enacted with the sole purpose of resolving the dispute between the parties through arbitration. It held that if the award given by the Arbitrator(s) is allowed to be challenged in a civil suit, the arbitration proceeding shall become a mockery and the whole purpose of the Act 2001 shall fail. The court further held that the only remedy available against an award rendered in Bangladesh is the setting aside of the award under section 42 of the Act and the Act bars the

²⁸⁴ *Drilltec-Maxwell Joint Venture v. Gas Transmission Company Limited* 21 BLC (2016)122, *Lita Sama Samad Chy v. Md. Hossain Bhuiyan*, 20 BLC 72.

²⁸⁵ *Supra* Note 271 para 24.

²⁸⁶ *Helm Dugemittel GmbH vs BCIC*, 16 BLC 783; *Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited*, Arbitration Application No. 11 of 2010 [Unreported] paragraph 4.

²⁸⁷ *Energy Prima Limited v. Bangladesh* 8 SCOB [2016] HCD 84 Para 25.

²⁸⁸ *Ibid.* See *Supra* note 260.

²⁸⁹ *Nurul Islam v. Bangladesh* 21 BLC 284.

²⁹⁰ 68 DLR (AD) 4 para. 19.

jurisdiction of the civil court. In *Tata Power Company Ltd. v M/S Dynamic Const.* (Tata Case), the AD confirmed that the factual and contractual positions are matters to be decided by the arbitrator and, as such, unless there appears to be gross illegality, the court should not entertain arguments on these points.²⁹¹ The apex court of Bangladesh considers that the scope to review a foreign award under section 46 of the Act is limited. The court cannot review an award for any error in finding fact and/or applying the law, for a reason is that it would frustrate the very purpose of arbitration.²⁹²

Despite the public policy being an expansive ground for refusal to enforce a foreign award, the supreme court maintains a restrictive approach to public policy. After the Act came into force, no case found where the court refused to enforce a foreign award solely on the ground of public policy. In *Tata*²⁹³ case, the AD took a pro-arbitration stance by restricting public policy exception. The Court held that an award would not be considered as contrary to public policy unless it appears that the award or the agreement relating to the award has a negative impact on the State and the society.²⁹⁴ Though the court did not explain the concept of public policy in this case, it narrowed the concept of public policy as a ground to refuse an award.²⁹⁵

XI Trends and observations

It appears from the above that, although the Act 2001 is based on Model Law, it departs from the Model Law on some substantial issues. The limited scope of the Act and the nationality-based definition of international arbitration might impede the potentiality of Bangladesh as an emerging seat for international arbitration. The internationality of arbitration can be defined by the

²⁹¹ [2015] 2 SCOB 15 (AD) para. 24.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid* para. 27.

²⁹⁵ Khan, *supra* note 11 at 301.

nationality of the parties or the location of the business. Arbitration may be international where one of the parties to the arbitration agreement is foreign, or both of the parties to the agreement are foreign. The Act is designed contemplating the first kind of international arbitration but not the latter.

Bangladesh is yet to adopt the amendments made to the Model Law in 2006. The Act 2001 does not contain provisions relating to interim measures and preliminary orders similar to Model Law. Unenforceability of interim order issued by the foreign seated tribunals may negatively impact the foreign investment scenario in Bangladesh. International business community certainly considers the enforceability of tribunal orders in a country before investing there. However, interim measures by way of interim award possibly enforceable in Bangladesh since the Arbitration Act does not distinguish between the interim award and final award.

In the absence of any reference to the New York Convention in the Act, it remains unclear whether the Supreme court of Bangladesh is bound by the Convention. An express reference to Model Law would oblige the court to interpret the provision from an international standpoint. Thus, the Act would achieve uniformity and internationalism for which the Model Law and the New York Convention were drafted. Furthermore, it would help a foreign party to predict the possible outcome of an application before a national court.

The legislatures tried to limit the scope of judicial intervention, but the very nature of the legal system with a written constitution does not allow a free-standing position of the tribunal. The constitutional position of *HCD* may pull up the expedited function of an international arbitration seated in Bangladesh since a leave to appeal may always lie to the *AD* against the decision of the *HCD*. The constitution jurisdiction over an international tribunal may become an

additional form of intervention on the functions of the tribunal if the jurisdiction has not been exercised judiciously. Nevertheless, the court rarely exercises its constitutional jurisdiction over an international tribunal seated in Bangladesh.

The Act leaves many opportunities to play delay tactic. For example, a tribunal has to wait until the final settlement of the challenge against an arbitrator. Moreover, the enforcement of foreign award through old civil procedure code sometimes obstructs the speedy execution of the award.

Apart from the above, the Act upholds the modern doctrines of international arbitration such as party autonomy, severability of the arbitration agreement, competence-competence and so forth. The Supreme Court of Bangladesh holds pro-arbitration attitude and respects the ethos of international arbitration. But, it does not deny its absolute tutelage over the international tribunal.²⁹⁶ An arbitration friendly attitude of the court does not suffice where the statute incapacitates the court's power to aid international arbitration. The law of the seat control international arbitration in its territory despite the pro-arbitration attitude of the judiciary towards international arbitration.²⁹⁷

²⁹⁶ *Supra* note 262.

²⁹⁷ See section 'Role of the Seat' in Chapter I, see also Park, *supra* note 18 at 5.

Chapter Four: Possible Legislative Changes to Attract Foreign Arbitration in Bangladesh

I. Introduction:

Chapter 3 explored the existing legal regime for international commercial arbitration in Bangladesh and depicted the weaknesses of the regime. It confirms that Bangladesh deviated from Model Law on some fundamental issues. This chapter proposes possible legislative changes for Bangladesh to become a center of international arbitration. It is organized in two main parts that present the possible legislative changes to improve the existing legal regime for international arbitration in Bangladesh. Chapter 3 identified some weak, unsuitable or inconsistent provisions of the Act 2001. This chapter, in the first part, proposes amendments of some existing provisions. Subsequently, the chapter continues with the reform proposal and suggests the inclusion of recent development compatible with the legal system of Bangladesh. Finally, the chapter concludes with some non-statutory issues for the improvement of the arbitration regime in Bangladesh.

The market for international arbitration is highly competitive. Adopting Model Law is not enough to attract international arbitration in Bangladesh. The jurisprudence of international arbitration is changing fast. The emerging seats are taking the place of the traditionally preferred seats for transnational arbitration. With the changing notion of international arbitration, Model Law may be found old. The countries are frequently modifying their arbitration legislation and include a more flexible procedure for transnational arbitration. Bangladesh has to bring changes in its arbitration legislation to obtain a stake in the global market of arbitration.

II. Proposals for Amendment

On preliminary issues

The Act 2001 neither refers to the Model law nor to the *New York Convention*. The amended Article 2A of the Model Law suggests that one should consider the international source of the Arbitration statute in interpreting the law. The preamble of the Act 2001 should refer to the background of the Act with specific reference to *UNCITRAL*'s adoption of the Model Law and the recommendation of the *UN* General Assembly to adopt the Law. It may include that the primary purpose of this Act is to ensure uniformity of the law of arbitral procedures and to comprise the requirements of international commercial arbitration practice in Bangladesh. Additionally, it should declare that the Act is enacted pursuant to Bangladesh's obligation under the New York convention. Chapter 3 explained the importance of the reference of the New York Convention for Bangladesh under the public international law.²⁹⁸ Though the preamble of an Act does not control the provisions of the statute, an express reference of the Model Law and the Convention in the preamble will pursue the court to consider the international origins of the statute. Reference of the Model Law and the Convention in the Act will act as a useful guide in interpreting the provisions of the Act.

The Act 2001 does not define the term 'commercial' in the Act 2001. Section 2(c) of the Act merely states that 'considered as commercial under the law in force in Bangladesh'. However, the term commercial has not been defined under any law in Bangladesh. Model Law suggests a wide interpretation of the term 'commercial'.²⁹⁹ The Act 2001 should incorporate the suggestion.

²⁹⁸ See 'Object of the Law' in Chapter 3.

²⁹⁹ UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations 2008) page 1 footnote 2.

This suggestion should be reflected in the statute. The Act 2001 should include a broad definition of the term ‘commercial’. In defining the term commercial, the application of the Act in international commercial context should be considered. Therefore, section 3(1) of the Act may be amended by stating that the Act is applicable to the arbitration of matters arising from all relationships of *commercial nature* whether national or international. Additionally, a non-exhaustive list of some commercial transactions may be included with the definition of the term ‘commercial’. This list will guide the tribunal, as well as the court, in interpreting the term ‘commercial’. A broad definition of the term ‘commercial’ is significant in determining the arbitrability of a dispute.

Chapter 3 establishes that the application of the Act is limited to the arbitration seated within Bangladesh.³⁰⁰ As to the arbitration seated outside of the Country, the Act applies exclusively for recognition and enforcement of the award. Accordingly, the interim measures issued by a tribunal seated beyond Bangladesh is not enforceable in Bangladesh. Bangladesh should demonstrate its arbitration friendly stance by extending the application of the Act to the arbitration seated beyond the country.

As mentioned earlier, Bangladesh is yet to adopt the amendments made to Model Law in 2006 on interim measures and preliminary orders. The interim orders under Section 7A of the Act 2001 are different in kind from the interim measures referred in the amended Model Law. The Act 2001 should include the interim measures recommended by the Model law with *mutatis mutandis*. The present Act albeit has provision for interim measures; it does not mention any condition, like the model law, in granting interim orders. The conditions referred to in Article 17A of the Model

³⁰⁰ See ‘Scope of the Act’ of in Chapter 3

Law in granting interim measures should be adopted in the Act. The Act may prevent any frustration of the interim measures by including Model Law provision on the preliminary order. Additionally, the grounds for refusal to recognize and enforce interim measures under the Model Law can also be the grounds under the Act 2001.

