



# Combating disputes in an alternative way

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ARBITRATION is an ancient system of resolution of dispute between parties by person or persons as agreed by them. With the velocity of time the concept and principles of arbitration awarded with statutory recognition in different countries and the basic object of arbitration with the change of time remained unbothered i.e. to resolve any dispute in convenient of the parties. According to Black's Law Dictionary, arbitration is "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding". In Bangladesh, now, arbitration proceedings are regulated by the Arbitration Act, 2001 which also includes international commercial arbitration. It may be advantageous to note that the said statute is for the most part based on the Arbitration Act, 1940. A precise idea concerning arbitration is of paramount benefits especially for those who are engaged in the fields of trade, commerce or business.

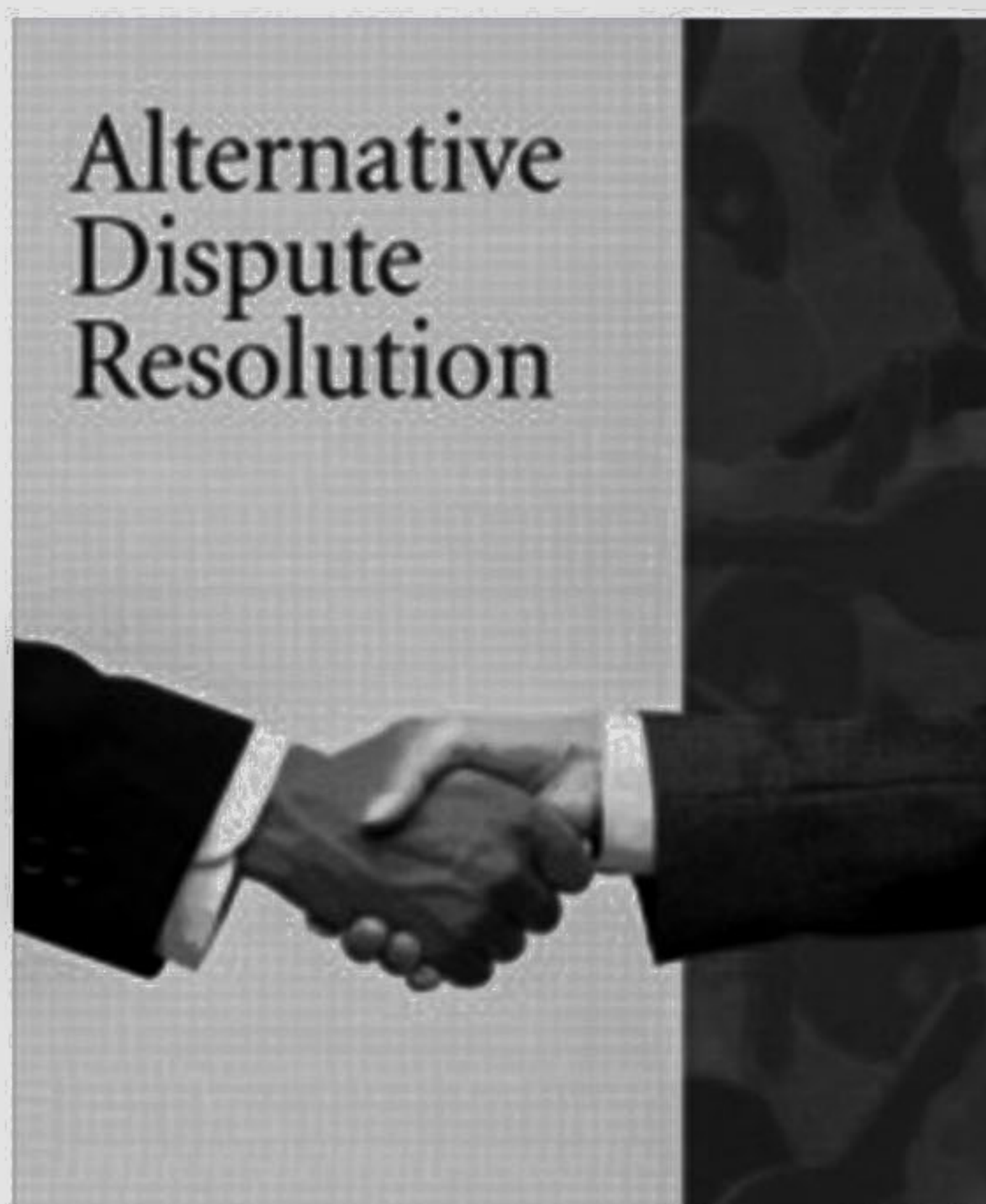
Any commercial contract may contains a clause of arbitration i.e. a provision to refer any dispute arising out of the contract between contracting parties to arbitrator or arbitrators whose decision shall be binding upon the parties. Although a dispute may be referred to a sole arbitrator but usually each party appoints one arbitrator and the appointed arbitrators engage the third arbitrator, popularly known as umpire, who shall be the Chairman of the arbitral tribunal. If either party fails to comply with a request to appoint an arbitrator within thirty days then the opposite party may apply to the District Judge or in case of international commercial arbitration to the Chief Justice or to any other judge of the Supreme Court as designed by the Chief Justice. Furthermore, if the appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment then he shall be appointed by the court in the above mentioned way. In a case the Indian Supreme Court ordered that, "...in spite of request by the petitioner, the respondent had failed to exercise his right to appoint an arbitrator. At this belated stage, now, the respondent cannot be permitted to take advantage of its own fault.....since there is failure on the part of the respondent in making an appointment of an arbitrator in accordance with the agreement, prayer cannot be granted"[2006 SCACTC 38 (SC)]. The arbitrators should confine their functions within the ambit of the agreement between the parties which is the sole authority of their jurisdiction. "The arbitrator cannot act arbitrarily,

irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has traveled outside the bounds of the contract, he has acted without jurisdiction" [2006 SCACTC 862 (SC)]. "...[D]eliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action....He cannot award an amount which is ruled out or prohibited by the terms of the agreement."[(1999) 9 SCC 283]. Misconduct on the part of the arbitrators may be a ground for setting aside their award. [50 DLR (AD) 63].

The place of arbitration may be determined by the concerned parties, failing which by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Unless the arbitrator's fees have been fixed by written agreement the arbitrator may fix his own remuneration and include it in the award. (1945 Sind 71). But the fees should not be unreasonable and excessive. Arbitrators may decline to file the award if their remuneration is not paid (1945 Nag 117). A party to an arbitral proceeding may be represented by his lawyer or other person chosen by him. Evidence may be given orally or in writing or by affidavit. The tribunal has also the authority to administer oath or affirmation to a witness subject to his consent.

In fact, to understand arbitration proper knowledge on the law of contract is must. If the contract containing arbitration clause is void then the said clause may not be possible to enforce. "The question, therefore, arises whether the illegal or void parts may be separated or 'severed' from the contract and the rest of the contract enforced without them" (Halsbury Law of England; Fourth Edition; Volume 9, Para 430, P. 297). The genera rule is that "where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality created by statute or by common law, you may reject the bad part and retain the good" (Chitty on Contracts; 29th Edition; Volume 1; pp.1048-49). It reveals that partial invalidity in contract will not ipso facto make the whole contract void or unenforceable [2006 SCACTC 38 (SC)].

Although an arbitration award is final as well as obligatory upon the parties but the right to challenge the arbitral award remains sheltered. A party to arbitration may within sixty days from the receipt of the award



apply to the court having territorial and pecuniary jurisdiction and in case of international commercial arbitration to the High Court Division for cancellation of the award. After the expiry of sixty days the award shall be enforced under the Code of Civil Procedure, in the same manner as if it were a decree of the court. As per section 43 of the Arbitration Act, 2011, an arbitral award may be set aside on the following grounds:

- a party to the arbitration agreement was under some incapacity;
- The arbitration agreement is not valid under the law to which the parties have subjected it;
- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding or was otherwise unable due to some reasonable causes to present his case;
- The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration;

provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;

v. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act;

vi. The subject matter of the dispute is not capable of settlement by the arbitration under the law for this time being in force in Bangladesh;

vii. The arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;

viii. The arbitral award is in conflict with the public policy of Bangladesh;

ix. The arbitral award is induced or affected by fraud or corruption.

It may be noted that, in proceedings out of arbitration, a court cannot be regarded as a court of appeal of appeal from the decision of the Arbitrator. Courts are in favour of non-interference with his findings unless they are perverse or he has misconduct himself or the proceedings (43 DLR 1).

In family settlement of dispute by means of arbitration is not ordinarily interfered by the courts on technical grounds. In Kerr on Fraud at p. 364 it is marked that, "...the principle which apply to the case of ordinary compromise between strangers do not apply to the case of compromises in the nature of family arrangement. Family arrangements are governed by a special equity peculiar to them, and will be enforced if honestly made..." The object of the arrangement is to protect the family members from long lasting hostilities and hatred relation and to ensure the unity and homogeneity among family members.

In fact, arbitration is an expanding branch of law in our legal system with paramount significance. A series of Articles may be beneficial for us to understand its salient features. The proper practice of arbitration may save disputing parties, in many cases, from hazardous expensive litigations and assist to flourish commercial arena in sound atmosphere.

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# Misapplication, but not the Fatwa itself be banned



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IT is not permissible to declare a law illegal due to its misapplication; rather it would be wise to take initiative to give proper treatment of that law. No doubt Fatwa is valid in Islamic law, if complied with Islamic Jurisprudence. How far it is rationale to harass people in the name of Fatwa is prime concern of the present Endeavour.

