

THE ARBITRATION ACT 2001 A Call for Reform

Necessary amendments to the Arbitration Act 2001 would certainly help overcome the stigma that arbitration in Bangladesh is a never-ending saga.



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LAW OPINION
The primary statute governing arbitrations in Bangladesh is the Arbitration Act 2001 (the AA 2001), which was drafted on the basis of the UNCITRAL Model Law of 1985 (the Model Law). The Model Law was prepared by UNCITRAL and adopted by the United Nations Commission on International Trade Law on 21 June 1985. In line with the progressive development of arbitration jurisprudence globally, the Model Law and other arbitration statutes have been amended to bring clarity to its legal provisions and to improve the effectiveness of arbitrations generally. These amendments raise serious questions as to whether the AA 2001 is falling short in keeping up with the changing standards of arbitration globally. This article will highlight specific amendments that could be brought to the AA 2001, in order to increase its efficiency. The first and foremost clarification that is required in the AA 2001 is its applicability;

especially for interim remedies. It is clear that the AA 2001 is not applicable for arbitrations seated outside of Bangladesh and the Courts in Bangladesh cannot grant interim remedies where the seat of arbitration is abroad. This issue has been addressed by the revised Model Law, which states that provisions relating to, inter alia, interim measures shall apply irrespective of the fact that the place of arbitration is outside the country concerned. It is useful for parties when they are arbitrating in a foreign seat and the respondent's assets are located in the country where it is situated. Otherwise, this would result in the claimant having won an expensive arbitration, coming to enforce the award in the respondent's country only to realise that the respondents have dissipated its assets to avoid enforcement of the same. The claimant would then be left with only a paper award. As a result, the AA 2001 should be amended to specifically address this issue.

The AA 2001 grants the arbitral tribunal sufficient powers to order interim measures as the arbitral tribunal may deem necessary. However, it does not provide any clear guidance and/or restrictions in relation to the granting of

the same. It would be helpful if the AA 2001 is amended to adopt certain provisions relating to interim remedies, which will be binding on the parties. Reference can be made to the recent amendments to the Indian Arbitration Act 1996, which states that local Courts shall not consider any application for interim measures after an arbitral tribunal has been constituted unless the Court finds special circumstances which may justify granting the same. The AA 2001 does not address these issues giving the parties in Bangladesh ample scope to file a case under the AA 2001 despite having a validly constituted arbitral tribunal. This causes undue pressure on the Court's caseload, which is already marred with delays.

In line with the revised Model Law, arbitral tribunals should also have the same powers that are available to a Court and that interim orders passed by an arbitral tribunal should be enforceable as if it was an order of a Court for all purposes. These amendments will increase confidence of arbitration users in the process. In addition, the parties will no longer need to rush to the Court for interim measures thereby saving both their time and money. More importantly, such amendments will help to alleviate the Court's problem of being overburdened with cases.

Perhaps, the most important amendment made in Indian Arbitration Act 1996 was the amendment of the term "Court" in so far as it relates to international arbitration. There is a clear distinction between an international commercial arbitration and a domestic arbitration with regards to the definition of "Court". For the purpose of international commercial arbitration, the definition of "Court" has been amended to mean only the High Court, exercising its ordinary original civil jurisdiction. Accordingly, in an international commercial arbitration, the lower Courts will have no jurisdiction and, as a result, the parties can legitimately expect a speedier and effective result directly from the High Court, which may be better equipped to deal with the complex issues of arbitration. This amendment was a welcome change for foreign investors, who have been languishing before the lower Courts in order to enforce their arbitral awards. This applies squarely to Bangladesh since enforcement of foreign awards is a significant concern for foreign investors wishing to do business in Bangladesh.

In the AA 2001, the 'Court' is defined as the District Judge's Court, including the Additional Judge's Court. The provisions of the AA 2001 state that the High Court Division has jurisdiction over arbitral proceedings only when passing orders for interim remedies and, that too, only in the case of international commercial arbitration.

One of the most prevalent problems in Bangladesh is that parties generally fail to agree on the appointment of arbitrators. As a result, the innocent party has to rush to the local Courts for an appointment. This usually takes a very long time in Bangladesh and, as a result, the overall arbitration process gets delayed. It is suggested that the AA 2001 be amended to the effect that any application for appointment of arbitrators gets disposed of within a fixed period of time.

