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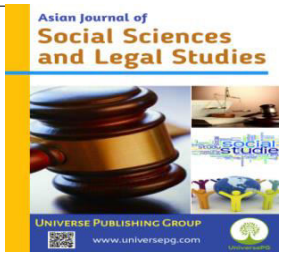

Stay of Proceedings in Favour of International Commercial Arbitration in Bangladesh: A Comparative Analysis between Arbitration Act 1940 and 2001

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ABSTRACT

This is a settled rule in international commercial arbitration where parties have agreed to resolve their dispute through arbitration, there is inevitably the right and expectation to have any reference to the court to have stayed in favour of arbitration. This rule, however, may not necessarily be the case in a jurisdiction that is less exposed to arbitration practice. Settling disputes through arbitration in Bangladesh is not a new method but this practice had been in place for many years and was previously governed by Arbitration Act of 1940. After 1971 the same Act continued to be the applicable law in Bangladesh till the Arbitration Act was enacted in 2001. When the Arbitration Act 2001 was enacted many expected a major change in the court's approach to dealing with a stay of proceedings in favour of Arbitration. Previously, upon the applicant fulfilling certain conditions, the court had the discretion whether to grant stay proceedings. However, under Arbitration Act 2001 granting the stay proceedings are now authorised upon the fulfillment of certain conditions. This paper will discuss the provisions under the Arbitration Act 1940 in relation to staying proceedings followed by examining the efficacy of stay proceeding in the Arbitration Act 2001.

Keywords: International commercial arbitration, Stay of proceedings, and Discretion of the court.

INTRODUCTION:

The Arbitration Act, 2001 is mostly based on United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Act came into force on the 10th Day of April, 2001[1] which replaced the Arbitration Act 1940. The Arbitration Act 2001 introduced new dimension in the arbitration practice and procedure in Bangladesh, strengthening the establishment of long demanding party autonomy and ensuring the removal of court interference in arbitration. The principle of party autonomy ensures that parties have absolute freedom to determine the conditions by which the arbitration agreement will be governed.[2] In the simplest of terms, the principle of party autonomy as a key characteristic of arbitration means that parties must have the substantial autonomy and control to decide how their arbitrations are to be conducted without interference of the court except for the purpose of supervision and enforcement of the arbitral award. It particularly allows parties to the arbitration to choose applicable laws to substance and procedure to conduct the arbitration process such as appointment of arbitrator, choosing seat of arbitration, language and flexible time frame based on mutual agreement between the parties.

The origin of international commercial arbitration can be found in the principle of 'party autonomy'. It is the parties' dispute; and the parties can settle their dispute at any time, in whatever manner and on whatever terms of their own choice.[3] This principle is the significant ground standard for arbitration laws across the jurisdictions. Many scholars address this

principle only in relation to the conduct of arbitration[4] highlighting Article 19 of the UNCITRAL Model Law which embodies the principle of 'party autonomy' by stipulating that parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[5] However, this should refer to the extent that the parties' choice to the forum shall be part of party autonomy as well as this choice should be maintained settling dispute through arbitration instead of going to the court. One such improvement is the provisions in the Arbitration Act 2001 governing the court's granting of a stay of the court proceedings in favour of arbitration.[6] This provision is one of the many mechanisms found in the Arbitration Act 2001 designated to facilitate arbitration proceedings by ensuring that if the parties agreed to settle their dispute through arbitration there should be no interference by the court.[7] In Arbitration Act 1940, upon the applicant fulfilling certain conditions, the court had the discretion to grant a stay of proceedings.[8] However, under the Arbitration Act 2001 the grant of such stay of proceedings is now mandated upon the fulfilment of such conditions unless one of the two prescribed exceptions is applicable.[9]

According to the Arbitration Act 2001, the granting of stay proceeding is no longer a discretion but mandated upon the fulfilment of such conditions unless one of the two prescribed exceptions is applicable.[10] This paper will first discuss stay of proceedings under the provisions of Arbitration Act 1940 in relation to the court interference in international commercial arbitration. Then it will continue examining the effects of the stay of proceedings under the provisions of Arbitration Act 2001. Finally, it will highlight the decisions of some recent case laws in relation to the stay proceedings under Arbitration Act 2001.

Stay of Proceedings under Arbitration Act 1940

As stated above granting of stay proceedings under the Arbitration Act 1940 was nonetheless at the discretion of the judges under section 34 of the Act which reads as follows:

> "Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of arbitration, such authority may make an order staying the proceedings." [11]

The above provision indicates that if there is an arbitration agreement between the parties, and one of the parties resorted to the court to settle any dispute or differences between them and the matter pending in the court is subject to the arbitration agreement, and the applicant has not taken any step in the proceedings before making a stay application, and was at the time the proceedings were commenced and still remains ready and willing to do all things necessary to facilitate the proper conduct of the arbitration, the Court has the discretion to grant a stay of proceedings in favour of arbitration.[12] There is no particular form for the application of stay of proceedings, however, there seems to be a general impression that a dispute cannot possibly be specified in the application because the defendant is debarred from filling a statement if he puts in an application for stay and a statement as to what is the dispute. It will amount to the filling of a written statement. This is a misapprehension when a person applies under section 34 of the Arbitration Act 1940, he has to satisfy the court firstly, that there is an agreement to refer and secondly, that the suit relates to any matter agreed to be referred, and that there is a dispute between the parties which is covered by the arbitration agreement unless it is shown that the suit cannot be stayed. If a suit is filed on the basis of an agreement which contains an arbitration clause, the mere fact that the defendant is not prepared for which he is liable under the agreement does not mean that there is a dispute between the parties.

It is not necessary to quote authorities to show that a dispute does not mean simply a refusal to pay money for which a person is liable. A dispute is constituted by a proposition of facts or law being alleged by one party and denied by the other. The defendant must sate, though not in detail the matter which the other

party alleges and which he denies or he alleges and the other party denies and the decision of which would affect the rights of the parties to the agreement. When the defendant thus, states the dispute, the court will determine whether it falls under the arbitration agreement or not. The party has to satisfy the court firstly, that there is an arbitration agreement to refer and secondly, that the suit relates to any matter agreed to be referred, that is, there is a dispute between the parties which is covered by the agreement. Unless that is shown that the suit cannot be stayed.[13]

