

LAW VISION

The quest for special courts for adjudication of corporate disputes



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In the last few years, Bangladesh has given its business environment a facelift to attract investments. To curtail excessive red tapism in company registration, the incorporation of company has been simplified by digitalisation. A 'one stop shop strategy' has been introduced by enacting a new law in Parliament namely One-Stop Service Act, 2018 and, thereunder, rules were framed in 2020. BIDA, a government agency, has been placed in charge of operating an online portal, which receives, and processes applications from domestic and foreign investors to provide investment related services upon demand.

Nevertheless, the annual World Bank's Doing Business Reports are disheartening for the nation. The country has recurrently received low scores and found its place relatively at the bottom of the list. In 2020, Bangladesh ranked 168th among 190 countries. Though it is six

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notches up from the previous year's ranking of 176th, it is still a poor ranking in the global perspective. In South Asia, this is the second to last position.

The World Bank's Doing Business Index provides ranking upon assessing a country's trade practice and regulations in areas, such as, starting business, getting utility connections, paying taxes, registering property, getting credit, dealing with constructions permits, enforcing contracts, etc. The procedures, time, and costs (required for availing services) are the main three baselines that are carefully assessed for ranking in the doing business index.

As the latest ranking suggests, Bangladesh

was graded poorly on almost all indicators. Upon analysis, the lower ranking was generally associated with the issues of corruption in public offices, lack of regulatory transparency and administrative delays in file approval, etc. which are understandably not encouraging for investors while considering doing business in a country.

For ranking on 'enforcement contract', the time and cost to resolve a commercial dispute and the quality of judicial processes are carefully evaluated. For this purpose, the World Bank Team analyses the aspects of an efficient judicial system by considering the factors, such as, (a) availability of specialised courts; (b) access to automated systems for filing complaints and serving notices; (c) regulations concerning the timeframe for each procedural instance; and (iv) existence of alternative dispute resolution mechanisms.

Except the last one, in other three indicators, Bangladesh received negative marking. Because, in Bangladesh, there exists no specialised corporate law courts dedicated to resolve intra-corporate and/or contractual disputes between the parties. So, no question arises as regards access to the automated systems for filing complaints and serving notices. The time frame, for each procedural step required in a case, received bad grades in the index because in majority cases, the prescribed time frame is not respected which results in judicial delays in resolution of disputes. Bangladesh has laws providing ADR mechanisms, but their application is not meaningful thanks to the passive judicial attitude and reluctance of the parties.

In other words, both in terms of monetary expenses and time spent, the litigation experience is not pleasant on any count for the corporate bodies in Bangladesh. The prime causes of the judicial delays are that the procedural laws are anachronistic, extremely complex, time consuming and they, to a large extent, still bear the mark of colonial heritage.

Hence, there is a legal and commercial necessity to establish special corporate law courts giving them jurisdictions to adjudicate corporate disputes. It may be mentioned that the High Court Division has statutory original jurisdiction to entertain, adjudicate certain intra-corporate and corporate disputes under the relevant legislation in force in Bangladesh. And, any such dispute if submitted to the High

Court Division is resolved within a reasonable time frame. It is possible because the Judges are highly efficient, and the case management system is well developed, though the court automation is yet to be advanced up to the satisfactory level. However, the High Court jurisdiction is limited under the relevant statutes. It can assert its jurisdiction to adjudicate only certain types of disputes which are expressly mandated by law. In all other cases, the subordinate courts assume jurisdiction and adjudicate by applying procedures which are very formalistic and lengthy.

Establishing special courts is not a new concept for Bangladesh. For instance, in civil jurisdiction, Artha Rin Adalat (Money Loan Court) established under the Artha Rin Adalat Ain, 2003 (Money Loan Court Act, 2003) is functioning as a special court which was established to provide mechanisms for speedy resolution of money loan cases. This law allows the banks and non-banking financial institutions to file cases in special courts for recovery of loan from the alleged defaulters. In the same fashion, special courts can be established providing exclusive jurisdictions to adjudicate all corporate disputes.

Available empirical evidence suggests that a specialised corporate law court equipped with the necessary physical, technological support and adjudicating environment, can bring significant changes to the country's judicial system. In Columbia, one of the emerging economies in Latin America, a similar court was established under a 2008 law and since then, the country has been witnessing fast track solutions to all corporate law cases. The creation of corporate law court in Colombia was proved to be effective for expeditious handling of cases and thereby positively impacting foreign investment in the country. The Colombian model is oft quoted by the scholars to propose it for the emerging economies.