On Arbitrability

Chapter 3 found that the Act 2001 does not define what are the disputes capable of resolving through arbitration. The statement ‘incapable of settling through arbitration’ in section 10(2) does not sufficiently describe the issue of arbitrability. For example, Swiss Private International Law provides minimum guidance on arbitrability by stating that all pecuniary claims are arbitrable.³⁰¹ The absence of clarity on the issue of arbitrability causes uncertainty of the fate of an award and make the award susceptible to be set aside. It may discourage users of international arbitration to choose Bangladesh as their seat of arbitration.

The Act may state that all civil matters as arbitrable. However, the term ‘civil’ is broad enough to apply in the arbitration situation. Alternatively, a long list of arbitrable matters may not be a feasible option to apply in the international arbitration context. Therefore, the Act should include a non-exhaustive list of non-arbitrable matters according to the public policy of Bangladesh. This list of non-arbitrable matters, though not exhaustive, will impliedly state that all matters are arbitrable except the matters mentioned in the list. The court can get a guideline from this list and can apply the principle of *ejusdem generis* in determining subject-matter arbitrability of a dispute. The list of non-arbitrable matter will limit the absolute power of the court in

³⁰¹ Article 177 of Swiss Private International Law.

interpreting the use of arbitrability. International parties intend to choose Bangladesh as their seat of arbitration may also get an idea on arbitrability from this list.

The public policy of Bangladesh should be taken into consideration in selecting non-arbitrable matters. For example, only the court can protect certain rights under the legal system of Bangladesh. The decisions of the court under the old Arbitration Act on the issue of arbitrability may be taken into account. Additionally, the consideration must be given on whether arbitration tribunal is well equipped to resolve a dispute. The proposed amendment should include clarification on the arbitrability of the matters which fall under the jurisdictions of some special courts in Bangladesh. Such as, consumer disputes fall under the jurisdiction of the consumer court.

In Defining International Arbitration

The nationality-based definition of international arbitration perhaps the key obstacle for Bangladesh in becoming a potential seat for international arbitration. Bangladesh should amend the definition to obtain a stake in international arbitration market. The Act should broaden its definition of international arbitration by including other elements of internationality. A broad definition of international arbitration will undoubtedly attract other forms of international arbitration in Bangladesh.

The Model Law definition of international arbitration is not wide enough. It defines international arbitration on the basis of the location of the business. In the era of online commercial activity, the determination of internationality on the point of a business location is outdated. The French approach could be an excellent option in defining international arbitration. Under the French Law, an arbitration is international simply because of international trade interests are at

risk.³⁰² Indeed, this definition of international arbitration possibly includes an arbitration which is otherwise domestic. There is no wrong to open the gateway for international arbitration even if some domestic commercial matters may fall within the category of international trade. Any deviation from the Model Law pursuant to a country's own policy is acceptable until it does not compromise with the standard incorporated in the Model Law.

On Supervision by Courts

UNCITRAL recommends the Model Law enacting State to specify the court or any other competent authority to perform the functions of assistance and supervision over the proceedings of arbitration seated within its jurisdiction. Bangladesh designates *HCD* to supervise the proceedings of an international tribunal seated in Bangladesh. This designation of *HCD* possibly impede the smooth functions of an arbitral seated in the country.

Chapter 3 confirms that the functions of the *HCD* under the Act 2001 are judicial acts. The powers and functions of the *HCD* are regulated by the constitution. The Constitution also deals with any recourse against a decision of the *HCD*. Article 103(3) of the constitution states that an appeal from an order of the *HCD* shall lie to the *AD* where the *AD* grants leave. An aggrieved party can always file an application for leave to appeal, against each order of the *HCD* under the Act 2001, before the *AD*. This scope of petition for appeal leaves an opportunity to play hoax with the decision of the *HCD*. A wicked party to the proceedings can always apply for leave before the *AD* with a motive to delay the proceedings. Additional prayer for staying the decision of the *HCD* along with the application for leave to appeal is a common practice. The court generally does not go to the merit of the petition in granting an order of stay. It usually considers that the merit will

³⁰² 1504 French Code of Civil Procedure.

be decided at the hearing of the petition. Chamber Judge of the Supreme court often grants stay order on the decisions of the *HCD* pending the hearing on the application. Furthermore, the ponderous workload of the Supreme Court may hover the hearing of the application for leave. The scope of leave to appeal under the present arbitration regime might frustrate the very purpose of international arbitration.

Apart from the supervision over the proceedings of an arbitral tribunal, the *HCD* can decide on an application for setting aside of an award. Although an application for setting aside of an award is not an appeal, the decision of the *HCD* against an application for leave to appeal is an order of the court. Therefore, a petition for leave to appeal shall also lie to the *AD* from the decision of the *HCD* on the application for setting aside of an award. As alluded above, it may cause additional delay in enforcing an award.

A bar on the application for leave to appeal from an order of *HCD* on arbitration matter is hardly possible since the constitution regulates the powers and functions of the Supreme Court. An amendment to the Act 2001 cannot curtail the jurisdiction of Appellate Division. Any constitutional provision cannot be reserved by using ordinary legislative power. In other words, a statute cannot supersede any constitutional provision. However, the functions of the *HCD* under the Act 2001 may be delegated to any other court or authority competent to function by amending the Act.

Though an application for enforcement of a foreign award lies to the Court of District Judge, the court does not deal with the application for setting aside of foreign awards. One may suggest transferring all the responsibilities of *HCD* under the Act 2001 to the court of the District judge. An amendment to the Act can declare all the matters decided by the District Judge on

arbitration are non-appealable. However, the proposal to transfer the responsibilities of the *HCD* to the District Judge may not be prudent. In the present Act, the legislatures thoughtfully vested the international arbitration matters to the *HCD*.³⁰³ The court of District judge is presumed not be equipped with sufficient knowledge, expertise, and training to supervise international arbitration tribunal and enforcement of foreign arbitral awards which very often involve complicated international legal issues. Furthermore, the Court of District judge is heavily burdened with the cases under its regular jurisdiction.³⁰⁴ If the court of District judge is vested with the supervisory power over the international tribunal; the slow court proceedings will severely hamper the functions of an international tribunal in Bangladesh. This step might affect the potentiality of Bangladesh as a future center of international arbitration.

Alternatively, this study proposes the establishment of a new court to perform the functions under Act 2001. Any person qualified to be a judge of the *HCD* may be appointed as a judge of the new court in consultation with the Chief Justice of Bangladesh. In appointing the judge of the proposed court, knowledge, experience, and expertise of the judged in the field of international arbitration may be taken into consideration. Pertinently, the issue of expertise in international arbitration is largely ignored in the present regime of international arbitration. The Chief Justice has hardly any scope to vest the power to supervise functions over international arbitration to a judge having expertise in international arbitration. Under the current regime, he has to delegate this functions to a regular judge of the Supreme Court.

³⁰³ See Maniruzzaman, *supra* note 9 at 173.

³⁰⁴ See Sattar, *supra* note 12.

A judge of a court having the status of a judge of the *HCD* is not rare in Bangladesh. For example, a judge of the *HCD* can be the Chairman of the Labor Appellate Tribunal.³⁰⁵ The Act 2001 can bar any recourse against the decision of the new court to expedite the proceedings of arbitration tribunal seated in Bangladesh. If no appeal or revision lies to the *HCD* against the decision of the proposed court, as argued in Chapter 3, the question of subordination to the *HCD* will not arise. Accordingly, the court will not be subject to the supervisory jurisdiction of *HCD* under the Constitution. However, *HCD* can still exercise its power of judicial review over the function of the proposed court. Chapter 3 pointed out that the *HCD* is very reluctant to exercise the power of judicial review over arbitration matters.³⁰⁶ Implementation of this proposal will minimize the judicial intervention over the functions of a tribunal seated in Bangladesh. The creation of a new court as an alternative to *HCD* is also vital for international arbitration since the Supreme Court stays on vacation for a significant period of the year.

As alluded in Chapter 2, where a party fails to appoint the arbitrator, or if the two arbitrators fail to agree on the third arbitrator, as the case may be, the court of the seat can appoint the arbitrator or third arbitrator.³⁰⁷ In appointing an arbitrator by the court, especially in case of international arbitration, a list of prospective arbitrators may be made and regularly updated in consultation with the Chief Justice to ensure the quality of appointment. The proposed court shall appoint, when necessary, an arbitrator from the list prepared under the Act 2001. Like many jurisdictions,³⁰⁸ one may suggest vesting the responsibilities of appointing an arbitrator in the above situations to an international arbitration institute of Bangladesh. However, this suggestion

³⁰⁵ Section 218(3) of the Bangladesh Labour Act 2006.

³⁰⁶ See *Energy Prima Limited v. Bangladesh* 8 SCOB [2016] HCD 84 para 25.

³⁰⁷ See section 'Supervisory role of the seat' in chapter II page. 29

³⁰⁸ Hong Kong International Arbitration Centre (HKIAC) can appoint arbitrator under section 24 of Hong Kong Arbitration Ordinance

is not feasible in the present state of international arbitration institutions in Bangladesh. Bangladesh has yet to develop state of the art institutions for international arbitration.

The proposed court will decide all application for setting aside of award produced within Bangladesh and enforce all awards irrespective of the seat of arbitration. The decision of the proposed court on an application for setting aside of award and enforcement of award shall be made final. In addition to the above, a time limit may be prescribed for the court in rendering its decision on an application for setting aside of award. These proposals will remove the scope for dilatory tactics which are possible under the present Act.