Granting Stay is a Discretionary power of the Court

Section 34 of the Arbitration Act 1940 provides that the court or judicial authority has been given a discretion to make an order to staying a proceedings,[14] if the following conditions are satisfied: i. the proceedings in the court has been commenced, ii. The proceedings have been commenced by the parties to the agreement or person claiming under him against another party to the agreement or a person claiming under him, iii. The proceedings are in respect of a dispute so agreed to be referred; iv. Application to stay is made by a party to the proceedings; v. the application is made by that party before he has filed a written statement or taken any steps in the proceedings; vi. The party applying for stay was and is ready and willing to do all things necessary for the proper conduct of the arbitration. It is therefore, quite clear that the legal proceedings which are sought to be stayed must relate to a dispute which the parties have agreed to refer to arbitration.[15] In the case of Chiltagong Port Authority the court held that power of the court under section 34 of the Arbitration Act 1940 is a discretionary power and when the two courts below have concurrently exercised the discretion in a particular way, namely in refusing the stay of proceedings, this court will be slow to interfere the exercise of discretion, unless it comes to the conclusion that the discretion was exercised arbitrarily or capriciously.[16] When a substantial part of the claim is outside the reach of the arbitration clause, discretion lies in refusing to stay of proceedings. Therefore, it is discretion of the court as to whether the jurisdiction under section 34 of the Arbitration Act 1940 is to be exercised.[17] This matter to be taken into serious consideration that even though the granting of a stay of proceedings in favour of arbitration under section 34 of the Arbitration Act 1940 was discretionary in nature, the courts were generally more inclined to grant a stay of proceedings where the requirements of the section 34 were fulfilled on the principle that the parties should adhere to what they had bargained for. Jurisdiction of the court is not to be ousted in a situation where the plaintiff in a legal suit was a party to the arbitration agreement to refer the matter in a dispute to the arbitration. But when the parties have preferred a private tribunal for the decision of their dispute, the court should refer the parties to the tribunal which they have chosen unless there is a good reason for not doing so.[18] This stance was encapsulated by the Appellate Division of the Supreme Court of Bangladesh in the case of *Gov of Bangladesh vs Mashriqui Textiles*[19] where both the parties agreed in accordance with the arbitration clause that the secretary of the Ministry would nominate the arbitrators. If the court is satisfied that the arbitration agreement should be applied, then the court will refer the dispute to the arbitrator to be nominated by the secretary of the Ministry. The court held that the question of change of the arbitrators was not relevant when the parties agreed upon his appointment in the agreement. The court ruled that the Arbitration Act 1940 empowers the court to refer the dispute to the arbitrators appointed by the parties. However, if the parties are unable to agree upon the appointment of the arbitrators, the court should appoint the arbitrators.[20]

Discretion has to be Judicially Exercised

Discretion vested in the court under section 34 of the Arbitration Act 1940 has to be judicially exercised in due regard to the facts and circumstances of the case. One governing consideration is how best the interest of justice will be promoted in a case without denying either party of its legal rights. In a case where the subordinate court had given a finding that the defendants were at the commencement of the proceeding and are still ready and willing to do all things necessary to the proper conduct of the arbitration but there was no ground for the findings. The Court of Appeal was very reluctant to interfere unless it was convinced that there were adequate grounds for saying that this discretion had not been exercised judicially. The appeal was allowed because there was no good reason submitted to the court as to why the matter should not be referred to the arbitration according to the agreement between the parties.[21]

This trigger the question of convenience of the court whether to exercise the discretionary power of the court. The question of balance of convenience and inconvenience is one of the governing considerations in the exercise of discretion under section 34 of the Arbitration Act 1940. This was held in the case of *Abu Bakar Siddique v, MV Aghia Thalassini*[22] The question of fraud, collusion and conspiracy as alleged by Respondent No. 1 against the appellants can only be determined on taking evidence and not by arbitration. It is the discretion of the Court as to whether the jurisdiction under section 34 of the Arbitration Act is to be exercised. The learned Admiralty Judge decided in the negative as to exercise of discretion and the matter ends there. Stay proceeding on the basis of arbitration clause and the dispute involving the arbitration agreement is to be decided both by the court and the arbitrators. The ultimate decision depends on the court; therefore, if it is about the validity of the arbitration clause then the court has the final say. In such a situation the application for stay of proceedings shall be refused.[23] It is quite clear that the legal proceedings which are sought to be stayed must relate to a dispute which the parties have agreed to refer to arbitration. But in a suit where the claim falls outside the arbitration claim under the agreement, the court must not grant any stay and this principle is well settled.[24]

Refusal by the Court for Stay of Proceedings

Section 34 of the Arbitration Act 1940 nevertheless indicates that the court may refuse a stay of proceedings if sufficient reasons are produced before the court that there are strong reason for the party not to refer the matter in accordance with the arbitration agreement. The burden of proof lies on the plaintiff, and rightly so as it is the plaintiff who is attempting to renege on his promise to arbitrate any disputes which may arise between the parties. It is quite clear that the legal proceedings which are sought to be stayed must relate to a dispute which the parties have agreed to refer to arbitration. But in a suit where the claim falls outside the arbitration claim under the agreement, the court must not grant any stay and this principle is well settled.[25] This principle was also upheld in the case of *Seafarers Inc vs. Province of East Pakistan*[26]where the defendant companies sought stay of proceedings under section 34 of the Arbitration Act 1940 on the ground that the dispute is covered by an arbitration agreement between the parties. The court disallowed the prayer on the ground that the defendants' companies through their agent had earlier taken steps in the suits conferring thereby jurisdiction on the court for adjudication of the dispute. Application for stay may be refused if it is found that the parties' intention is not a *bonafide* intention. In a case where both the parties to the suit are resident of Karachi, however, the defendant applied to the court for stay of proceedings on the ground of a valid arbitration agreement in New York between the parties. In this case the parties failed to produce sufficient ground for settling the dispute by arbitration in New York. The court held that in such a matter it has to consider as to how the dispute between the parties can most readily be resolved. The court considered that the application was just a mere device to postpone the decision of the case, the appeal was dismissed.[27] What the court has to determine in proceedings of this nature is firstly, what is the dispute followed by whether the dispute is covered by the terms of the arbitration clause in the contract. It is true that each case has to be decided on the terms of the arbitration clause and there are cases where the terms of an arbitration clause are so very comprehensive that even frustration of a contract is covered by the arbitration clause. But in interpreting the terms of arbitration clause in a contract, the court has to put a reasonable consideration on the terms and it cannot be said that because the words 'in relation to' or 'in connection with' or 'arising out of' occur in it, therefore, each and every matter which is in any way connected with the contract should be taken as the subject matter of arbitration agreement.

