

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH



INTERNATIONAL TRADE DISPUTES IN BANGLADESH

Crisis time drafting of commercial contracts

MOHAMMED FORRUKH RAHMAN

LOSS of Cargo, Loss of Export earning, receiving defective goods, rejection by buyer, documentary Fraud etc. are increasingly becoming common in international trade practice in Bangladesh.

The problems are arising due to use of wrong Inco terms, lack of understanding of duties of parties at the documentary tender stage, delivery of goods stage, confusion as to roles and responsibility of parties involved e.g. seller, shipper, consignor, buyer, consignee, cargo receiver, issuing bank, advising bank, negotiating bank, confirming bank, notify party, freight forwarder, C & F agent, carrier etc., lack of understanding of the significance of crucial documents like Bill of lading, sales contracts and its terms, waiver, rejection, use of association rules, illegal practices like advance acceptance of documentary tender, inconsistencies in regulations etc. are contributing to the increasing number of disputes.

Although Free on Board (FOB) is more popular while amongst the exporter and Cost and Freight (CFR) is more popular amongst the buyer, the law allows uses of other Inco terms like E, D terms at the risk of the parties. In crisis time, the exporter may consider using E terms and importer may consider using D terms. However, at the same time, to comply with local laws both the exporter and importer need to negotiate with their counterpart so that they agree on issuance of Bill of Lading to the order of AD. Special caution should be given in agreeing any default association terms or charter party terms without knowing the content.

While the problem in case of import is comparatively less although due to circulation of both received for shipment bill of lading and master bill either mistakenly or deliberately, consignment often get lost and cargo are released by buyer/agent/freight forwarder agent by one set of documents while seller is holding another set of bill of lading.

In case of export, the Letter of Credit and D/A and D/P are the only mode of payment allowed. Foreign Exchange Regulation Act 1947 and guidelines there under imposes duty on the seller and AD to bring export proceeds in Bangladesh within four months hence irrespective of Inco terms used in sales contract and LC, carriers are bound to issue Bill of lading and other title



documents to the order of Authorized Dealer (AD) Bank. In case of delay in receiving Bill of Lading, advising AD bank are allowed to providing credit facilities, negotiate on the basis of House Bill(received for shipment Bill) issued by freight forwarder.

However, this would not be sufficient for documentary tender as AD bank is required to take Master Bill as issued by Carrier. In practice, due to lack of knowledge, AD bank often complete documentary tender with House Bill while master bill is in circulation not taken by AD bank. This creates opportunity for fraud and often cargo get lost and released by using Master bill by the Agent/Buyer etc leaving the corresponding bank and seller unpaid by not accepting the documentary tender due to discrepancy.

Practice is required to be developed for using mediation and arbitration clause particularly in high volume international trades to give a clear picture to the parties and also to provide a clean legal redress mechanism.

Acceptance before documentary tender is contributing toward significant number of fraud practice. Seller insists on prior acceptance even before or at the time of signing sales contract. Practice has grown in such a way that the buyers are bound to do so giving opportunity to the seller to non deliver or partially deliver the goods while receiving the payment from issuing bank in full.

Banks often open LC, mostly relying on UCP 600 terms without having the knowledge of other laws

and practices and need for the existence of any sales contract. This is happening often due to own ignorance or by taking advantage from the ignorance of the seller. Further legal enforcement mechanism are often weak due to lack of understanding of the trade fraud and mechanism by the lawyers and others concerned. Parties generally do not use mediation and arbitration clause causing further difficulties in case of cross-border disputes.

Much more is required to be done by raising awareness amongst bankers, sellers, buyers, and freight forwarders. Focus should be given on the sales contract perhaps by ratifying the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG").

FF Agents (Licensing) Rules 2008 created confusion by allowing issuance of "Bill of Lading" as if MTO although being a rule it cannot supersede the mother laws: Carriage of Goods by Sea Act 1925 and Carriage of Goods by Air 1966, which do not allow issuance of bill of lading other than by carrier, which is the ship-owner or airline as applicable. However, the confusion must be removed.

If Multimodal transportation is required to be allowed, a lot is required to be done. Entire legal regulatory regime is required to be changed and MTO's licensing rule must address the need for bigger insurance and higher capital structure of the licensee.

On custodial violence

should not be coerced and intimidation to answer self-incriminating questions under section 25 of the Evidence Act. But these provisions are being neglected by law enforcers over years.

Custodial violence has become an open secret in our country. In this situation, we congratulate our recent enactment by parliament namely the Torture and Custodial Death (Prevention) Act



2013. It has been made to comply with UN Convention against torture and inhumane, cruel or degrading treatment.

The newly passed law defined custodial death as any death in custody of any public servant, death in custody in illegal detention, death during arrest by law enforcers, and death during interrogation. It defines torture as any act or omission that causes physical or mental pain to any individual for obtaining from that individual or some other individual, information or a confession, or for

punishing that individual for any act or omission, for intimidating or coercing that person or some other person. It also said causing physical or mental pain to an individual through discrimination at instigation of someone or at the individual capacity or government capacity would also be considered as torture. Again it stipulates that the police, Rapid Action Battalion (Rab), Border Guard Bangladesh (BGB), Customs, Immigration, Criminal Investigation Department (CID), intelligence agencies, Ansar & VDP, Coast Guard and other public servants cannot extract confessional statement through torture.