**What is Fatwa**

We can define Fatwa as religious opinion concerning Islamic law issued by Islamic

scholar. Normally Fatwa means to give solution to the problems relating to Islamic law. Therefore, when an Islamic erudite scholar gives his opinion on any matter of Islamic Shariah on the basis of Quran, Sunnah, Ijma, qias & prevailing circumstances, it is called Fatwa.

**Nature of Fatwa**

Fatwa generally means to reply any query. Recently a misconception has grown among the populace that Fatwa is issued and used only against women to suppress them in the form of Hilla Marriage, beating,

throwing slues, verbal divorce, compelling to live lonely etc. In fact Fatwa is not the same. It can be interpreted that Fatwa forms on aspect of our legal system. Mass people feel free to oblige Fatwa whereas law is mandatory and necessarily people are bound by law.

**Who are eligible to give Fatwa**

Mufti Mizanur Rahman secretary of Bashundhara Islamic Research centre as amicus curie has opined before Supreme Court that only competent person can give Fatwa. In order for a scholar to be qualified to issue a Fatwa, it was required that he must have obtained license to teach and issue legal opinions. In addition he must have due knowledge and sincerity of heart about the issue. The so-called religious clerics are in no way authorized to issue Fatwa. It is worthy to mention here that in Bangladesh usually ill-literate Matbar, Imam and influential personnel issues Fatwa resulting serious sufferings to the victim. In fact Fatwa must have issued and done in correspond with Quran, Sunnah, Ijma & qias. Otherwise it would be defrauding to citizen & punishable in law. Our Apex court has also affirmed that only competent person are eligible to issue fatwa though the term 'Competent' has not been well defined.

**HENA episode and Fatwa in Bangladesh**

In 1993 the issue of Fatwa came up in the caption of dailies of Bangladesh where Nur Jahan Begum were compelled to death by throwing stones. Very recently the term Fatwa attracts the attention of the people of Bangladesh. It is due to the episode of "Hena's death" being a victim of mistreatment of Fatwa. Hena, a 14 years girl was caused to death through inflicting "Dorra". Salish consisted of 5 members headed by

one ward member with local Imam & teachers of Madrasha, gave verdict to impose Dorra. Whether the Salish board has authority to issue Fatwa is the central question here. No one is authorized to impose punishment beyond tenets of law. It tantamounts to violation of Art 35 (1) of Bangladesh constitution.No Fatwa should be enforced which results in deprivation of other's rights. For example, in rural areas the so called Mufti or local Matbar declares a marriage invalid or compels a family to live lonely or directs an innocent girl to death. Without any doubt, all these determine personal as well as social prestige of the victim family. It is absolutely interference to freedom of life, the most precious fundamental rights in broad sense. Recently the ambit and misapplication of Fatwa have been rising tremendously in our society. At the beginning of the year it is noticed that in the name of Fatwa some religious fanatics attacked our culture by compelling the bauls to get their mustache and long hair cut terming it as anti-Islamic.

**Maltreatment of Fatwa and Criminal Offence**

Many of our legal experts put forward that as there is no specific legal provision regarding Fatwa, so it is becoming difficult to bring the clerics under the process of law. Some people argues that issuing Fatwa is a criminal offence under our penal law. Again issuance of Fatwa beyond authority is necessarily an offence under section 34 of penal code for persecuting common intention. When any person declared that I have issued this Fatwa and two others on behalf of him enforced it, then it would come under the very doctrine of common intention or abetment. Then it comes very much within the ambit of section 100 of penal code.

**Supreme Court Initiative**

A division Bench of High Court

Division(HCD) consisting of Justice Golam Rabbani and Justice Najmun Ara Sultana declared all punishments imposed in the name of Fatwa illegal on January 1, 2001. The HCD issued it on its own initiative. An appeal was preferred against that order. After a long time hearing on the issue commenced on February 1, 2011. The court appointed some amicus curie to assist it in reaching decision. In the meantime the HCD following the episode of HENA, issued 8 directives. Amongst others, these are, to run a campaign at all mosques, madrasas and union parishad across the country identifying Fatwa as criminal offence. The Appellate Division of the Supreme Court on 12th May has given solution to the proceedings pending before it for about 10 years confirming Fatwa valid in cases which are purely religious in nature. But it is neither be enforced nor any physical or mental pressure be imposed in any way. People at large welcomed the verdict though there still remains some vagueness in understanding some terms used in the primary order.

To meet up the new challenges & situation of Islamic law one might resort to Fatwa. But how this Fatwa is exercised and enforced is the prime concern. Anyone found guilty of abusing Fatwa can be brought before law. To that effect the government should take initiative to prevent its misapplication. However the govt. may think of establishing Fatwa Board consisting qualified, updated and expert Islamic scholars. The responsibility of the board may be to render Fatwa in the light of the Holy Quran, Sunnah, Ijma & Qias and to restrain any sort of abuse of Fatwa.

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