Proposal for an exclusive court for international arbitration may be considered aspirational in Bangladesh context. For the optimum utilization of resources, the functions of a Court of District Judge relating to arbitration under the Act 2001 can be transferred to the proposed court. Chapter 3 noted that the Court of District judge being the enforcing court of foreign awards on many occasion have failed to understand the ethos of transnational arbitration.³⁰⁹ The proposed court with a judge having expertise in international arbitration and commercial matters will certainly expedite the enforcement of foreign awards in Bangladesh. Additionally, another commercial jurisdiction of the *HCD*, i.e., company matters may also be vested in the proposed court.³¹⁰ These measures will expedite the disposal of arbitration matters, ensure optimum use of resources and minimize the present workload of the Supreme court.

³⁰⁹ See 'Enforcement of award' in Chapter III; see also *Smith Co-Generation (BD) Pvt. Ltd. v PDB* (2010) 15 BLC (HCD) 704

³¹⁰ The HCD is the court of first instance in company matters under the Companies Act, 1991 (Bangladesh)

To Reduce delay in deciding challenge against the arbitrator

Postponement of arbitration proceedings, pending the decision of the court on the challenge against an arbitrator, hampers the smooth functioning of the tribunal. Under the present Act, an arbitral tribunal has to wait until the final settlement on the challenge against an arbitrator by the court.³¹¹ The Act prescribes 90 (ninety) days to the court for the decision on the challenge against an arbitrator. This period is unreasonable in international commercial context and may affect Bangladesh negatively as a seat for international arbitration. The time for a decision on the challenge against an arbitrator by the court may be limited to 30 (thirty) days. In this thirty days, the tribunal should be allowed to continue the arbitral proceedings and make an award. The suggestion for 30 days for determining a challenge against an arbitrator is consistent with the above proposal for new court since the proposed court will exclusively deal with arbitration matters and be able to decide the challenge within the 30 (thirty) days.

III. Proposals for Further Development

Confidentiality of the proceedings

Confidentiality of arbitral proceedings is one of the reasons for preferring arbitration to litigation.³¹² Arbitration is privately arranged dispute settlement mechanism meaning it is not open to the public. The Act of 2001 does not contain any provision on confidentiality of arbitration proceedings. The autonomy of parties allows them to agree on the confidentiality of their arbitration matters. Most institutional rules and some national statutes include a provision on

³¹¹ See 'Challenge against Arbitrator and Removal' in Chapter 3.

³¹² See e.g. Born, *supra* note 16 at 2779–2831.

confidentiality of the arbitration.³¹³ Statutory provision on confidentiality in arbitration is especially important in *ad hoc* arbitration.

There is no uniform principle on confidentiality.³¹⁴ Although the hearings of arbitration are not open to the public, the documents relating to the arbitration may not remain confidential always. The common law position on the confidentiality of arbitration documents varies from one jurisdiction to another. While there is an implied obligation for non-disclosure arbitration documents in the UK, no such implied obligation is available in Australia and the United States.³¹⁵ The extent of the confidentiality of arbitration documents is also vital. The Supreme court of Bangladesh has not yet decided on confidentiality in commercial arbitration.

Confidentiality in arbitration is not right where an arbitration matter is brought before any court.³¹⁶ Confidentiality of award is complicated since an award determines the rights of a party. Moreover, an award is required to disclose in case of involvement of the third party. An award is a public document similar to a judgment or a decree of a civil court.

Although Model Law does not contain any provision on confidentiality, a statutory provision on confidentiality of the arbitral proceedings and documents is preferable. A statutory provision can define the nature and extent of confidentiality, and it is readily enforceable. Any

³¹³ Article 6 of Appendix I–Statutes of the International Court of Arbitration, International Chamber of Commerce (ICC) Rules of Arbitration 2017, Rule 39 of Arbitration Rules of the Singapore International Arbitration Centre (SIAC), Article 42 of Hong Kong International Arbitration Rules, Rule 30 of Bangladesh International Arbitration Centre.

³¹⁴ Nelson J, ‘International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared’ (2014) 10 A.I.A.J. 120

³¹⁵ See Daniel R Bennett & Madeleine A Hodgson, “Confidentiality in Arbitration: A Principled Approach” (2016) 3 McGill J Dispute Resolut 98.

³¹⁶ *Ibid.* 104.

violation of confidentiality by a participant in the arbitral proceedings is not actionable unless there is a clear provision on the confidentiality.

Many jurisdictions, irrespective of Model Law, adopted provision on confidentiality of arbitration.³¹⁷ Hong Kong's provision on confidentiality is comparatively modern and encompasses the nature and extent of the confidentiality in arbitration. Article 18(1) of the Hong Kong Arbitration Ordinance 2013 prohibits publication, disclosure and communication of any information relating to arbitration proceedings as well as the award subject to exceptions for protecting or pursuing a legal right or interest of the party; or to enforce or challenge the award before a judicial authority within or outside Hong Kong. The Ordinance allows the publication, disclosure, and communication of information made under any legal obligation or to an adviser. Similar to Hong Kong, the Act 2001 should include a provision on confidentiality in arbitration.

On Third Party Involvement

The jurisprudence on the involvement of a third party to arbitration proceedings is evolving. The Act 2001 made no reference to the involvement of a third party to an arbitration proceeding. Since arbitration is an adjudication based on an agreement between parties, only parties to the agreement can participate in the proceedings and are bound by the agreement. In complex international commercial transactions, a third party to the arbitration agreement may be required participating in or get benefit from an arbitration proceeding. Involvement of a third party in arbitration may arise in two situations. Firstly, the third party may have an interest in an arbitration proceeding or in the outcome of the proceedings. Secondly, the third party albeit not signed the agreement may be bound by the agreement because of its involvement in the performance of the contract or the

³¹⁷ See Born, *supra* note 16 at 2786.footnote 28.

corporate relationship with a party to the agreement creates a presumption that the party accepted the arbitration clause and it was aware of its existence and scope.³¹⁸ This second type of the third party is commonly termed as ‘non-signatory’ party to an arbitration agreement. Professor Park terms this kind of party as ‘less-than-obvious party’ to an agreement.³¹⁹

Parties to an agreement are usually determined by the signature to the agreement. Section 9(2) of the Act 2001 states that an arbitration agreement shall be deemed to be in writing if it is contained in a document *signed by the parties*. There are circumstances where a party though not signed the original agreement may be bound by it and benefited from it.³²⁰ An arbitration tribunal, unlike a court, cannot join a party to the proceeding who has not signed the related agreement. Signature to the agreement may not be the only criteria for determining a party to an arbitration agreement. On the other hand, the power to compel a non-signatory party to the arbitration agreement to participate in arbitration is controversial.³²¹ Thus, a clear statutory provision on the involvement of the third party is crucial.

Neither Model Law nor the Act 2001 provides the scope of involvement a non-signatory in arbitration proceedings. The *New York Convention* emphasizes the requirement of signature to bind a party with an arbitration agreement.³²² The Supreme Court of Bangladesh has not yet decided on non-signatory parties to an international arbitration agreement. Parties to a

³¹⁸ William W Park, “Non-Signatories and International Contracts: An Arbitrator’s Dilemma” (2013) 2:2 Köln Schr Zum Wirtsch 198 at 3.

³¹⁹ *Ibid.*

³²⁰ *See BGer, 4A_450/2013*, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_450/2013, Case Date 7 April 2014

³²¹ *See Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov’t of Pakistan* [2010] UKSC 46 (U.K. S.Ct.); *See also* James M Hosking, “The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent Collaborative Law” (2003) 4 Pepperdine Dispute Resolut Law J 469.; and Park, *supra* note 302.;

³²² Article II(2) of the New York Convention 1958

dispute can make an agreement to extend the application of their agreement to a non-signatory in some situations, such as a group of companies. An agreement to extend its application for non-signatories is unavailable in most situations. Moreover, it is difficult to reach an agreement between parties after the dispute arise.

Joining a non-signatory party to the proceeding is a substantive issue, and the parties to an arbitration agreement generally expect an arbitrator to decide that substantive issues. Nevertheless, determination of the party to an arbitration is not within the jurisdiction of the tribunal.³²³ An arbitrator may find that an award will not be effective without joining a party to the proceeding. In joining a non-signatory as a party to the arbitration, an arbitrator remains in a tension between the principles of consensual nature of arbitration agreement and practical effectiveness of an award.³²⁴ The judicial determination of the party to an arbitration agreement at the beginning of the arbitration is undesirable. In this situation, the Arbitration Act of the seat may authorize the tribunal to join a third party to the agreement in the proceedings in certain situations. The Act 2001 may include a provision on the scope to join a third party to an agreement in the arbitration to fare in the modern trend of international arbitration law.

There are varieties of approaches under which the arbitration agreement may bind a non-signatory party. Modern arbitration jurisprudence follows two theories - in determining a non-signatory as a party to the international arbitration: constructive consent and lack of corporate personality.³²⁵ The Act 2001 may authorize a tribunal to join a non-signatory party in the arbitration proceedings in specific situations. Professor Park listed five situations when a non-

³²³ See Article 16 of Model Law and Section 17 of the Act 2001

³²⁴ Park, *supra* note 302 at 3.

³²⁵ *Ibid* at 25.

signatory can be joined as a party to the proceeding. These are: i) when the non-signatory participated in the formation of the contract; ii) when the non-signatory to the arbitration agreement signed a document which constitutes part of a single contract; iii) when the non-signatory party has a constructive to the arbitration agreement; iv) when the signatory has no legal personality; and v) when the non-signatory fraudulently used the corporate personality of the signatory as a shame or façade.³²⁶ The Act 2001 may also authorize the tribunal seated in Bangladesh to compel a non-signatory party to participate in arbitration in these situations.