The presence of such courts is imperative for an emerging economy like Bangladesh which has set its Vision 2041 to reach the level of high-income status through industrialisation.

THE WRITER IS PURSUING AN ADVANCED MASTERS IN COMPLIANCE AT THE UNIVERSITY OF FRIBOURG, SWITZERLAND, AND A PRACTICING LAWYER OF THE SUPREME COURT OF BANGLADESH.

LAW OPINION

Congestion of Containers in Ports and ICDs: Legislative and Infrastructural Reforms Needed

SHWEATA MISHRA AND AHMAD MUSANNA CHOWDHURY

The Ports of Bangladesh face severe congestion every year between the months of April and October. This year, the ongoing Covid-19 situation in Bangladesh has begun to impact the maritime industry, particularly port yards, causing major cargo congestion. It was seen in the past few weeks that hundreds of export laden trucks and covered vans carrying cargos from the different parts of the country were standing in a long queue in front of the inland container depots (ICDs), although the Chittagong Port Authority (CPA) had claimed that the Chittagong Port was free of container congestion and that exports and imports were proceeding normally and the country's Ministry of Transportation, on the other hand, made statement that the transportation of export products from the ports was not a major issue because there were sufficient ships and empty containers lying at the ports. Amid the situation, the CPA in the last month had asked the ICDs of the country to shift ICD-bound goods and empty containers from the port yards. By allowing the storing of all cargoes at the private depots and undertaking other measures, such as raising the number of berths by the government, priority berthing for Colombo-going vessels, the CPA has now able to improve the cargo congestion situation at the port yards and such improvement has also eased the backlog situation at the private

depots. But this development is considered to be temporary.

The substantial disruption of shipping schedules of vessels at many transshipment ports, as a result of the pandemic, is one of the key causes of the current problem. Furthermore, vessels stuck in the Suez Canal have also caused a backlog at transshipment ports. Import containers heading for Bangladesh are congested at transshipment ports, i.e. Singapore, Colombo, and Port Klang. On the other hand, the containers that took goods for export in many foreign ports are taking more time to return as the import in the country has decreased due to the pandemic. Besides, the containers that are lying idle in the ports of Bangladesh are mostly from other companies that are not owned by the frontline MLOs, such as Hapag-Lloyd, Hyundai Merchant Marine, CMA CGM, Mediterranean Shipping Company (MSC) and Maersk Line, who mostly ship cargos from Bangladesh. Because of this halt in the container bookings, the shipment of cargos to the mother vessels in transshipment ports has become uncertain. Furthermore, the paucity of feeder vessels is also noticeable and the freighters are failing to book spaces in the mother vessels due to severe space scarcity in mother vessels at transshipment ports.

The crisis of container congestion at ports creates an imbalance in shipping activities. The supply chains disrupt. Shippers and consignees count demurrages for the prolonged stay of trucks and covered vans in front of the ports



or depots and they eventually have to bear the additional expenses for the shipments. The merchants, shipping lines, forwarders, terminal operators, hauliers have to incur unforeseen additional costs, whatever the reasons of congestion are. It is extremely difficult to determine the true costs as incurred by them due to the congestion. Moreover, delayed shipments in numerous consignments are causing exporters to be concerned about timely delivery and order cancellations.

The delay in shipping and hike in costs are causing Bangladesh to lag behind its competitors. The country's economy will see a negative impact if this continues. In these circumstances, the government should undertake effective long-term measures to

solve this regular annual problem. Taking the pandemic into consideration, the port authorities, who have a larger role to play in addressing these challenges, need to ensure better services to the shippers and take all kind of safety measures so that the port staff, workers, and other stakeholders such as importers, exporters, shipping agents, clearing and forwarding agents, freight forwarders, berth operators, ship-handling operators, and customs officials could work together to come out from the crisis. It is evident that, although the government has not shut down the port activities for a single day in the midst of the lockdown, the lockdown can no longer be given to save the shipping industry.

The assistance of all stakeholders is needed

to increase the handling capacity as per our growing demand and to hold the supply chain. Shippers must come forward to help us and find a way out with regard to the issues involving scarcity of containers. A legislative change may be made with regard to the cargo congestion and, overall, to encourage the shipping competition among the exporters, the importers and the shipping companies who will play their respective roles without undue influence. In this respect, the United States' Ocean Shipping Reform Act of 2021 which aims to address the carriers' service failures and unfair pricing at the container markets may be a reference point for Bangladesh.