The court shall consider the suit as it is pleaded and framed. If it comes to a conclusion that such a suit as pleaded is a suit on the contract or arising out of the contract then the suit should be stayed. However, if the suit as pleaded is independent of the contract then the court has no power to stay proceedings though it is satisfied that the suit has been so framed to serve as a means of avoiding the consequences of alleging the true nature of the claim.[28] The same principle which is applicable to a case under section 34 of the Arbitration Act 1940 in the exercise of discretion of the court, is applicable to a case of an application under section 5 of the Arbitration Act 1940 for withdrawal of the authority of the arbitrators. Further, it should be remembered that in granting leave under section 5 of the Arbitration Act 1940 the court exercises it discretion and it has been held in a series of cases that there are two limits

within which the discretion is to be exercised.[29] Firstly, the court should not flippantly release the parties from their bargain that follows from the sanctity the court attaches to contract. Secondly, the court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal to grant the leave,[30]

Application for Stay of Proceeding to be filed before Responding to the Court Proceeding

Defendant who wants to take advantage of an arbitration clause in the contract shall without any delay and before submitting to the jurisdiction of the court apply to the court in unequivocal terms that he is going to insist upon the implementation of the arbitration clause. Any step taken by him in the proceedings will disentitle him to the protection as contemplated by section 3 of the 1940 Arbitration Act.[31] 'Taking step in the proceedings' means something in the nature of an application to the court and not mere expression to the legal representatives' clerk, not the writing of letters, but the taking of some step, such as taking out of a summons or something of that kind, which is, in the technical sense, taking a step in the proceeding. In other words to constitute a step in the proceedings the act in question must be an application made to the court either on summons or something in the nature of an application to the court e.g. attending on summons for direction and such an act as would indicate that the party is acquiring the dispute decided by the court.[32] The primary duty of a court is to look into the facts of the case fairly and squirrely and then to decide whether the conduct of the applicant is such as would amount to a participation in the suit itself or an indication of consent in its proceedings. If so, an application under section 34 would be barred for the simple reason that a party is not allowed to ask for staying the proceedings where he has clearly and willingly participated in them in a manner which can be construed as acquiescence therein. If he intends to enforce an arbitration clause, he must do it at the earliest possible moment. If this conduct is such as would indicate that he has acquiesced in the suit, he is shut out from claiming the benefit of section 34 of the Arbitration Act 1940.[33] In the case of *Badsha Mia v Nurul Huq* the suit was for dissolution of a partnership and for accounts. On 10th April 1965 an application was made by the plaintiff for appointment of a receiver in respect of the assets of the firm. On that date the learned judge issued notice on the defendants to show because why the prayer of the plaintiff should not be allowed. On the 19th of April, 1965 defendants asked for time to show cause and the court fixed the 26th April 1965. Defendants of the said date, filed a petition for staying the proceedings before the court under the section 34 of the Arbitration Act 1940 and simultaneously with the said application filed an objection against the application for appointment for a receiver. The court held that it cannot be said that the opposite parties by merely taking time to file a written objection and by filling such objection, are deemed to have consented on the proceedings when at the earliest possible and practiceable moment, they have, with the aforesaid written objection filed a separate application for staying proceedings in the suit under section 34 of the Arbitration Act 1940.[34] The fact that they also field a written objection to the application for appointment of a receiver is not very material when they did ask for staying the proceedings at the earliest possible moment. They had to object to such appointment in order to take recourse to arbitration. The true test for determining whether an act is a step in the proceedings is not so much the question as to whether there has been an application in the suit although, the party has made a written objection in the proceedings. Of course, that would be satisfactory test in many cases but the test is whether the act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration.[35] An objection to the suit and the application for stay of proceedings should be made at earliest opportunity before filing written statement or taking any affirmative step in the proceedings.[36] However, there is no separate application needed for stay of proceedings, written application or statement to the court indicating the refusal to submit to the court's jurisdiction is sufficient to discharge the duty of making an application.[37] Respondent's plea in respect of misapprehension and coercion was not taken into consideration by the court of appeal in this regard for the delay in objection to the application.[38] However, in a circumstance which shows that the defendants did not take a step in the proceedings, even though he entered appearance. Legal proceedings can, therefore, be stayed at the defendants' instance under this section. On be-half of the plaintiff where there was a prayer for injunction and the defendant appeared but they did not know what was the suit is all about and it cannot be said

that they participated in the proceedings just because they appeared before the court and applied for time for filing written submission to the injunction; if they did not have a copy of the petition for injunction, nor the plaint. If the defendant never indicated that they wanted to defend the action, it cannot therefore, be held that the action taken by them would constitute a step in the proceeding.[39] It is only when a suit or a proceeding has been commenced against a party that he can make up his mind as to whether he would apply for stay or not. He is not bound to remind the other party who has commenced the proceeding, therefore, such commencement of his duty not to start the suit under the agreement between them a notice of suit imposes no obligation on the party served with notice to say that the dispute shall be decided by their own tribunal and not by the court of law. He can apply for stay of proceedings at any time before filling a written statement or taking any other step in the proceedings, but not there-after.[40] If there is a submission for reference to arbitration, and a party chooses to bring a suit, the other party can then decide whether or not he will remain before the court, which he indicates by taking some step in the action, or whether he will avail himself of the contractual rights to have the dispute referred to arbitration. If he had mislead the plaintiff in some way into bringing the suit, it might be a good ground for punishing him in costs and if the misleading had been definite enough to amount to a particular statement that he would not apply to have the matter referred to arbitration and would submit to the jurisdiction of the court, it might be a good ground for punishing him with costs and it might even amount to an estoppel, so as to prevent him from making an application thereafter.[41] It is now well settled that in spite of having an arbitration clause in the contract made between the parties, a party may file a suit against the other party and in that case section 34 of the Arbitration Act 1940 provided that the other party may apply to the court to stay further proceedings of the suit, but the defendant who wanted to take advantage of the arbitration clause must file such an application before submitting to the jurisdiction of the court by filling his written statement.[42]

Stay in relation to the Challenging Arbitration Agreement

Person who want to attack the existence or validity of the main contract which contains the arbitration clause are deprived of an alternative defence that even if there is an agreement the suit should be stayed for reference to the arbitration. The reason for this result is that the question as to whether an agreement had first to be decided by the court and once the court begins the proceedings section 34 of the Arbitration Act 1940 does not apply.[43] On 9th Apri11954, Khwaja Muhammed Yusaf on the basis of the above agreement instituted a suit in the Court of the Senior Sub-Judge Peshawar, who transferred it to Sub-Judge 1st Class, Peshawar, against the Government North-West Frontier Province, for the recovery of Rs. 26,513/3/6. On 5th May, 1954, the Government North-West Frontier Province made an application under section 34 of the Arbitration Act 1940, for the stay of these proceedings, on the ground that in the agreement entered into between the parties; there was a submission clause, by which all questions whatsoever, touching the agreement or the subject-matter thereof or arising out of it, were to be referred to the arbitration of the Director of Civil Supplies, whose decision was to be final. The learned Sub-Judge by his order dated 4th October 1954, assented to Government's request and stayed the proceedings. A contract appointing an arbitrator is a contract *uberrima fides* and it is the most fundamental principle of justice that if the tribunal appointed by the parties has lost confidence of anyone of these parties, or it has acted in a manner which creates a strong suspicion that substantial miscarriage of justice might result, if the dispute is referred to such tribunal, then it would be absolutely wrong to bind a party to its contract and compel it to get the decision from a biased arbitration tribunal. Sheikh Abdul Hamid Khan on account of his own conduct has made himself incapable of acting as an arbitrator in the case; in this case it will be a complete denial of justice to Khwaja Muhammad Yusaf if he is compelled to have the dispute decided by him. Under section 34 of the Arbitration Act, the proceedings can only be stopped if the Court is satisfied (1) that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and (2) that the applicant was at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. So far as no. (1) is concerned, as has already been discussed the matter cannot be referred to the arbitration of the Director of Civil Supplies in accordance

with the arbitration agreement. As regards no. (2), it is conceded by the learned counsel, appearing for the Government, that on 5th October, 1953, i.e., about six months prior to the institution of the suit the Advocate of Khwaja Muhammad Yusaf had served a notice on the Government to appoint an independent arbitrator or arbitrators with the concurrence of his client for the decision of his client's claim within fifteen days of the receipt of that notice. The Government did not take any notice of this communication, and this makes it perfectly clear that the Government was not ready and willing to do all things necessary to the proper conduct of the arbitration. The two sole ingredients entitling the Court to stay the civil proceedings were, thus, lacking in this case, and the Court consequently had no jurisdiction to act in the matter, thus refused the application for stay. [44]