One may wonder with the jurisdiction of the tribunal to determine party to an agreement and worry about the safety net against possible abuse of the power. The jurisdiction of the tribunal to decide a party to the proceedings is not final. Under the Act, recourse against the determination of the tribunal's own jurisdiction is always possible before the court.³²⁷ Tribunal's power to decide on the party to the proceedings will serve as "useful assistance" to the court in re-examining the question of jurisdiction and enhance speedy disposal of the objection, if any, against tribunal's jurisdiction. In addition to that, an aggrieved party can also challenge the jurisdiction in proceeding for setting aside of an award or before the court of enforcement of the award. If a challenge on tribunal's jurisdiction to determine a party to the proceedings becomes unsuccessful before a court, there will be less chance to set aside the award on this ground since the same court has already decided the issue.

³²⁶ *Ibid* at 8.

³²⁷ Section 20 of the Act 2001 corresponding to Model Law Article 16(3).

Contrast to the Model Law, the Act 2001 does not authorize an arbitrator to act as an *amiable compositeur* or to act *ex aequo et bono*.³²⁸ Section 36 of the Act corresponds to Article 28 of the Model Law states the rules applicable to the substance of the dispute. However, section 36 omits to adopt sub-Article 3 of Article 36 which authorizes the arbitral tribunal to act as an *amiable compositeur* where the parties have expressly authorized it to act. It appears that the legislatures perhaps did not want or prohibits arbitrator to act as an *amiable compositeur* or settle a dispute *ex aequo et bono*. Restriction on an arbitrator to act as an *amiable compositeur* may affect negatively on the potentiality of Bangladesh as a future seat of international arbitration.³²⁹

Unlike the Model Law, section 36(3) of the Act used a phrase ‘for ends of justice’. This phrase might be misunderstood as authorizing an arbitrator to act *ex aequo et bono*. However, the phrase ‘for ends of justice’ is only applicable in considering a usage, if exist, of the subject matter of the dispute and does not authorize an arbitrator to act *ex aequo et bono* meaning ‘what is fair (or equitable) and good’.³³⁰

Most developed national laws and institutional rules include provision for the arbitrator to act as an *amiable compositeur* subject to the express agreement by the parties.³³¹ However, only a few arbitration agreements provide arbitration “*ex aequo et bono*” or for an arbitrator to act as

³²⁸ Following the Model Law, the study uses the terms *amiable compositeur* and *ex aequo et bono* interchangeably though the definitions of both of these terms vary.

³²⁹ Greenberg, Kee & Weeramantry, *supra* note 20 at 139. Regis Bonnan, “Different Conceptions of Amiable Composition in International Commercial Arbitration: A Comparison in Space and Time” (2015) 6:3 J Int Dispute Settl 522 at 539.

³³⁰ Markus Kotzur, *Ex Aequo et Bono*, Max Planck Encyclopedia of Public International Law [MPEPIL], at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1402>, last accessed August 1, 2018

³³¹ See Bonnan, *supra* note 329 at 523.

‘*amiable compositeur*’.³³² An arbitrator cannot act as an *amiable compositeur* unless authorized by the parties to the agreement explicitly. An award can be set aside or refused to enforce on the ground of excess of authority if the arbitrator acts as *amiable compositeur* without express authorization from the parties. The statutory recognition of the arbitrator’s power to act as an *amiable compositeur* or ‘*ex aequo et bono*’ is crucial before the court dealing with an application for setting aside or refusal to enforce an award since an arbitrator acting as an *amiable compositeur* or ‘*ex aequo et bono*’ need not to give the reason of an award.

Party autonomy is the core feature of international arbitration. The tribunal decides the substance of the dispute according to the law chosen by the parties. The seat should not restrict the autonomy of the parties in choosing *ex aequo at bono* applicable to the substance of their dispute. Parties to the arbitration may prefer an arbitrator to act as an *amiable compositeur* or to settle their dispute on principle of *ex aequo at bono*. However, *ex aequo at bono* cannot be the sole basis of an award. It can be applied where the applicable law fails to mitigate an appropriate result.³³³ The difference between the presence and absence of a clause of *ex aequo at bono* is that while an arbitrator may deviate from the applicable positive law in the former case if he considers proper, he cannot do so in the latter situation.³³⁴ An Arbitrator authorized to act as *amiable compositeur* can provide primacy of fact of a case by limiting the applicable law to make a proper award.³³⁵ Notably, the principle of *ex acquo at bono* is different from the principle of *lex mercatoria*.³³⁶

³³² Gary B Born, *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014) at 2770.

³³³ *Ibid* at 2774.

³³⁴ Award in ICC Case No. 5118, in S. Jarvin, Y. Derains & J.-J. Arnaldez (eds.), *Collection of ICC Arbitral Awards 1986-1990* 318 (1994); Final Award in ICC Case No. 3755, 1(2) ICC Ct. Bull. 25, 25 (1990)

³³⁵ Award in ICC Case No. 3327, 109 J.D.I. (Clunet) 971, 975 (1982)

³³⁶ See ‘the Concept of *Lex Mercatoria*’ in Chapter 2.

Whereas an arbitrator being an adjudicator may be bound to apply the principles of *lex mercatoria*, he has no obligation to follow any legal rule or principle acting in *ex aequo at bono*.³³⁷

It appears from the above that the Act 2001 should include a provision authorizing the tribunal to act as an *amiable compositeur* or *ex aequo at bono* to respect party autonomy and ensure the prospective validity of the award.

For expedited resolution

The method of international arbitration has been changing fast. A competitive arbitration statute needs to accommodate the modern trend of international arbitration. Nature of every commercial dispute is not the same. While complex and high-stake commercial disputes may require examination of the various type of evidence, some simple disputes may be resolved on the basis of the documents submitted with the pleadings. Despite the cooperation between the parties to ensure a speedy and cost-effective settlement of the dispute, the typical arbitration proceedings may take a long time. Thus, straightforward claims require an expedited procedure of arbitration.

A tribunal always remains in tension between completion of the case efficaciously and ensuring the parties' opportunity to present their case. Statutory provision on expedite disposal of some disputes will ensure less probability to challenge an award on a procedural ground. In the absence of statutory flexibility on the procedure in settling some disputes, the award produced under the expeditious procedure is susceptible to challenge on procedural grounds. Most of the renowned arbitral institutes include provision for prompt disposal of some kinds of dispute. The statutory provision is especially crucial for *ad hoc* arbitration. The Act 2001 should include an

³³⁷ Alexander Belohlavek, "Application of Law in Arbitration, Ex Aequo et Bono and Amiable Compositeur" (2013) at 43.

expedited procedure of disputes resolution to make Bangladesh a thriving place for international arbitration.

An expedited arbitration procedure should be made as an option to choose by the parties for their non-complicated small amount of dispute. At any time of formation of the tribunal or before, parties to the arbitration agreement may agree to settle their dispute through an expedited procedure. The expedited procedure will settle a dispute only on the pleadings of the parties, documents, and submission filed by the parties without any oral hearing. However, if the tribunal considers necessary, an oral hearing may be conducted without any technical formalities. There shall be a mandatory time frame for the tribunal to complete the arbitration and production of the award. After the expiry of the time limit, the mandate of the tribunal will expire unless a court meanwhile extends the time.

The doctrine of party autonomy allows the parties to settle their disputes in accordance with their own pace and procedure. An expedited procedure is cost effective and time-saving which are the key features of international arbitration. Bangladesh should include expedited arbitration procedure to attract foreign arbitration in the country and to compete in the global market of dispute resolution.

Other incentives

The international business community, as well as arbitration institutions, do consider the incentives offered by a place of arbitration. The Act 2001 is yet to include some facilities which the stakeholders of international disputes resolution typically consider. To thrive international arbitration in Bangladesh, it should include some facilities which are commonly found in ideal seats of international arbitration.

The Act 2001 is yet to clarify on immunity of arbitrators in Bangladesh. The Arbitrators should be immune from any criminal liability and negligence in respect of anything done or omitted to be done in the capacity of an arbitrator and any mistake in law, fact or procedure made in good faith in the course of arbitral proceedings or the making of an arbitral award. These immunities may be extended to arbitral institutions or any other appointing authority functions in Bangladesh.

The Act 2001 checks the performance of an arbitrator in Bangladesh. The award induced by fraud or corruption can be set aside under section 43(b)(iv) of the Act 2001. Fraud and corruption have a broad meaning under the laws of Bangladesh. Additionally, an arbitrator may be challenged in circumstances that raise doubts as to his independence or impartiality.³³⁸

Unlike the court system, the parties to the dispute have to bear the cost of arbitration more particularly fees of the arbitrators. The cost of arbitration is not always cheap. Sometimes a party to the arbitration may run out of its funding for arbitration and fail to proceed a meritorious claim. Unlike a pauper suit before the national courts, there is no option for a pauper to participate in arbitration. A third-party to the proceedings, who has no relation with the subject-matter of the arbitration, may be permitted to fund the arbitration cost of the impecunious party subject to an agreed share of prospective award or a success fee.³³⁹ Although third-party funding for adjudication may be found contrary to the public policy of Bangladesh, it may be permitted

³³⁸ Section 13(3) of the Act 2001

³³⁹ See Harfouche, Roula and Searby James, *Third-Party Funding: Incentives and Outcomes*, (31 October 2012), Online: *Global Arbitration Review* <https://globalarbitrationreview.com/benchmarking/the-european-middle-eastern-and-african-arbitration-review-2013/1036737/third-party-funding-incentives-and-outcomes>, last visited August 11, 2018; Lisa Bench Nieuwveld & Victoria Shannon Sahani, *Third-party funding in international arbitration*, second edition, ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V., 2017) at 2. *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, ICCA Report Series ICCA Report No. 4 (International Council for Commercial Arbitration, 2018) at 50.

considering the international character of arbitration and where the funding has no negative impact on the society of Bangladesh.