The act also provides punishment for custodial deaths. Within the meaning of this law if anyone dies from torture in custody, the convicted individual would be sentenced to maximum life-term jail or minimum taka 100,000 as fine or both. In addition, the convicted individual would have to pay compensation of Tk 200,000 to the family of the victim.

The law addresses delays in investigation and adjudication of the cases of custodial violence for the first time in Bangladesh as it mandates that any investigation into cases of torture will have to be completed within 90 days of registration of a complaint, and the trial will have to be completed within 180 days. It also mandates suspension of the accused from service during investigation.

Finally, it can be resanobaly said that this Act is a great achievement in criminal justice mainframes in Bangladesh.



TALUKDAR RASEL MAHMUD

THE term 'custodial violence' includes all types of physical and mental torture inflicted upon a person in police custody. It is a crime against humanity and a naked violation of human rights. The Indian Supreme Court held it as ".....nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a State official running berserk regardless of human rights"[Kishor Singh Ravinder Dev Etc v State Of Rajasthan (1980)]."

Custodial torture and violence are clear violation of fundamental rights within the meaning of our constitution. The Eight Amendment of American Constitution provides a prohibition against cruel and unusual punishments. Likewise, the Constitution of Bangladesh also prohibits torture and other forms of cruel and degrading treatment under Article 35(5). Some provisions of the Code of Criminal Procedure, 1898 call for judicial scrutiny by magistrates in the event of granting detentions and remand with a view to reducing if not eliminating custodial torture. The Penal Code, 1860 of Bangladesh also provides that causing hurt to a person in order to extract confession, wrongful confinement voluntarily, causing grievous hurt, rape and murder are punishable offences. Again, Article 35(4) of the constitution provides protection against self-incrimination that a person shall not be compelled to be witness against himself and an arrested person



FOR LAW STUDENTS

NOOR JAHAN PUNAM

SO, it was my first Model United Nations. Honestly, when I filled in the form I hardly knew what it was all about although I was given a very minimal idea by my friend. As soon as I got the invitation letter from the BUGMUN Secretariat, I started looking up for MUNs and how it all works out there. At the outset, the information I got, reminded me of my Bar training days since it involved professional attire, research, negotiation and what not.

I only wish I knew about MUNs prior to going for my Bar Professional Training Course since it teaches you how to handle hectic pressure of research, speaking out professionally in front people you may feel alien to, in the beginning. It felt like only if I did this before going into my civil advocacy small group sessions I would have been confident there. MUN puts you in a mode of defending your country (assigned to you by the secretariat) from all the aspects possible not in an emotional way but in a logical manner supported by

authentic data just like a lawyer defends his client at the court of law backing up his/her arguments with previous legal authorities.

Additionally, MUN helps one to reason well in a crisis situation arising out of nowhere at 4 am in the morning despite being dragged out of bed in the middle of your warm, cozy sleep. While writing this I remember a teacher of mine who would discourage us to become lawyers during our lectures with him, since he used to have days when he used to sleep off in his chair at the chambers whilst working through the night and wake up to find that it was time for court already and for other significant reasons not worthy of mentioning here.

I felt old attending the MUN since my committee mates included school girls from scholastic but yet so the experience tells me it never too late to start MUN-ing unless you are too old to be eligible, certainly. Further, I am not imposing my ideas on anyone when I say this but I believe being a law graduate does not do the magic



for lawyers anymore. The world is developing rapidly at recent times and having a glossy title is not worth it when you know nothing but law only. We are the youth of a very young and beautiful nation. We are the future leaders of our country and being able to adapt to hectic schedules at our early age does prepare us to face real world problems with the weapons of logic and reasoning. Although I wished to dedicate this piece of writing to the law students of our country but all the thoughts about the youth being enlightened

in a multi-dimensional manner is true for students of other subjects too.

Last but not the least anyone wishing to write their Bar application in the upcoming days should take up a habit of participating in MUNs since it would really make your application shine out bright and stand out in the crowd of many mainstream applications and that is one incentive I can give to the law students reading this here and now.

THE WRITER IS BARRISTER



Fighting against Human Trafficking

Petty done, the Undone vast

MOHAMMAD GOLAM SARWAR

A number of human trafficking events are taking place which causes huge suffering to the victims of trafficking disregarding human rights values with dignity. While the government of Bangladesh pledges utmost commitment to combat human trafficking but 'unfortunately' reality suggests a shocking picture. The last week event on February 11 is the glaring example where 200 people were rescued. Among them 105 are Bangladeshis and the rest are rohingya citizens, thanks to the Coast Guard members. These recued people may have sense of solace and at least they are relieved from being trafficked. However, what would be the fate of their invested money which they may have collected by selling their last resort? This particular incident being part of series events propels us to revisit the issue of human trafficking with maximum care and attention.