Stay of Legal Proceedings Pending Arbitration

Where a contract contains an arbitration clause, a suit is liable to be stayed under section 34 of the Arbitration Act 1940. However, if the suit as indicated is a suit independent of the contract, the court has no power to stay the proceedings.[45] In determining whether a suit should be stayed under section 34 of the Arbitration Act 1940 the court has to determine what the dispute is and whether the dispute is covered by the term of the arbitration clause in the contract.[46] The domestic Courts retain the jurisdiction to decide the disputes between the parties at any stage and parties are free to file a suit for damages or interim measure what so ever against the each other. The parties are also free to ask for a stay of the suit, pending arbitration, and it is for the domestic court having regard to all circumstances, to arrive at a conclusion whether sufficient reasons are made out by the applicant for refusing to grant a stay.[47] The High Court Division has discussed a number of cases on stay of suit under section 34 of the Arbitration Act, 1940 and we need not dwell further on that, the issue in this appeal not being whether or not to grant an order of stay.[48] In view of the above, decisions of the then Pakistan Supreme Court and our Appellate Division as well as the Supreme Court of India in the *A.B.C Laminart case*[49], it can be said that when the parties to an agreement agree to resolve their disputes through arbitration and they agree that such arbitration will be conducted in accordance with the law of a foreign country, thereby, excluding the jurisdiction of the Courts in Bangladesh in favour of the jurisdiction of the Courts in that foreign country, such parties should not be allowed to take recourse to litigations in Bangladesh in respect of the subject matter of such arbitration agreement. It can result in conflicting decisions between arbitration tribunal in a foreign country and a Court in Bangladesh.

Stay of Proceedings under Arbitration Act 2001

The obvious contrast between the old regime and the Arbitration Act 2001 in relation to the stay of proceedings is that the Arbitration Act 2001 has taken away the discretion of the courts to decide whether the matter should be resolved in the court or to be referred to arbitration in accordance with the arbitration agreement by making the granting of a stay of proceedings mandatory in nature. This in fact reinforces the already established judicial inclination towards granting stay under the Arbitration Act 1940. The rules regarding the stay of proceedings contained in section 7 of the Arbitration Act 2001 which reads as follows:

"Jurisdiction of Court in respect of matters covered by arbitration agreement: Notwithstanding anything contained in any other law for the time being in force, where any of the parties to the arbitration agreement files a legal proceedings in a Court against the other party, no judicial authority shall hear any legal proceedings except in so far as provided by this Act."[50] This section is a *pari materia* of Article 8 of the UNCITRAL Model Law which is mandatory in nature. But with the additional ground to refuse a stay if 'there is in fact no dispute between the parties with regards to the matters to be referred'. This additional ground however is identical to the provision which can be found in the Item 8(1) of the First Schedule of the New Zealand Arbitration Act 1996. Section 7 of the Arbitration Act 2001 deals with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. This principle is in line with the principle of New York Convention[51] which obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make no later than when submitting his first statement on the substance of the dispute. This provision, by its nature, binds merely the domestic courts not to

interfere arbitration and to give universal recognition and effect to commercial arbitration agreements. The ultimate outcome of the Section 7 of the Arbitration Act 2001 is that if there is an arbitration agreement between the parties, and the matter pending in the court is the subject of the said arbitration agreement, and the applicant has not taken any step in the proceeding before making a stay application, it is mandatory for the court to grant a stay of proceedings in favour of arbitration unless any of the two rather narrow exceptions pursuant to section 7 of the Arbitration Act 2001 applies.

Inherent Power of the Court

As regard to the stay of proceedings that can be invoked in a Civil Court in respect of the subject matter of arbitration agreement in exercise of inherent power under the Code of Civil Procedure,[52] when there is specific provision under Section 10 of the Arbitration Act 2001 for staying such proceedings and the application of such provisions has been excluded by Section 3, inherent power of the Court under Section 151 should not be exercised as because such exercise will render the provision under Section 3 of the Arbitration Act 2001 redundant.[53] Now the question is, in the absence of such provision to stay proceedings under Section 10 of the Arbitration Act 2001, whether the Court may excise its inherent power to stay such proceedings? Section 151 of the Code of Civil Procedure provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Therefore, it is apparent from this provision that this provision is not affected by any other provisions of the Code and that any other provision of the Code shall not be deemed to limit or affect the inherent power of the Court when the occasion arises to pass such necessary order for the ends of justice or to prevent the abuse of the process of the Court. In such a situation whether the court should have stayed the proceedings pending before it in exercise of such inherent power of the Court for sending the matter in dispute to resolve through arbitration? It may be noted that when the British Airways case[54] was decided, there was similar provision like Section 10 of the present Act in the Arbitration Act 1940.[55] However, there was no such provision like Section 3 of the present Act thereby limiting the applicability of the provisions in respect of arbitration where the seat of such arbitration is in a foreign country. In view of the above,[56] we are of the view that when the parties to a contract agree to resolve their disputes through arbitration and they agree that such arbitration will be conducted in accordance with the law of a foreign country, thereby, excluding the jurisdiction of the Courts in Bangladesh in favour of the jurisdiction of the Courts in that foreign country, such parties should not be allowed to take recourse to litigations in Bangladesh in respect of the subject matter of such arbitration agreement. Not only that such practice is against the terms agreed by them, such practice might also result in conflicting decisions between arbitration tribunal in a foreign country and a Court in Bangladesh. The Arbitration Act 2001 has been enacted by the Parliament in order for facilitating resolution of disputes through arbitration thereby avoiding the protracted civil litigations. Therefore, when one of such parties files a suit in Bangladesh Court raising disputes regarding matters covered by the said arbitration agreement, the Courts in Bangladesh should stay such proceedings thereby enabling the parties to resolve their disputes through arbitration in a foreign country as per their agreement. In such a case, if the Court is prevented from staying such proceedings because of non-applicability of Section 10 in view of the provisions under Section 3 of the said Act, the Court should exercise its inherent power as possessed by it in view of the provisions under Section 151 of the Code to secure ends of justice and to prevent the abuse of the process of the Court in order to avoid potential conflicting decisions between the arbitral tribunal in a foreign country and the Court in Bangladesh. Therefore, neither Section 3 nor Section 10 of the Arbitration Act should be deemed to limit or otherwise affect such inherent power of the Court to pass such orders staying such proceedings before it.