IV) Conclusion

Model Law does not have any provision on many of the issues alluded above. The object of Model Law is to promote uniformity in the practice of international commercial arbitration. Model Law is the minimum standard of practice for international commercial arbitration. Besides the uniformity, Bangladesh may have an object to become an attractive place of international arbitration. Adoption of the Model Law is not sufficient to compete in the international market of arbitration. Although international arbitral instruments such as the Model Law and the *New York Convention* suggests uniformity in arbitration practice, the differences in arbitral law and practice among the jurisdictions are usual.³⁴⁰

Some non-statutory issues also affect international arbitration in Bangladesh. Among them, the role of the local arbitration institute is paramount. The local arbitration institute has a significant role in making the seat as a center of cross-border dispute settlement. The role of the arbitration institute is crucial for formulating arbitration rules rather than its commercial functions. The institute should adopt new arbitration rules in accordance with the demands of new arbitration uses. Bangladesh International Arbitration Centre (*BIAC*) should come forward with changing method of dispute resolution to compete in the global market of arbitration.

³⁴⁰ See Jack Wright Nelson, 'International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared', Asian International Arbitration Journal, (Singapore International Arbitration Centre (in co-operation with Kluwer Law International); Kluwer Law International 2014 Volume 10 Issue 2) pp. 105 -136

Apart from the legislative changes, Bangladesh has to develop an arbitration-friendly attitude by providing other incentives to the participants in international arbitration such as tax incentives, permission to practice for non-resident, easy accessibility to non-residents in the country and so forth. Finally, the success of a modern arbitration statute largely depends on the judicial attitude towards international arbitration.

Chapter Five: Conclusion

The key rationale for undertaking this study was to investigate problems in the current international arbitration regime of Bangladesh. Despite the adoption of the Model Law, Bangladesh is yet to consider a preferred place for international arbitration. The study states that the adoption of the Model Law is not sufficient to attract foreign arbitration in a country. A state may not confine itself within the provisions of the Model Law. It can go beyond the Model Law according to its own policy of the advancement of arbitration within its jurisdiction. The study demonstrated, more specifically in Chapter 3, that Bangladesh deviates from the Model Law on some substantial issues, and many of these deviations negatively affect the arbitration regime in Bangladesh.

Before moving to the country-specific investigation: the role of Bangladesh as a seat of international arbitration, Chapter 2 illustrated the theoretical framework of the role of the seat of international arbitration. This chapter, as a whole, argued for the significance of the seat in international arbitration. It critically analyzed both localized and delocalized theories of international arbitration. The chapter depicted the role of the seat at pre-constitution of the arbitration tribunal, during the proceedings of the tribunal and post-award situation. It concluded that the significance of the seat is undeniable because of its supervisory role over the arbitration proceedings, assistance to the tribunal in taking evidence and power to set aside an award produced within its jurisdiction. Moreover, arbitration proceedings must respect the mandatory provisions and public policy of the seat for the validity of the prospective award. The seat of arbitration is crucial for ensuring validity, finality, and fairness of the award. The effective functioning of international arbitration requires assistance from the legal system of the seat. The seat acts as a safety net where the victim of an improper award-resulting from an excess of authority, violation

of due process or corruption- may seek redress against such award. The chapter denies the concept of the stateless award since the arbitration cannot happen in the cloud.

Chapter 2 interrogated the delocalized theory of transnational arbitration. The chapter contended that the idea of stateless international arbitration is chimerical. The only basis of the delocalized theory of international arbitration is the scope of enforcement of the annulled award. It was argued that an annulled award does not pass through the territorial boundary of the state where it has been made, and therefore, legally impossible to enforce through a court of law. Furthermore, the enforcement of the annulled award is against international comity. Even the advocates of the delocalized theory of arbitration cannot ignore the seat altogether since it is not certain, during the arbitration proceedings, where the forthcoming award will be enforced.

Given the theoretical basis of the localized arbitration in chapter 2, chapter 3 investigated the position of Bangladesh as a seat of international arbitration. Bangladesh certainly admitted the territorial theory of international arbitration by adopting Model Law. It is evident from chapter 3 that the Arbitration Act of Bangladesh deviates from the Model Law on some substantial issues. Many of these deviations affect the arbitration regime of Bangladesh. Most importantly, the nationality-based definition of international arbitration limits the potentiality of Bangladesh as a center for international arbitration. In addition to that, the Act has no application to the arbitration conducted under any special law. Therefore, some sectors of foreign investment in Bangladesh remain beyond the ambit of the Act. The Act still leaves many opportunities to play delay tactic by a non-cooperative party to the arbitration.

The study goes beyond the apparent scope of judicial intervention over the arbitration in Chapter 3. The legislatures unwisely designated the *HCD* to supervise the functions of international arbitral tribunal seated in Bangladesh. This designation increased the opportunity to

linger the arbitration proceedings and the decision on an application for setting aside of an award. Besides the ordinary supervisory jurisdiction like a court of the seat, the *HCD* of the Supreme of Bangladesh has unique constitutional supervision over an international tribunal seated in Bangladesh. Chapter 3 explored that how the localized theory of arbitration brings the constitutional issues over the arbitration: a privately arranged dispute settlement procedure. The constitutional supervisory power of *HCD* over the arbitration tribunal reminiscent the words of Lord Justice Scrutton ‘there must be no Alsatia in England where the King's writ does not run’.³⁴¹

Chapter 3 depicted the attitude of the Supreme Court towards arbitration by analyzing its decisions on arbitration matters. After the *Saipem* incidence, there is hardly any instance where the Supreme Court unduly intervene in the functions of international tribunal seated in Bangladesh. The Supreme court albeit holds a pro-arbitration attitude; it does not deny its tutelage over the arbitration tribunal. It upheld the spirit and ethos of international instruments on commercial arbitration in a number of occasions. It appears that though the views of the *HCD* on arbitration issues varies from case to case, the *AD* consistently holds pro-arbitration attitude. The *AD* interpreted narrowly the expansive idea of public policy in the post-award situation. Nevertheless, the statute restricts the power of the court to aid international arbitration on some points. Chapter 3 as a whole contended that although the Act upholds the modern doctrines of international arbitration such as party autonomy, severability of the arbitration agreement and competence-competence, many provisions of the present Act are still inept to the ethos of international arbitration. The shortcomings of the Act identified in chapter 3 can be resolved by implementing the proposals made in Chapter 4.

³⁴¹ *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 K.B. 478, at p. 488.

In Chapter 4, the study proposed amendments of some provisions of the Act which found weak and unsuitable in chapter 3. No development has been made in the arbitration regime since 2004. The Act 2001 is old relative to the tremendous development in international arbitration. It is yet to include the amendments made to the Model Law in 2006. Chapter 4 included two kinds of proposals. Firstly, it suggested amendments of some provisions of the Act which the study considers unsuitable to the purpose of the Act. The proposal for amendments is made to lessen the scope of the court's interference and accelerate the arbitration proceedings. In addition to the proposals for amendments, chapter 4 also suggested filling the gap of the statute on some issues of arbitration such as the doctrine of *amiable compositeur*, expedited arbitration, arbitrator's liability, confidentiality, the involvement of the third party in arbitration and so forth. The question may arise whether this vacuum should be filled by the statute or court. Albeit the localized theory of international arbitration is widely accepted, the modern arbitration statutes try to keep minimal intervention by the court. The study proposed to fill the legal vacuum by statutory provisions. Statutory provisions are usually more accessible than judicial precedent. It is usually clear and less susceptible to wide interpretation and can limit the role of the court in relation to arbitration. Besides the statutory changes, Chapter 4 drew attention to some non-statutory issues.

Many of the proposals made in Chapter 4 depart from the Model Law prescriptions. The proposals may not be compatible with the purpose of Model Law: promotion of uniformity in application arbitration law. Nonetheless, the differences in arbitral law and practice among the jurisdictions are usual. Model Law suggests the minimum international standard for commercial arbitration. Meanwhile, the competition has increased remarkably in inviting foreign arbitrations. Despite the strong position of traditional arbitration centers, South East Asia emerges as a new

challenger. Bangladesh can participate in this challenge by adopting the latest jurisprudence on international arbitration.

It should be submitted that the proposals made in chapter 4 are not meant to create an impression that Bangladesh will turn into a hub of international arbitration overnight. Rather, the study submits that improvement is a continuous process of revisiting issues. The current unsatisfactory arbitration regime in Bangladesh certainly calls for an ameliorative step. It can be reasonably expected that the implementation of the proposals will equip Bangladesh to compete in the global market of dispute resolution.

Chapter 2 of this thesis established that the court of arbitration can intervene over the functions of the tribunal seated within its jurisdiction. On the other hand, the modern jurisprudence of arbitration emphasizes parties' autonomy in arbitration. There must be a balance between these two contrasting ideas. The nature of the court's interference relies on the attitude of a particular state to arbitration. The attitude of a seat of arbitration may vary from pro-arbitration to cynicism towards arbitration as a dispute resolution mechanism. A pro-arbitration seat can minimize the scope of judicial intervention through statute and grant freedom of parties to arbitrate. Where the law of the seat ensures parties' autonomy to arbitrate, the theoretical question of judicial control over the arbitration tribunal will not arise.