Arbitration is a form of ADR (which means Alternative Dispute Resolution). However, in Bangladesh, most users say that arbitration has a different meaning. Instead of it being an alternate quicker remedy, they refer to arbitration as an Additional Dispute Resolution. There is no debate that arbitration in Bangladesh is a long drawn out process, which in fact defies the very ethos of arbitration. The AA 2001 should be amended to impose strict time period for rendering arbitral awards. In the Indian Arbitration Act 1996, amendments have been made so that arbitral awards are rendered within a fixed period of time. Such amendments to the AA 2001 will be a positive step to impose a statutory burden and/or obligation on the parties and ensure that awards are rendered within a short time frame. This would certainly help overcome the stigma that arbitration in Bangladesh is a never-ending saga.

A valuable lesson can be taken by Bangladesh from the revised Model Law and from our neighboring countries. Such lessons will help Bangladesh make its arbitration statute, the AA 2001, more effective so that users feel more encouraged to use arbitration in Bangladesh as an alternative mode of dispute resolution rather than resorting to local Courts.

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Understanding Environmental Law

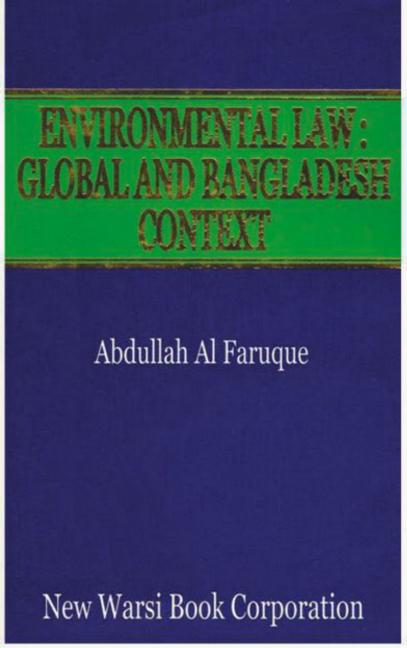
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ENVIRONMENTAL law, one of the dynamic realms of international law, is deemed as the most fascinating area of research and analysis for academicians and international law researchers. Since 1970s, this branch of international law has been expanding to protect environment. However, to delve into the realm of environmental law, it is requisite to grapple the national and international dimensions of this complex but dynamic subject. Only upon fulfilling this, the legal regime of environment can be used as tool to check the threat of environmental menace. In this respect, Professor Dr. Abdullah Al Faruque in 'Environmental Law: Global and Bangladesh Context' contributes something of a novelty in legal scholarship. The book introduces readers a whiff of fresh analysis to brewing debates, developments and controversies concerning environmental law, both from Bangladesh and international law perspectives. The book is structured into 30 chapters and all these chapters are bucketed under the headings of five specific

parts in a way that the readers get enabled to comprehend how international environmental law is evolving in comparison with how the laws of Bangladesh interacts with the international regime.

First part (chapters 1 to 4) sets the tone with a comprehensive introduction stating historical evolution, sources, and principles of environmental law. The introductory chapters start off with concise but clear understanding of the nature of environmental pollution; philosophical views of the environmental protection; understanding of 'common concerns of humankind' concept and overview of environmental justice. While the first part of the book is descriptive in nature, the preceding four parts of the book are embellished with author's insights and analysis. Second part (chapters 5 to 11) examines issues such as conservation of biodiversity, climate change, marine pollution, hazardous waste management and protection of ozone layer. Third part of the book (chapters 12 to 15) finely curves out some contemporary issues relating to protection of environment such as linkages of environment with human rights, trade and nuclear energy and corporate environmental accountability. Throughout the fourth part (chapters 16 to 20) various compliance mechanisms of environmental law at international and national level are brought under perusal. Part five (chapters 21 to 30) concentrates on legal and institutional framework on protection of environment in Bangladesh.

The book concludes with bibliography with a list of environment related treaties ratified by Bangladesh. It is pertinent to mention here that the book lacks a comprehensive index section. This deficit of index section creates bulwark for researchers to find a topic. A comprehensive index section would undoubtedly gilt-edge the book as treasure trove on issues of environmental law. However, this critical remark should not cloud the fact that the book commands and demands reverence.