Power to compel arbitration

When a party to the arbitration agreement behave in breach of contract, an arbitral tribunal has no jurisdiction to compel to the arbitration.[57] In such a situation the arbitral tribunal has to depend on the domestic courts to enforce the arbitration agreement.[58] Besides, The New York Convention 1958 requires all signatory States to the Convention to recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences.[59] This means that where court proceedings have been commenced in breach of arbitration

agreement then the domestic court will be required to stay proceedings in favour of arbitration if so requested.[60] However, if the court proceedings have been commenced in another jurisdiction in breach of an arbitration agreement, the courts at the seat of arbitration may enforce the arbitration agreement if requested to do so.[61] There are two sets of contrary decisions given by different benches of the Bangladesh Supreme Court on the said point of law.[62] However, the court should give little concern about the factors that could ordinarily influence the court when considering the question of *forum Convenience* where arbitration agreement is concerned.[63] The implication of section 7 of the Arbitration Act 2001 is that if there is an arbitration agreement between the parties, and the matter pending in the domestic court in Bangladesh is the subject matter of the said arbitration agreement, and the applicant has not taken any step in the proceeding before making a stay application, it is mandatory for the court to grant a stay of proceedings in favour of arbitration unless anything falls under section 7A of the Arbitration Act 2001. Pursuant to the provision under section 7 the general discretion vested in the court to stay proceedings is no longer available. Instead the requirement to stay proceeding is now mandatory, on an application by any party to the arbitration agreement before taking any steps in the court proceedings.

However, the court may proceed if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed or there is in fact no legal dispute between the parties with regard to the matters to be referred.[64] Precedent shows that High court Division of the Supreme Court of Bangladesh dismissed the appeal for stay proceedings in favour of arbitration where there was no written agreement has been found for arbitration proceedings between the parties.[65] The High Court Division of the Supreme Court of Bangladesh decided that the decision of District Judge was just and fair in dismissing the application under section 12 of the Arbitration Act 2001for the appointment of arbitrator where there was no valid arbitration agreement between the parties.[66] In *Accom Travels and Tours Limited Vs. Oman Air S.A.O.C and others* Before filing the written statement, Oman Air (defendant Nos. 1 and 2), on 26.11.2015, filed an application under Section 10 read with Sections 7 and 9 of the Arbitration Act 2001 read with Section 151 of the Code of Civil Procedure seeking stay of the proceedings of the said suit on the ground that the agreements mentioned in the plaint had arbitration clause for resolving disputes between the parties. Thereupon, the Court below, after hearing the parties, allowed the said application in a modified form in that it dismissed the entire suit on the ground that the suit was not maintainable.[67] Being aggrieved by such dismissal of the suit followed by a decree, the plaintiff preferred this appeal and submitted that the provisions under Section 3 (1) and (2) of the Arbitration Act 2001, the provisions of the said Act, except the provisions for recognition and implementation of the awards as provided by Sections 45, 46 and 47 of the said Act, are not applicable in a proceeding initiated in any court in respect of the subject matter of an arbitration agreement where the seat of arbitration is in a foreign country. Accordingly, the provisions under Section 10, seeking stay of the proceedings, and Section 7, questioning jurisdiction of the Court, cannot be invoked. Thus, the Court below has committed gross illegality in rejecting the plaint entirely holding that the same was not maintainable. In support of these submissions, he has referred two different decisions of this Court where the court has compelled the parties to arbitration.[68] In the course of hearing, the said division bench found two sets of contrary decisions given by different benches of this Court on the said point of law. Accordingly, the said division bench, without expressing any view of its own, referred the matter to the Chief Justice of Bangladesh for constitution of a larger bench. Thereupon, the Chief Justice has sent this matter to this bench of the High Court Division which ultimately held that, further proceedings of the said suit are hereby stayed, in exercise of the inherent power of the Court under Section 151 of the Code of Civil Procedure, till resolution of the dispute between the parties through arbitration in Oman as agreed by them.

Applicable Law

According to the provisions under Section 3 (1) and (2) of the Arbitration Act 2001, except the provisions for recognition and enforcement of the awards as provided by Sections 45, 46 and 47 of the said Act, are not applicable in a proceeding initiated in any Court in respect of the subject matter of an arbitration agreement where the seat of arbitration is in a foreign country. Accordingly, seeking stay of the proceedings under Section 10 and questioning jurisdiction of the Court under Section 7 cannot be

invoked. Therefore, if there is any arbitration agreement between the parties for settling a dispute outside Bangladesh, domestic courts has to decide that Arbitration Act 2001shall not applies.[69] However, that does not mean that the court will hear the dispute relating to the same subject-matter for which parties agreed for arbitration irrespective of the seat of arbitration is in Bangladesh or in the foreign countries.[70] The *HRC Shipping Ltd.* case[71] arose out a dispute in relation to the shipment of goods from Bangladesh to Sri Lanka under a charter agreement. Under the contract HRC shipped 53 containers which was dropped into the sea because of the negligence of the crew and partly by tsunami. HRC instituted a legal suit in Bangladeshi court. On the other hand, the defendant commenced arbitration proceeding in London because there was an arbitration agreement in the contract. Defendant also applied for stay of proceeding under section 10 of the Arbitration Act 2001. Claimant resorted to section 3(1) of the Arbitration Act 2001which states that this Act would apply where the seat of arbitration is in Bangladesh. The defendant argued that the Act does not exclusively states that it would not apply where the place of arbitration is not in Bangladesh or it would 'only' apply where the place of arbitration is Bangladesh. Arbitration Act 2001 carries the spirit of UNCITRAL Model Law which was adopted to harmonise and support international commercial arbitration worlds wide. High Court decided based on the spirit of the UNCITRAL Model Law and allowed the Stay of proceeding in favour of arbitration instituted outside Bangladesh. However, the courts has decided otherwise in the case of *STX Corporation Ltd case* and *Egyptian Fertilizer* in the same issues where the seat of arbitration was outside Bangladesh which is discussed in the following part of this article.