It appears in this study that the potentiality of Bangladesh as an international place for arbitration has been neglected in the Act 2001. The Act has not been designed to thrive international arbitration in Bangladesh. It merely suffices the purpose of recognition and enforcement of the foreign award. The study calls for rethinking the international arbitration regime in Bangladesh from the standpoint of enforcement of foreign award to the perspective of a center of international arbitration.

Bibliography

LEGISLATION

International

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958

National

The Arbitration Act, 2001 (Bangladesh)

The Arbitration and Conciliation Act 1996 (India)

The Arbitration Act 1996 (UK)

The Arbitration Act 1996 (British Columbia, Canada)

The Arbitration Act, 1991 (Ontario, Canada)

The Arbitration Ordinance (Hong Kong)

The Commercial Arbitration Act 2013 (Queensland, Australia)

The French Code of Civil Procedure

The International Arbitration Act, 1994 (Singapore)

Switzerland's Federal Code on Private International Law (CPIL), 1987

JURISPRUDENCE

International Instruments

UN General Assembly Resolution 40/72 (11 December 1985)

UN General Assembly Resolution 61/33 (4 December 2006)

The Hague Principles on Choice of Law in International Commercial Contracts

UNCITRAL Model Law 1985 (as amended in 2006)

Case Laws

Bangladesh

Bangladesh Power Development Board (BPDB) v. Summit Industrial and Mercantile Corporation (Pvt.), 19 BLC 284.

Canada Shipping and Trading SA v. TT Katikaayu and another (2002) 54 DLR (HCD) 93

Drilltec-Maxwell Joint Venture v. Gas Transmission Company Limited 21 BLC (2016)122

Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited, Arbitration Application No. 11 of 2010 [Unreported] paragraph 4

Energy Prima Limited v. Bangladesh 8 SCOB [2016] HCD 84 Para 25

Fazl-E-Haq v. State, (1960) 12 DLR (SC) 254

Helm Dungemittel Gmbh v. BCIC, 16 BLC 783;

HRC Shipping Limited v. MV X-Press Manaslu and others 12 MLR [2007] 265

Project Builders Ltd. (PBL) v. China National Technical Import and Export Corporation, 69 DLR [2017] 290;

Rajuk Karmachari Bahumukhi Samabaya Samity v. Al-Razib Traders, 18 BLC 285

Saipem S.p.A. v. Petro-Bangla 5 MLR [2000] 45

STX Corporation Ltd. v Meghna Group of Industries Ltd. and Ors [2012] 32 BLD 400; 64 DLR [2012] 550

Smith Co-Generation (BD) Pvt. Ltd. v PDB (2010) 15 BLC (HCD) 704

Iftekhar Afzal v. Pubali Bank, (1998) 50 DLR 623;

Lita Sama Samad Chy v. Md. Hossain Bhuiyan, 20 BLC 72

Md. Nurul Abser v. Alhaj Golam Rabbani and others 68 DLR [2016] AD 4

Nurul Islam v. Bangladesh 21 BLC 284

Smith Co-Generation (BD) Pvt. Ltd. v. Bangladesh Power Development Board, (2010) 15 BLC (HCD) 704

Tata Power Company Ltd. v M/S Dynamic Const. (Tata case) [2015] 2 SCOB 15 (AD)

Unicol Bangladesh Blocks Thirteen and Fourteen and another v. Maxwell Engineering Works Ltd. and another 56 DLR (AD) [2004] 166;

United Commercial Bank Ltd. v. Freshner Bucket, (1998) 3 BLC 430

France

General National Maritime Transport Co. v. Société Gotaverken Arendel A.B., Court of Appeal of Paris, 21 February 1980', Revista Brasileira de Arbitragem, (© Comitê Brasileiro de Arbitragem CBar&IOB; Comitê Brasileiro de Arbitragem CBar&IOB 2013, Volume X Issue 39)

Germany

Bank A v. Bank B, Landesgericht [Court of First Instance], Hamburg, 18 September 1997', Germany No. 49, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2000 - Volume XXV, Yearbook Commercial Arbitration, Volume 25 (© Kluwer Law International; Kluwer Law International 2000)

ICC

Award in ICC Case No. 3327, 109 J.D.I. (Clunet) 971, 975 (1982)

Award in ICC Case No. 5118, in S. Jarvin, Y. Derains & J.-J. Arnaldez (eds.), Collection of ICC Arbitral Awards 1986-1990 318 (1994);

Final Award in ICC Case No. 3755, 1(2) ICC Ct. Bull. 25, 25 (1990)

ICSID

SAIPEM S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award on June 30, 2009

India

Bhatia International vs. Bulk Trading S.A. and others AIR 2002 (SC) 1432

Coal India Limited v. Canadian Commercial Corporation, High Court of Calcutta (Kolkata), India No. 47, AP No. 172 of 2002, 20 March 2012 Yearbook Commercial Arbitration 2012 - Volume XXXVII (van den Berg (ed.); Jan 2012).

OlexFocas v Skoda Export 2000 AIR (Delhi) 171

Singapore

PT Garuda Indonesia v. Brigen Air [2002] 1 SRL 393 at 399

FirstLink Investments Corp Ltd v. GT Payment Pte Ltd et al., High Court, Suit No. 915 of 2013 (Summons No. 5657 of 2013), 19 June 2014 Singapore No. 13, Yearbook Commercial Arbitration 2014 - Volume XXXIX (van den Berg (ed.); Jan 2014

Turner v Grovit [2002] 1 WLR 107

Multi-Code Electronics Industries (M) Sdn Bhd and Another v Toh Chun Toh Gordon and Others [2009] 1 SLR 1000

Switzerland

BGer, 4A_450/2013, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_450/2013, Case Date 7 April 2014

U.K.

C v. D, High Court of Justice, Queen's Bench Division, Commercial Court, 28 June 2007 and Court of Appeal (Civil Division), 5 December 2007 UK No. 80, Yearbook Commercial Arbitration 2008 - Volume XXXIII (van den Berg (ed.); Jan 2008)

Star Shipping AS v. China Nat'l Foreign Trade Transp. Corp. [1993] 2 Lloyd's Rep. 445, 452 (English Ct. App.).

World Sports Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte. Ltd., Supreme Court of India, Civil Appeal No. 895 of 2014 Case Date 24 January 2014.

Sulamérica Cia Nacional de Seguros SA and Ors v Enesa Engenharia SA and ors [2012] EWCA Civ 638

Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan [2010] UKSC 46 (U.K. S.Ct.);

UK No. 80, C v. D, High Court of Justice, Queen's Bench Division, Commercial Court, 28 June 2007 and Court of Appeal (Civil Division), 5 December 2007 Yearbook Commercial Arbitration 2008 - Volume XXXIII (van den Berg (ed.); Jan 2008)

Reliance Industries Ltd and Amor v Enron Oil and Gas India Ltd. [2002] 1 All ER (Comm.) 59

USA

US No. 550, JSC Surgutneftegaz v. President and Fellows of Harvard College, United States District Court, Southern District of New York, 3 August 2005 and United States Court of Appeals, Second Circuit, 15 February 2006 Yearbook Commercial Arbitration 2006 - Volume XXXI (van den Berg (ed.); Jan 2006)

SECONDARY MATERIAL: MONOGRAPHS

Berg, A J van den. *The New York Arbitration Convention of 1958: towards a uniform judicial interpretation* (Deventer; Boston: Kluwer Law and Taxation, 1981).

Berger, Klaus Peter. *The Creeping Codification of the New Lex Mercatoria* (Kluwer Law International, 2010).

Berman, Harold J. *Law and revolution: the formation of the Western legal tradition* (Cambridge, Mass.: Harvard University Press, 1983).

Bernini, Giorgio. *The enforcement of foreign arbitral awards by national judiciaries: a trial of the New York Convention's ambit and workability* (na, 1982).

Blackaby, Nigel et al. *Redfern and Hunter on International Arbitration*, sixth edition (Oxford, New York: Oxford University Press, 2015).

Blessing, Marc. *Impact of the extraterritorial application of mandatory rules of law on international contracts* (Helbing & Lichtenhahn, 1999).

Born, Gary B. *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014).

Caron, David D & Lee Caplan. *The UNCITRAL arbitration rules: a commentary: (with an integrated and comparative discussion of the 2010 and 1976 UNCITRAL arbitration rules)*. (2013).

Fouchard, Philippe & Berthold Goldman. *Fouchard, Gaillard, Goldman on international commercial arbitration* (Kluwer law international, 1999).

Gaillard, Emmanuel et al. *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York, 1958* (2017).

Gaillard, Emmanuel, Domenico Di Pietro & Nanou Leleu-Knobil. *Enforcement of arbitration agreements and international arbitral awards: the New York Convention in practice* (London: Cameron May, 2008).

Goldman, Berthold. *Les conflits de lois dans l'arbitrage international de droit privé* (Martinus Nijhoff, 1963).

———. *Lex mercatoria* (Kluwer Law and Taxation Publ., 1983).