We also consider that inadequate infrastructure at the ports is also contributing to cargo congestion. In order to deal with the problems that the port authorities are currently facing and to save the country's shipping sector in the long run, the ports of the country should compulsorily be modernised by upgrading the infrastructures, installing digitisation and making investment in new technologies. The construction work of the 'Bay Terminal', the project of the government which will expectedly enhance the container handling capacity of Chattogram Port upto 5 million TEUs to the existing yearly capacity (which is around 3.1 million TEUs container), must be finished as quickly as feasible.

THE WRITERS ARE HEAD OF THE CHAMBERS OF MCLAW SERVICES AND ADVOCATE OF SUPREME COURT OF BANGLADESH, RESPECTIVELY.



LAW EVENT

LWM organises virtual discussion on 'The Judicial Process of Bangabandhu Murder Case and Its Verdict'

In continuation of the series of events organised by the Liberation War Museum (LWM) on the occasion of the birth centenary of Bangabandhu Sheikh Mujibur Rahman, a virtual discussion titled 'The Judicial Process of Bangabandhu Murder Case and Its Verdict' was held on the last evening of the mournful August. Mr. Justice Obaidul Hassan from the Appellate Division, Mr. Justice M Enayetur Rahim and Madam Justice Kashefa Hussain from the High Court Division of the Supreme Court of Bangladesh participated in the discussion.

The event began with the welcome speech given by one of the trustees of the LWM, Dr. Sarwar Ali. In his remarks, he gave a historical brief on Bangabandhu's killing, the politicisation of justice and unreasonable delay in trial process. In particular, he opined that a culture of impunity was promoted in the post-1975 political scenario, due to which, the family members of Bangabandhu as well as the whole nation had to wait for 34 years to receive the final verdict from the highest court of the country. Speaking on behalf of the LWM Trustee Board, Dr. Ali recognised the trial process of Bangabandhu killing, its judgment and execution as one of the prime developments in establishing the rule of law in Bangladesh. He concluded his speech by remembering the contribution of some prominent legal figures who made justice a reality, namely Advocate Sirajul Hoque, former District and Session Judge Kazi Golam Rasul, former Attorney General Mahbubey Alam, and constitutional law expert Mahmudul Islam.

Madam Justice Kashefa Hussain spoke at the beginning of the main discussion. She considered the day of Bangabandhu killing as the beginning of a dark chapter in the history of the post-independent Bangladesh. She further focused on the post-1975 political upheavals and its adverse aspects that directly put a halt to the legal motion. The Indemnity Ordinance, being passed on 26 September 1975 and validated afterwards through the fifth constitutional amendment, was a political attempt to prevent justice from taking its course, leading to a legal inertia for 21 years. When the case was finally brought before the court, it further went through the regular criminal procedure that caused procedural entanglement.

She opined that such entanglement could have been avoided if this case had been adjudicated under a special law. She finally hoped that some of the convicted individuals who are still free and living as fugitives, would be brought back to Bangladesh so that people could see the full implementation of the verdict.

Mr. Justice M Enayetur Rahim then highlighted the political reluctance in different regimes as the main obstacle in bringing Bangabandhu's killers to book. After the Indemnity Ordinance was repealed in 1996 by the Awami League-led government, the course of ensuring justice for Bangabandhu and his family members gained its normal pace, but at the cost of time. When the case was initiated, some of the accused showed resistance by questioning the legality of the trial. Mr. Justice M. Enayetur Rahim praised the judiciary's role in overcoming the hurdles as well as amplifying the definitional ambit of "criminal conspiracy". Despite the delay that ensued on various political grounds, he appreciated the then government's initiative to follow the existing criminal procedure mechanism to make the trial process an acceptable one both at home and abroad.

Agreeing with the earlier speakers, Mr. Justice Obaidul Hassan gave a brief account of some of the historical dates. His speech covered the case's journey to the upper courts from the subordinate court. He termed the assassination of Bangabandhu as the result of a concerted effort with domestic, foreign, and military patronage. Attempts had been made to divert the court by raising legal questions at various times even after the commencement of the trial. Navigating through the adverse environment, the judiciary also failed to perform its duties properly. On the other hand, there were complications with the judges of the case, which fueled the passage of time. Despite the court's extraordinary jurisprudential explanation of criminal conspiracy and mutiny, Mr. Justice Obaidul Hassan expressed his frustration at the acquittal of some accused persons who took the advantage of benefit of doubt. He then expressed his hopes that the government would soon form an independent commission to fully unravel the mystery of Bangabandhu's assassination.

THE EVENT WAS COVERED BY MD. IKRA, A GRADUATE STUDENT OF LAW AT BANGLADESH UNIVERSITY OF PROFESSIONALS AND VOLUNTEER TO THE LIBERATION WAR MUSEUM.