Seat of Arbitration is outside Bangladesh

As mentioned in the above that the Arbitration Act 2001 is based on UNCITRAL Model Law which defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States".[72] Differences between domestic arbitration and international arbitration mostly depends on the above principle according to the Model Law. Besides, an arbitration to be considered international if the seat of arbitration is in the foreign country, place of the performance of the contract is in the different States, or subject-matter of the dispute is in the foreign country or parties expressly agreed that the subject-matter of the dispute are in different countries. According to the Section 3 of the Arbitration Act 2001, one may call the territorial scope of application which states this Act shall apply where the place of arbitration is in Bangladesh. Article 1(2) of the UNCITRAL Model Law provides the provision of this Act would only apply in a State, which adopted this law, if the place of arbitration is in the territory of this State.[73] However, the Model Law included an important exception[74] which deals with the recognition and enforcement of arbitration agreement including interim measures together with recognition and enforcement of foreign arbitral award irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined. In the case of *STX Corporation Ltd.*[75] Meghna Group of Industries Limited, a company incorporated in Bangladesh had a supply contract with a foreign company STX Corporation which contained an arbitration clause. The arbitration clause provided that any dispute in relation to the above contract will be settled through arbitration in Singapore. STX Corporation initiated an arbitration in Singapore to settle a dispute regarding supply contract between the parties. STX Corporation also applied for an interim measure in the High Court Division of Bangladesh under section 7A of the Arbitration Act 2001 to restrain the respondents from removing or selling off the assets from the jurisdiction.[76] High Court Division of the Supreme Court of Bangladesh has made the decision in this case against the spirit of the Arbitration Act 2001. The prime issue before the bench was whether interim measure and remedies are available in the case where the seat of arbitration is outside Bangladesh under section 3 of the Arbitration Act 2001. The High Court applied literal approach of the section 3 and held that this Act only applies where the seat of arbitration is in Bangladesh. The High Court was of the opinion that the intention of the legislature was to limit the jurisdiction to the territory of Bangladesh referring to the section 2(c) (k) and section 3 of the Arbitration Act 2001 except that there is a scope to enforce an award passed in a foreign arbitration, pursuant to Section 3(2) read with Sections 45, 46 and 47 of the said Act of 2001.[77] The reason behind the application of this principle in relation to the

interpretation of statutes, the High Court held that the literal construction of a statute is the golden rule of construction and that when words in a statute are clear and unambiguous, they should be construed according to their plain meaning, as it most clearly reflects the intention of the legislature. The High Court further stated that, while interim measures for foreign arbitration were provided for in other jurisdictions, until and unless the Parliament enacts such a provision explicitly in a statute, such measures cannot be granted in Bangladesh.

Respondent produced and cited persuasive authorities before the High Court and the court held that the legal principles under section 3(1) (4) of the Arbitration Act 2001 is limited in application as to the arbitration being held in Bangladesh and that the High Court could not refer the parties to arbitration under section 10 of Arbitration Act 2001, as the proceedings were being conducted outside Bangladesh. However, this ruling goes against the spirit of the Arbitration Act 2001 and the UNCITRAL Model Law. The Act was enacted following the spirit of the Model Law to promote international commercial arbitration which was disregarded by the High Court Division in this case. The High Court followed the precedent established by the Appellate Division of the Supreme Court of Bangladesh in this issue and held that there was no further scope for this Court to depart from their findings in light of the rule of binding precedent provided in Article 111 of the Constitution of the People's Republic of Bangladesh.[78] However, the High Court considered the case of *HRC* and the case of *Bhatia* to indicate the due deference to the decisions of the Appellate Division. This literal approach of construction of the scope of Arbitration Act 2001 has been adopted in several cases succeeding the *STX* case which could be a cause for serious concern among the relevant authority to arbitration in Bangladesh. In the case of *Egyptian Fertilizer* there was a dispute between the parties regarding a sale and purchase agreement which contained an arbitration clause. Egyptian Fertilizer Trading Ltd. Was incorporated in the United Arab Emirates, the applicant in this case, on 10th September 2009 entered into a Sale & purchase agreement with East West Property Ltd., incurporated in Bangladesh for sale of 35000 tonnes of granular urea. The dispute arose regarding the delay of payment by East West Properties. The arbitration clause concludes that in the event of any dispute parties will refer it to the ICC arbitration in London. On 5th January 2010 the applicant initiated arbitration proceedings before ICC which was communicated to the respondent. The East West properties launched a court proceeding against the applicant in the District Court of Bangladesh praying for the contract to be declared void and an injunction against the Egyptian Fertilizer from pursuing any legal proceedings against the Respondent. This injunction was granted by the district court on 28 January 2010 and Egyptian Fertilizer's application for the suit to be stayed in favour of arbitration was rejected on 1 June 2010. Egyptian Fertilizer appealed to the High Court Division of the Supreme Court of Bangladesh against the decision of the District court on the basis of section 7 and 10 of the Arbitration Act 2001. They argued that restrictive interpretation of the provision of Arbitration Act 2001 wold be against the spirit of international commercial arbitration and also will infringe the treaty obligation under New York Convention and UNCITRAL Model Law.[79] Egyptian Fertilizer further argued that the District Court did not have jurisdiction over the dispute since the contract contained an arbitration clause to the ICC jurisdiction which was an infringement to the arbitration agreement in the contract. Thus, Egyptian Fertilizer submitted that an injunction be passed on East West from pursuing the suit until the completion of the arbitration proceedings and a final award is made.[80] On the other hand, the East West Properties submitted before the High Court Division that it did not have jurisdiction to hear the submission of the Egyptian Fertilizer in relation to the proceedings under the District Court. They submitted that if a court does not have jurisdiction over a matter, it should not go into the merits of the said matter.[81] East West argued that an application under section 7A of the Arbitration Act 2001 was not applicable as the place of arbitration was outside Bangladesh. East West submitted that Arbitration Act 2001 can only be applied in the case of recognition and enforcement of foreign arbitral awards according to section 45, 46 and 47 of the said Act. East West also submitted to the High Court Division of the Supreme Court of Bangladesh that an award was delivered by the ICC on 30 June 2012, pursuant to which Egyptian Fertilizer had filed a money decree execution case for the recovery of the value of the fertiliser and sought to attach East West's property to secure the same.[82] East West

noted that Egyptian Fertilizer had failed to notify the High Court of these developments. They contended that the application could no longer be maintained as its core purpose of restraining domestic litigation in favour of arbitration had evaporated.[83] After completion of the submission made by both parties the High Court rejected the application made by Egyptian Fertilizer on the basis that it was not justifiable in this case for the following three reasons:

Firstly, it held that while exercising its special statutory jurisdiction under section 7A of the Arbitration Act 2001, the High Court did not act as a court of appeal or revision against any order passed by a court or judicial authority in any suit[84] and in such capacity it did not have constitutional jurisdiction over the lower court. The High Court averred that the proper course of action in such circumstances would have been to file a revisional application before a superior court against the order or orders of the district court under the Code of Civil Procedure 1908.[85] The court added that a host of recent arbitration applications (AAs) had been rejected on the same grounds.[86]

Secondly, the court held that pursuant to a literal interpretation of section 3(1) of the Arbitration Act 2001, applications for interim relief from the High Court under sections 7, 7A and 10 of Arbitration Act 2001 were not applicable for arbitration proceedings seated outside Bangladesh. The court interpreted the scope of the Act to extend 'only'[87] to arbitrations seated in Bangladesh. While sections 45 to 47 of the Arbitration Act 2001 were specifically made applicable under section 3(2), all other sections of the Arbitration Act 2001 were omitted.[88]

Thirdly, the High Court was of the view that following the pronouncement of the arbitration award by the ICC, the substance of the application had fallen away. There was no longer any need for an injunction and further prolongation of the matter was an abuse of process of the High Court.[89]

In *Canda Shipping Case*[90], a single bench of the High Court Division, exercising Admiralty Jurisdiction, held following the submissions of the learned Advocates of both sides by referring to Section 3(1) and (2) it appears that the Act applies to arbitration where the place of arbitration is in Bangladesh and not in a foreign country. Sections 45, 46 and 47 are made exceptions to section 3. So, in the court's view, section 10 of this Act is not applicable and the application to stay the proceeding before this court should not be entertained considering the facts that it involves arbitration proceeding in a foreign country and not in Bangladesh and the application is not concerning an arbitration award but concerning an arbitration proceeding.