- Greenberg, Simon, Christopher Kee & J Romesh Weeramantry. *International commercial arbitration: an Asia-Pacific perspective* (Cambridge; New York: Cambridge University Press, 2011).
- Islam, Mahmudul. *Constitutional law of Bangladesh*, 3rd ed. (Dhaka, Bangladesh: Mullick Brothers, 2012).
- Jemielniak, Joanna. *Legal interpretation in international commercial arbitration* (Routledge, 2016).
- Kronke, Herbert. *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York Convention* (Alphen aan den Rijn, The Netherlands; Austin; Frederick, MD: Kluwer Law International; Wolters Kluwer Law & Business; Distributed in North, Central, and South America by Aspen Publishers, 2010).
- Lew, Julian D M, Stefan M Kröll & Loukas A Mistelis. *Comparative international commercial arbitration* (The Hague [u.a: Kluwer Law International, 2003).
- Lisa Bench Nieuwveld & Victoria Shannon Sahani, *Third-party funding in international arbitration*, second edition. ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V., 2017)
- Mistelis, Loukas. *Seat of Arbitration and Indian Arbitration Law* (Hein Online, 2015).
- Mistelis, Loukas A. *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009).
- Moses, Margaret L. *The principles and practice of international commercial arbitration*, 3rd ed (Cambridge, UK: Cambridge University Press, 2017).
- Mustill, Michael J & Stewart C Boyd. *The law and practice of commercial arbitration in England* (London; St. Paul Minn.: Butterworths; Butterworths Legal Publishers, 1989).
- Ostrove, Michael, Claudia T Salomon & Bette Shifman. *Choice of venue in international arbitration* (2014).
- Park, William W. *Why courts review arbitral awards* (Mealey, 2001).
- . *Non-signatories and International Contracts: An Arbitrator's Dilemma* (Oxford University Press, 2009).

———. *Arbitration of International Business Disputes: Studies in Law and Practice* (OUP Oxford, 2012).

Poudret, Jean-François & Sébastien Besson. *Comparative law of international arbitration* (Sweet & Maxwell, 2007).

Reisman, William Michael. *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press, 1992).

Reyes, Anselmo & Weixia Gu. *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Bloomsbury Publishing, 2018).

Sutton, David St John et al. *Russell on arbitration.*, 2007 (23rd ed (London: Stevens and Sons: Sweet and Maxwell, 1949).

The UNCITRAL Secretariat Guide on The New York Convention.

SECONDARY MATERIAL: ARTICLES

Abedian, Hossein. “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review” (2011) 28 J Int’l Arb 553.

Aglionby, Andrew & Mun Catherine. “Judicial Review of Tunnel Toll Arbitration” (2017) 2006:1 Asian Dispute Review 36.

Anzorena, Ignacio Suarez. “The Incapacity Defence Under the New York Convention” in *Enforcement of arbitration agreements and international arbitral awards: the New York Convention in practice* (London: Cameron May, 2008) 615.

B Hamlin, James. “Contractual Alteration of the Scope of Judicial Review: The US Experience” (2017) 15:4 Journal of International Arbitration, Kluwer Law International 1998 47.

Bachand, Frédéric. “Does Article 8 of the model law call for full or prima facie review of the arbitral tribunal’s jurisdiction?” (2006) 22:3 Arbitration International 463.

Barracrough, Andrew & Jeff Waincymer. “Mandatory rules of law in international commercial arbitration” (2005) 6 Melb J Int’l L 205.

Bashiri, Akbar & Hojjatollah Nouri. “An investigation of the role of domestic courts in international commercial arbitration in Iranian law” (2018) 9:2 Lex Humana 20.

Belohlavek, Alexander. “Application of Law in Arbitration, Ex Aequo et Bono and Amiable Compositeur” (2013).

Belohlavek, Alexander J. “Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth” (2013) 31 ASA Bull 262.

Bennett, Daniel R & Madeleine A Hodgson. “Confidentiality in Arbitration: A Principled Approach” (2016) 3 McGill J Disp Resol 98.

Berg, Albert Jan van den. “Should the Setting Aside of the Arbitral Award be Abolished?” (2014) 29:2 ICSID Review 263.

Bermann, George A. “Mandatory rules of law in international arbitration” (2007) 18 Am Rev Int’l Arb 1.

———. “The UK Supreme Court Speaks to International Arbitration: Learning from the *Dallah* Case” (2011) 22 Am Rev Int’l Arb 1.

———. “The gateway problem in international commercial arbitration” (2012) 37 Yale J Int’l L 1.

———. “Interpretation and Application of the New York Convention in Canada” in *Recognition and Enforcement of Foreign Arbitral Awards* (Springer, 2017) 163.

Betancourt, Julio César. “Judicial review of the merits of arbitration awards under English law” in *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (Oxford University Press, 2016).

Betancourt, Julio César & Chartered Institute of Arbitrators (Great Britain). “Improving judicial performance in matters involving international arbitration” in *Defining issues in international arbitration: celebrating 100 years of the Chartered Institute of Arbitrators* (2016).

Blackaby, Nigel et al. “Challenge of Arbitral Awards” in *Redfern and Hunter on international arbitration* (Oxon; New York: Oxford University Press, 2009) 569.

———. “Role of National Courts during the Proceedings” in *Redfern and Hunter on International Arbitration*, sixth edition (Oxford, New York: Oxford University Press, 2015) 415.

Bonnan, Regis. “Different Conceptions of Amiable Composition in International Commercial Arbitration: A Comparison in Space and Time” (2015) 6:3 Journal of International Dispute Settlement 522.

Born, Gary B. “Parties to International Arbitration Agreements” in *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014) 1404.

———. “Confidentiality in International Arbitration” in *International Commercial Arbitration*, 2nd ed (Kluwer Law International).

———. “Recognition and Enforcement of International Arbitral Awards” in *International Commercial Arbitration*, 2nd ed (Kluwer Law International) 3394.

Carbone, Giulia. “The Interference of the Court of the Seat with International Arbitration Symposium” (2012) 2012 J Disp Resol 217.

Carducci, Guido. “The Arbitration Reform in France: Domestic and International Arbitration Law” (2012) 28:1 Arbitration International 125.

Chang, Ya-Fei. “Legislative Control of Post-Award Procedural Dynamics: Modeling Judicial Behaviors of Post-Award Review Systems in International Commercial Arbitration” (2016), online:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850495.

Chiasson, Edward C. “Canada: No Man’s Land No More” (1986) 3 J Int’l Arb 67.

Cole, Sarah Rudolph. “Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards” (2007) 8 Nev LJ 214.

Davis, Kenneth R. “Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (2002) 37 Tex Int’l LJ 43.

Delaume, Georges R. “Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria” (1988) 63 Tul L Rev 575.

Drahozal, Christopher R. “Contracting out of National Law: An Empirical Look at the New Law Merchant Competing and Complementary Rule Systems: Civil Procedure and ADR” (2004) 80 Notre Dame L Rev 523.

———. *Party Autonomy and Interim Measures in International Commercial Arbitration*, SSRN Scholarly Paper ID 1905699 (Rochester, NY: Social Science Research Network, 2011).

Fassberg, Celia Wasserstein. “Lex Mercatoria - Hoist with Its Own Petard The Empirical and Theoretical Underpinnings of the Law Merchant” (2004) 5 Chi J Int’l L 67.

- Franck, Susan D. “The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity” (2000) 20 NYL Sch J Int’l & Comp L 1.
- Gaillard, Emmanuel. “Thirty years of *lex mercatoria*: towards the selective application of transnational rules” (1995) 10:2 ICSID Review 208.
- . “The enforcement of awards set aside in the country of origin” (1999) 14:1 ICSID Review 16.
- . “International Arbitration Relegated to a Component of a Single National Legal Order” in *Legal theory of international arbitration* (Brill, 2010) 15.
- . “Transnational Law: A Legal System or a Method of Decision Making?” (2014) 17:1 Arbitration International 59.
- Garnett, Richard. “National Court Intervention in Arbitration As An Investment Treaty Claim” (2011) 60:2 The International and Comparative Law Quarterly 485.
- Gélinas, Fabien & Frédéric Bachand. “Interpretation and Application of the New York Convention in Canada” in *Recognition and Enforcement of Foreign Arbitral Awards* (Springer, 2017) 163.
- Genevieve Saumier, “The Hague Principles and the Choice of Non-State Rules of Law to Govern an International Commercial Contract” (2014) 40 Brook J Intl L 1 at 28.
- Glasner, Kenneth J & William G Horton. “Judicial Review of Commercial Arbitration Awards North of the 49th Parallel” (2014) 32:10 Alternatives to the High Cost of Litigation 151.
- Goldman, Berthold. “The applicable law: general principles of law—the *lex mercatoria*” in *Contemporary Problems in International Arbitration* (Springer, 1987) 113.
- Goode, Roy. “Usage and its reception in transnational commercial Law” (1997) 46:1 International & Comparative Law Quarterly 1.
- . “The role of the *lex loci arbitri* in international commercial arbitration” (2014) 17:1 Arbitration International 19.
- Hanotiau, Bernard. “What Law Governs the Issue of Arbitrability?” (1996) 12:4 Arbitration International 391.
- . “Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues” (2001) 18 J Int’l Arb 251.
- . “The law applicable to arbitrability” (2014) 26 SAcLJ 874.

Hanotiau, Bernard & Olivier Caprasse. “Arbitrability, Due Process, and Public Policy under Article V of the New York Convention-Belgian and French Perspectives” (2008) 25 J Int’l Arb 721.

Hayford, Stephen L. “Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards” (1995) 30 Ga L Rev 731.

Herrmann, Gerold. “Does the World Need Additional Uniform Legislation on Arbitration?: The 1998 Freshfields Lecture” (1999) 15:3 Arbitration International 211.

———. “Does the World Need Additional Uniform Legislation on Arbitration?: The 1998 Freshfields Lecture” (1999) 15:3 Arbitration International 211.

Hill, Jonathan. “The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958” (2015) 36:2 Oxford Journal of Legal Studies 304.

Hoffman, Peter M & Lindsee Gendron. “Judicial Review of Arbitration Awards After Cable Connection: Towards a Due Process Model” (2010) 17 UCLA Ent L Rev 1.

Hosking, James M. “The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent Collaborative Law” (2003) 4 Pepp Disp Resol LJ 469.

———. “Non-Signatories and International Arbitration in the United States: The Quest for Consent” (2004) 20:3 Arbitration International 289.