What has been done

In response to pressing needs the government of Bangladesh enacted Human Trafficking Deterrence and Suppression Act 2012. This Act complying with the International standards stressed on the protection and implementation of the rights of the victims of human trafficking ensuring safe migration. The Act categorically defined various terms related to trafficking like forced labour, exploitation, consent etc. Most significantly it provides provision of criminalising all forms of trafficking involving internal and transnational. This Act also widened the scope of beneficiary by incorporating the term "Person" that means natural person including company, firm which particularly indicates the inclusion of male victim in the law.

Prescribed punishment: The Act provides severe punishment for the trafficking offence committed individually (maximum punishment is an imprisonment for life) or as an organised crime (maximum punishment is the death penalty).

Anti-Human Trafficking offence tribunal: The Act calls for the establishment of tribunal for the purpose of speedy trial of cases which is accorded with wide power of taking evidence and other necessary tools to establish judicial accomplishment.

Protection of victims: The Act secured more significance than any other law, at least in letters, while addressing not only the preventive measures but also the



protective measures for the victims of human trafficking. The measures include the identification, rescue, repatriation, rehabilitation, social integration, return (when the victim is found in foreign country) of victims of trafficking.

The core features of this Act, in my understanding that the Act pledges for the principle of equality and non-discrimination while dealing with the offenders, victims and witnesses. It also clearly affirms the constitutional commitment and International standard as well. National Plan of Action for combating Human Trafficking echoed with the Anti-Trafficking Act also focused on the following areas: prevention of human trafficking, holistic protection of trafficking victims, prosecution of traffickers, partnership & cross-country legal assistance, and monitoring & evaluation.

What has not been done

Though the Act calls for framing rules to implement the purposes of the Act which including the establishment of operating procedures but till date the rules are yet to be passed. This not only frustrates the effective implementation of the Act but also shows the gap between the enactment and the implementation of the law.

The Act makes provision for establishing Special tribunal for the purpose of speedy trial, in this regard the first point is that the wording of the provision i.e. 'may establish' indicates mere direction without obliging any compulsion for the formation of tribunal. Another important thing is that the Act itself assigns and empowers the Nari O Shishu Nirjaton Daman Tribunal in each District to act as the Anti-Human-Trafficking Offence Tribunal of that District. As it is well established that the Nari O Shishu Nirjaton Daman Tribunal in Bangladesh suffers from huge backlog of cases along with low conviction rate, so the extra burden of dealing trafficking offences might create pressure and hamper effective adjudication as well.

It not only violates the purposes of Anti-Trafficking law but remain the offenders of trafficking beyond conviction. On February 13 2014 The Daily Star published a report where organisers of the One Billion Rising movement informed that 2 lakh cases filed in 11 years (2002-2013) relating to violence against women but few were adjudicated. Needless to mention that Low conviction rate accelerates the repeated commission of the offence where the victims can do nothing.

The Act also calls for other essential measures to establish for example, protective homes and rehabilitation centre, developing comprehensive data base etc, but after one year these measures still suffers from functioning and operating crisis. As the instrumentalities ascribed under this Act are not properly established and equipped as well, it can be reasonably said that battle against human trafficking still remains a far cry.

What needs to be addressed

After analysing the Act it can be reasonably deduced that the Act only talks about the post occurrence measures that will be applied only when the offences of trafficking are taken place. The Act does not focus on the preemptive measures that are essential to make people aware and capable so that they might not become the victims of trafficking.

Emphasis to be given with due care what are root causes of taking the risk of going abroad which turns them into victims of trafficking. At the same time what are the facilitating factor which influences the members of broker house to engage in this heinous job. Now the question is whether by imposing severe punishment on the offenders are we getting rid of this serious predicament? The social factors and economic insolvency are the influencing factors which propel them to go abroad even by illegal means. Lack of knowledge and isolation of information might be one reason which curtails their capability to bargain against the members of broker house to compel them for ensuring safe migration. The concerned authorities should identify the vulnerable sites where trafficking are often taken place.

Finally I want to underscore the role of NGO to protect the victims of trafficking. For the purpose of smooth functioning of the Act, the Act itself contains provisions for collaboration with non-governmental organisations. In this regard, Relief International (RI), a humanitarian agency, has undertaken a project titled as "Protecting Victims of Human Trafficking in Bangladesh". The Project focused to protect the victims of trafficking with a special emphasis on unskilled male migrant workers. Dissemination of information regarding the Human Trafficking Deterrence and Suppression Act 2012 is one of the prior concern of RI and in this regard radio programme titled as "Our Rights" (airing on 2nd Tuesday in every month at Radio Today FM 89.6) is playing significant role to spread this legislation as well as to aware people about trafficking horrors. This effort is made possible with generous support from the US Department of states' office to monitor and combat trafficking in persons.

To ensure the benefits of the Anti-Trafficking law, the cumulative efforts from government as well as non-government organisations are to be immediately actualised.

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