Current practices

Section 3 is the basis for the 'scope' of Arbitration under of the Arbitration Act, 2001. According to sub-section (1) of Section 3, the provisions of the Arbitration Act shall apply where the place of arbitration is in Bangladesh. Sub-section (2), however, provides that notwithstanding anything contained in sub-section (1), the provisions under Section 45, 46 and 47 relating to the recognition and implementation of foreign arbitral award will also be applicable when the place of arbitration is outside Bangladesh. Section 7 of the said Act imposes a prohibition on the judicial authority in Bangladesh from hearing any legal proceedings except in so far as provided by the said Act when one of the parties to the arbitration initiates any legal proceedings before such judicial authority, and this provision has been given overriding effect over any other law for the time being in force by way of a non-obstante clause therein. Section 7A, as incorporated subsequently by amendment in 2004, has conferred power on the judicial authority concerned to take interim measures for protection of the subject-matter of arbitration,[91] notwithstanding anything contained in Section 7, and such ad-interim measures can be taken by such judicial authorities, on an application of a party to the arbitration agreement, during continuation of such arbitration proceedings or before or until enforcement of arbitral award under Sections 44 or 45 of the said Act. Besides, Section 10 of the said Act provides that the Courts concerned in Bangladesh shall refer the matter covered by arbitration agreement to ar bitration and stay proceedings pending before it, on an application filed by any of the parties before filing written statement. Examination of Sections 7 and 7A has become relevant because one of the single benches of the High Court Division in the *Southern Solar Case*[92] has expressed the view that by incorporation of the said provision under Section 7A in 2004, the limited nature of applicability of the provisions of the Arbitration Act has been removed and that the Legislature has changed the jurisdictional footing of the Courts. As stated above, Section 3 of the said Act has provided

the scope or applicability of the provisions of the said Act. In specifying the said scope or applicability, sub-section (1) of Section 3 provides that where the place or Seat of any Arbitration is in Bangladesh, the provisions of the said Act shall apply in respect of such arbitration. Sub-section (2), however, provides that notwithstanding anything contained in sub-section (1), the provisions under Sections 45, 46 and 47 of the said Act shall also be applicable to the arbitration if the place or seat of such arbitration is outside Bangladesh. Decision of the High Court Division in the case of Southern Solar case is a fundamental enclosure to the support of international commercial arbitration in Bangladesh. In the case of Frigo Mekanik Insaat Tesisat Ve Taahut Sanayi Ve Ticarest A.S.,[93] the High Court Division upheld the applicability of Section 7A of the Arbitration Act 2001where the seat of arbitration was not in Bangladesh. It is admirable to note that the High Court Division in the Southern Solar case has gone ahead to give a liberal interpretation to the provisions of the Arbitration Act in order to aid the arbitration process. This is definitely a way forward message to the arbitration community which is seen as a timely attempt at stretching the provisions of the Arbitration Act to the point of giving effect to its actual spirit envisaged at the time of its inception. It may be noted at this juncture that although the legislatures in Bangladesh have enacted their respective arbitration law following the guidelines given in the aforesaid UNCITRAL Model Law, they have not followed the same in totality. Such deviation by our legislature will be apparent if we compare this provision under Section 3 with the corresponding provision of the UNCITRAL Model Law, namely Article 1 thereof. Sub-article (2) of Article-1 of UNCITRAL Model law is worded in the following terms: "(2) The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State".[94]

It appears from the above quoted provision of the UNCITRAL Model Law that the said Model Law has specifically excluded the application of Article 8, similar to our Section 10, Article 9, similar to our Section 7A, Article 35, similar to our Section 45 and Article 36, similar to our Section 46 where the seat of arbitration is in the State concerned. Additionally, the word "only" has been used therein thereby providing the scope of applicability of the provisions of the said Model Law, except Articles 8, 9, 35 and 36, 'only' if the place of arbitration is in the territory of the State concerned. However, our Legislature has framed the said provision specifying the scope, namely Section 3, in a different way. Not only that the word 'only' has been omitted, our Legislature has also refrained from specifically excluding the application of the provisions under Sections 10, 7A, 45 and 46 when the seat of such arbitration is in Bangladesh.

However, our legislature has, under sub-section (1) of Section 3, made a legislative declaration to the effect that the provisions of the said Act shall be applicable when the place of arbitration is in Bangladesh. Again, according to sub-section (2) of Section 3, notwithstanding anything contained in sub-section (1), the provisions under Sections 45, 46 and 47 will be applicable even when the place of arbitration is in a foreign country. Therefore, it appears that although the word 'only' has not been used by our legislature in sub-section (1) and that the applicability of the provisions under Sections 10, 7A, 45 and 46 have not been clearly excluded like the UNCITRAL Model Law where the place of arbitration is in Bangladesh, it has, by sub-section (2), categorically stated that the provisions under Sections 45, 46 and 47, namely the provisions relating to the recognition and enforcement of foreign arbitral award, will be applicable in respect of such arbitration where the seat of arbitration is in a foreign country. Therefore, by joint reading of these two provisions under sub-sections (1) and (2) of Section 3, it is clear that although the word 'only' has not been used by our Legislature, the impact of the said word is very much apparent when we see that our Legislature, by sub-section (2), has declared only three Sections, namely Sections 45, 46 and 47, which are applicable when the seat of arbitration is in a foreign country.