The book is well researched and eloquently written by a distinguished international law professor of Bangladesh. Furthermore, the book's greatest strength lies in the amount of detail it provides in a systematic and concise manner. To the students of law and international relations, the book paves stepping stones for in-depth analysis of international environmental law.



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Compensatory justice to the victims of war

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SOON after the Second World War, by constituting the Charters of the Nuremberg Tribunal (1945) and Tokyo Tribunal (1946), the world community expressed their resentment against horrors of war crimes, crimes against peace and humanity. By bringing key perpetrators to justice, they deconstructed the plea of impunity in the name of "sovereign immunity". However, justice so dispensed was retributive in nature, intended only to be an example in discouraging succeeding war. Nevertheless, wars occurred and war crimes took place. Eventually, international judicial authorities came into play in Yugoslavia (1993), Rwanda (1994) and the Hague (2002) to prosecute international crimes. In compare with other forums, the International Criminal Court (ICC) so established in the Hague is unique in providing: (i) victims participation in proceedings, and (ii) reparations to victims and their families.

Article 68(3) of the ICC statute provides that where personal interests of the victims are affected, the Court may permit their views and concerns to be expressed and considered at appropriate stages of the proceedings in a manner which is not inconsistent with accused's rights and fair trial.

Article 75 permits the Court to make reparation order against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. In appropriate cases, the Court may order reparation award from the Trust Fund created under Article 79. Before making such order, the Court may invite and take account of representations from or on behalf of the convicted, victims and other interested persons or states. Moreover, to execute reparation order, the ICC may, in cooperation with state parties, take initiative for identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for eventual forfeiture (Article 93).

Since its inception, the ICC has been allowing victims' participation in legal proceedings. But the issue of reparation remained in abeyance until 24 March 2017, when in 'The Prosecutor vs. Germain Katanga (ICC-01/04-01/07),

the Trial Chamber II issued an order awarding individual and collective reparations to the victims of crimes committed by Germain Katanga on 24 February 2003 during an attack on the Bogoro village, in Ituri district of Congo. On 23 May 2014, Germain Katanga was sentenced to 12 years imprisonment after being found guilty, as an accessory, of one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging).

Upon hearing of reparation claims, the Trial Chamber II awarded 297 victims with a symbolic compensation of \$ 250 per victim who lost relatives,

in communities, and (ii) to develop "mobile memorialization" initiatives in communities to promote awareness raising of the crimes and resulting harms, reintegration, reconciliation, and memorialization. However, decision on non-symbolic collective reparations is pending.

Hence, by recognising (i) "proportional" and "symbolic" reparations, and (ii) "individual" and "collective" claims for reparation, the ICC has transcended the earlier notion of justice in the trial of international crimes. A transformation towards reparation as demonstrated in Katanga and Lubanga cases is a positive gesture in restoring the wrongs suffered by the



property or livestock or suffered psychological harm.

However, The Prosecutor vs. Thomas Lubanga Dyilo (ICC-01/04-01/06) was the first ICC case to witness some form of symbolic compensation even before the case of Germain Katanga. On 10 July 2012, Congolese warlord Thomas Lubanga was sentenced to 14 years imprisonment for war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. On 21 October 2016, in reparation claims hearing, judges approved plan for "symbolic reparations" to create a "living memorial" to remember and raise awareness about child soldiers. The plan for symbolic reparations includes (i) construction of "symbolic structures", in the form of commemoration centers that will host interactive symbolic activities

victims. The national and regional judicial forums prosecuting international crimes may lineup in this transformation. No doubt, the amount so awarded by the ICC, does not represent reparations for all the crimes committed by Germain Katanga, nonetheless, "it is a very significant symbol that will comfort victims and help ensure the social reintegration of survivors".

Before it is too late, the Parliament of Bangladesh may revisit the International Crimes (Tribunals) Act 1973, so as to enable the Prosecution and International Crimes Tribunal-1 to incorporate the precedent imparted by the ICC, and thus to dispense compensatory justice to the victims of 1971 liberation war.

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