International Chamber of Commerce, International Chamber of Commerce & International Court of Arbitration. “ICC dispute resolution bulletin.” (2015) ICC dispute resolution bulletin.

Jack Wright Nelson, 'International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared', Asian International Arbitration Journal, (© Singapore International Arbitration Centre (in co-operation with Kluwer Law International); Kluwer Law International 2014 Volume 10 Issue 2) pp. 105 -136

Jarvin, Sigvard. “Arbitrability of Antitrust Disputes: The Mitsubishi v. Soler Case” (1985) 25 Swiss Rev Int’l Competition L 53.

———. “The sources and limits of the arbitrator’s powers” (1986) 2:2 Arbitration International 140.

Jin, Choi, Vishnu Konoorayar & Jaya V S. “International Commercial Arbitration in South Asia: A Comparative Study” (2012), online: <<https://papers.ssrn.com/abstract=2359220>>.

- Jin, Choi, Vishnu Konoorayar & Jaya VS. “International Commercial Arbitration in South Asia: A Comparative Study” (2012).
- Kawharu, Amokura. “The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards” (2017) 24:5 *Journal of International Arbitration*, Kluwer Arbitration 491.
- Kessedjian, Catherine. “Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?” (2007) 18 *Am Rev Int’l Arb* 147.
- Khan, Maimul Ahsan. “Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: A Bangladesh Perspective” in *Private International Law* (Springer, Singapore, 2017) 285.
- Kim, Joongi. “Recognition and Enforcement” in *International Arbitration in Korea* (Oxford University Press, 2017) 331.
- Kleinheisterkamp, Jan. “The impact of internationally mandatory laws on the enforceability of arbitration agreements” (2009).
- Lando, Ole. “The *lex mercatoria* in international commercial arbitration” (1985) 34:4 *International & Comparative Law Quarterly* 747.
- Laurence Shore, “Applying Mandatory Rules of Law in International Commercial Arbitration” (2007) 18 *Am Rev Int’l Arb* 91.
- Lew, Julian DM. “Applicable law in international commercial arbitration. A study in commercial arbitration awards” (1978) Dobbs Ferry, NY: Oceana Publications and Leiden: Sijthoff & Noordhoff, 1978.
- Loukas, A Mistelis. “Delocalization and its Relevance in Post-Award Review” (2013) 167 *The UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration*.
- Maniruzzaman, A F M. “International Commercial Arbitration in the Asia Pacific-Asian Values, Culture and Context” (2002) 30 *Int’l Bus Law* 508.
- . “The new law of international commercial arbitration in Bangladesh: a comparative perspective” (2003) 14 *American Review of International Arbitration* 139.
- . “International arbitrator and mandatory public law rules in the context of state contracts: an overview” (1990) 7 *J Int’l Arb* 53.

———. “The *lex mercatoria* and international contracts: a challenge for international commercial arbitration” (1998) 14 Am U Int’l L Rev 657.

———. ‘The Bangladesh Arbitration Act 2001 - Some Reflections’, Asian Dispute Review, (© Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2005, Volume 2005 Issue 3) pp. 73 - 75

———. “Bangladesh embraces the UNCITRAL model law on international commercial arbitration—but not quite!” (2004) 19:3 Mealey’s International Arbitration Report 1.

Mann, Frederick A. “Lex Facit Arbitrum” (1986) 2 Arb Int’l 244.

Mayer, Pierre. “Mandatory rules of law in international arbitration” (1986) 2:4 Arbitration International 274.

McConaughay, Philip J. “The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles” (2013) 1 Peking U Transnat’l L Rev 9.

Moses, Margaret. “Party Agreements to Expand Judicial Review of Arbitral Awards” (2017) 20:3 Journal of International Arbitration, Kluwer Law International 2003 315.

Muhammad S Hossain and Mohammad I. Hossain, ‘Causes of Delay in Administration of Civil Justice: A Look for Way Out in Bangladesh Perspective’ (2012) 6 ASA University Review 103, 107

Murphy, Stephen Wills. “Judicial review of arbitration awards under state law” (2010) Virginia Law Review 887.

Mustill, Justice. “The new *lex mercatoria*: the first twenty-five years” (1988) 4:2 Arbitration International 86.

Nouraie, F Shabnam. “Arbitration Nation: While Arbitration Grows, Judicial Review of Arbitral Awards May Be Shrinking” (2010) J Disp Resol 205.

Park, William W. “The Lex Loci Arbitri and International Commercial Arbitration” (1983) International and Comparative Law Quarterly 21.

———. “National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration” (1988) 63 Tul L Rev 647.

———. “Duty and discretion in international arbitration” (1999) 93:4 American Journal of International Law 805.

———. “Duty and discretion in international arbitration” (1999) 93:4 *American Journal of International Law* 805.

———. “Respecting the new york convention” (2001) 18:2 *ICC Bulletin* 77.

———. “Non-Signatories and International Contracts: An Arbitrator’s Dilemma” (2013) 2:2 *Kölner Schriftzum Wirtschaftsrecht* 198.

Paulsson, Jan. “Arbitration unbound: award detached from the law of its country of origin” (1981) 30:2 *The International and Comparative Law Quarterly* 358.

———. “Delocalisation of international commercial arbitration: when and why it matters” (1983) *International and Comparative Law Quarterly* 53.

———. “Enforcing Arbitral Awards Notwithstanding Local Standard Annulments” (1998) 6:2 *Asia Pacific Law Review* 1.

Perloff, Saul. “The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration” (1992) 13 *U Pa J Int’l Bus L* 323.

Petersen, Niels. “The International Court of Justice and the judicial politics of identifying customary international law” (2017) 28:2 *European Journal of International Law* 357.

Potestà, Michele. “Legitimate expectations in investment treaty law: understanding the roots and the limits of a controversial concept” (2013) 28:1 *ICSID review* 88.

Pryles, Michael. “Application of the Lex Mercatoria in International Commercial Arbitration” (2008) 31 *UNSWLJ* 319.

Quigley, Leonard V. “Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1960) 70 *Yale LJ* 1049.

Raghavan, Vikram. “New Horizons for Alternative Dispute Resolution in India-The New Arbitration Law of 1996” (1996) 13 *J Int’l Arb* 5.

———. “Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on some US Developments” (2017) 15:3 *Journal of International Arbitration, Kluwer Law International* 1998 103.

Sandrock, Otto. “The Extension of Arbitration Agreements to Non-Signatories: An Enigma Still Unresolved” (2000) *Corporations, Capital Markets and Business in the Law, Liber Amicorum Richard M Buxbaum* 461.

Sattar, Sameer. “Enforcement of Foreign Arbitral Awards in Bangladesh: The Law, Its Implementation and Challenges” in *Private International Law* (Springer, Singapore, 2017) 303.

_____. The Asia-Pacific Arbitration Review 2016: Bangladesh, Global Arbitration Review (GAR), available at <https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2016/1036904/bangladesh>,

Scherer, Maxi. “The fate of parties’ agreements on judicial review of awards: a comparative and normative analysis of party-autonomy at the post-award stage” (2016) 32:3 *Arbitration International* 437.

Schwebel, Stephen M. “Anti-Suit Injunctions in International Arbitration-An Overview” (2005) 2:5 *Transnational Dispute Management (TDM)*.

Van den Berg, Albert Jan. “New York convention of 1958: Refusals of enforcement” (2007) 18:2 *ICC International Court of Arbitration Bulletin*.

W Park, William. “Why Courts Review Arbitral Awards” in *Arbitration of International Business Disputes: Studies in Law and Practice*, 2nd ed (Oxford: OUP, 2017) 315.

Williams, David AR. “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10:2 *Asian International Arbitration Journal* 137.

Yifei, Lin. “Judicial review of arbitration agreements in China” (2012) 28:2 *Arbitration International* 243.

Youssef, Karim. “The death of inarbitrability” (2009) 1 *Mistelis, Loukas; Brekoulakis, Stavros Arbitrability: International and Comparative Perspectives* 47.

Yu, Hong-Lin. “Written Arbitration Agreements—What Written Arbitration Agreements?” (2013) 32:1 *Civil Justice Quarterly* 68.

Yu, Hong-Lin & Masood Ahmed. “The New French Arbitration Law: An Analysis” (2012) 15:1 *International Arbitration Law Review* 20.

“Interpretation and Application of the New York Convention in Canada” in *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017) 1.

SECONDARY MATERIAL: REPORTS

Kamal Hossain, Sharif Bhuiyan, et al., 'National Report Bangladesh (2016)', in Jan Paulsson and Lise Bosman (eds), ICCA International Handbook on Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 1984, Supplement No. 89, June 2016) p. 40;

SECONDARY MATERIAL: WEBSITES

Alvarez, José E. “Crossing the ‘Public/Private’ Divide: Saipem v. Bangladesh and Other Crossover Cases”, (29 September 2017), online: *Kluwer Arbitration, Home*<<http://www.kluwerarbitration.com>>.

Bangladesh Code at

http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367§ions_id=24666,

Bernardo Cremades, Liber Amicorum. “Unlawful interference with International Arbitration by National Courts of the Seat in the Aftermath of Saipem v. Bangladesh”, (29 September 2017), online: *Kluwer Arbitration*<<http://www.kluwerarbitration.com>>.

Markus Kotzur, Ex Aequo et Bono, Max Planck Encyclopedia of Public International Law [MPEPIL], at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1402>,

Metropolitan Chamber of Commerce and Industry (MCCI), Dhaka, Bangladesh: http://www.mccibd.org/images/uploading/act_and_policy/corporate_governance/The-Arbitration-Act-2001.pdf,

Supreme court of Bangladesh: <http://www.supremecourt.gov.bd/web/>

United Nations Treaty Collection:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en,

UNCITRAL:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html,



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