Now, let us examine the provisions under Sections 7 and 7A of the said Act, in particular to examine what change, if any, has been brought-about by Section 7A to the scope of applicability of the provisions of the Arbitration Act 2001. It appears from the provisions under Section 7 that by this provision the Legislature has determined the jurisdiction of the Court in respect of the matters covered by the arbitration agreement. Section 7 provides that notwithstanding anything contained in any other laws for the time being in force, if a party to an arbitration agree-

ment initiates a legal proceeding in a Court in respect of matters covered by such arbitration agreement, the Court shall not have jurisdiction to hear any such proceeding which has not been initiated in accordance with the provisions of the Arbitration Act 2001. Therefore, it appears that by this provision the Legislature has only allowed the proceedings in a Court, by a party to an arbitration agreement, in respect of matters covered by arbitration which have been initiated in accordance with the provisions of the said Act and that the Court will not have jurisdiction to hear any proceedings in respect of such matters which have not been initiated or continued in accordance with such provisions of the said Act. Be that as it may, it appears from the examination of the above two provisions under Sections 7 and 7A of our Arbitration Act that while Section 7 has ousted the jurisdiction of the Court in hearing any proceedings relating to the matters covered by the arbitration agreement if such proceedings are not in accordance with the provisions of the Arbitration Act 2001, Section 7A provides that notwithstanding anything contained in Section 7 as regards ouster of such jurisdiction of the Court, the Court shall have jurisdiction to take ad-interim measures in respect of matters covered by arbitration agreement, on the application of any of the parties to such agreement, at different stages, namely during continuation of the arbitration proceedings or before or until enforcement of the award under Sections 44 or 45 of the said Act.

Therefore, Section 7A appears to be an exception to Section 7 of the said Act in that while Section 7 ousts the jurisdiction of the Court to hear a proceeding in respect of the matters covered by the arbitration agreement if such proceeding is not in accordance with the provisions of the said Act, Section 7A provides an exception as regards interim measures in order for preservation of the subject-matter of arbitration, and the Court is empowered under this provision to pass ad-interim orders in order for such preservation during continuation of the arbitration proceedings, before such proceeding or until enforcement of the award under Sections 44 and 45. Following rulings of the courts are provided to support the above discussions in this paper. In *Unicol Bangladesh Case*[95], the Appellate Division, made an order against a judgment of a division bench of the High Court Division, exercising civil miscellaneous appellate jurisdiction.[96] Although, the case itself was originated from the provisions of the previous law, namely Arbitration Act, 1940 (now repealed), the Appellate Division, while discussing various submissions of the learned advocates of the parties, made the following observation: "... since we have already mentioned that the law as in sections 3(1) and 3(4) of the Act barring the Court from granting an order of injunction is limited in application as to the arbitration being held in Bangladesh, but not as to matter restraining a particular party from proceeding with arbitration in foreign country in respect of a contract signed in Bangladesh". By referring to the decision of a Division bench in the above referred Uzbekistan Airways case[97], he submits that a division bench of the High Court Division has categorically held therein that the provisions under Section 10 of the said Act are not applicable in view of the provisions under Section 3(2) of the said Act, and that the said decision of the said division bench has been approved by the Appellate Division in Civil Petition for Leave to Appeal No. 112 of 2005. Therefore, he submitted that the issue had already been settled by this Court up to the Appellate Division and as such the Court below had committed gross illegality in entertaining the said application filed by the defendant-respondent and thereby rejecting the entire plaint on the ground of maintainability.

In the case of *Silkways Cargo Serviecs Limited* [98] parties had a dispute regarding a contract for sale of air tickets where Malaysian airlines refused to renew the agreement with the *Silkways Cargo Serviecs Limited.* In the contract there was an arbitration agreement between the parties under which International Air Transport Association (IATA) was selected as the forum for arbitration. Petitioner initiated an arbitration proceeding against the respondent in the IATA and instant arbitration applications under Section 7A of the Arbitration Act 2001, seeking interim orders for staying the Notices of Expiry and for renewal of the agreements until the settlement of disputes through arbitration.

Petitioners brought this matter to the High Court Division of the Bangladesh Supreme Court for interim measure for the enforce-ment of the arbitration agreement and the court ruled upon hearing the submissions that the operation of the termination notice to be stayed and directed the Respondent to renew the Agreements till conclusion of the Arbitration proceedings.

The High Court held that it has jurisdiction to make an order for interim measure to preserve the subject matter of the dispute until the arbitral tribunal has yet to be formulated. However, regarding the scope of section 7A of the Act, the cfourt held that once the seat of arbitration is determined and the Arbitral Tribunal is *in seisin* of the matter, any interim order passed prior to that point will be void and of no effect. The reason for that being once the Tribunal is formed it will be empowered to give interim reliefs. Hence the Court modified the earlier order of stay and declared that the order of stay shall continue until and up to the first sitting of the Arbitral Tribunal. Recently, High Court Division of Bangladesh Supreme Court has decided in the case of *Accom Travels and Tours Limited*[99] that application to be stayed on the ground that the parties had arbitration agreement irrespective of the seat of arbitration is domestic or foreign. Before filing of the written statement, Oman Air filed an application under Section 10 read with Sections 7 and 9 of the Arbitration Act, 2001 read with Section 151 of the Code of Civil Procedure[100] seeking stay of the proceedings on the ground that there was an arbitration agreement between the parties. The Court below allowed the application for stay[101] which was upheld by a larger bench of the High Court Division and ordered further proceedings of the said suit are hereby stayed, in exercise of the inherent power of the Court under Section 151 of the Code of Civil Procedure, till resolution of the dispute between the parties through arbitration in Oman as agreed by them.

CONCLUSION:

Stay of proceeding in favour of arbitration under the Arbitration Act 1940 was a discretionary power of the court upon fulfilling certain conditions. Under the Arbitration Act 1940 where one of the parties submitted to the court to settle their dispute disregarding their arbitration agreement and the applicant applied to the court for stay of proceeding instead of taking any step in the proceedings before making a stay application, and was at the time the proceedings were commenced and still remains ready and willing to do all things necessary to facilitate the proper conduct of the arbitration, the Court had the discretion to grant a stay of proceedings in favour of arbitration. The above was overruled by the legislature under Arbitration Act 2001 granting the stay proceedings is now authorised upon the fulfilment of certain conditions. The noticeable difference between the old regime and the Arbitration Act 2001 in relation to the stay of proceedings is the discretion of the courts to decide whether the matter should be resolved in the court or to be referred to arbitration by allowing the granting of a stay of proceedings mandatory in nature. However, section 3 (1) & (2) of the Arbitration Act 2001 provides that the provisions of the said Act, except the provisions under Sections 45, 46 and 47, are not applicable in respect of an arbitration where the seat of arbitration is not in Bangladesh. Therefore, the provisions under Sections 7, 7A and 10 cannot be invoked in such a case except the order of interim measures. Section 7A of the said Act may only be invoked at the stage of enforcement of foreign arbitral award. In spite of such non-applicability of the above provisions in any legal suit concerned, if the Court is prevented from staying such proceedings because of non-applicability of Section 10 in view of the provisions under Section 3 of the said Act, the Court should exercise its inherent power as possessed by it in view of the provisions under Section 151 of the Code of Civil Procedure 1908 to secure ends of justice and to prevent the abuse of the process of the Court in order to avoid potential conflicting decisions between the arbitral tribunal in a foreign country and the Court in Bangladesh. Therefore, neither Section 3 nor Section 10 of the Arbitration Act should be deemed to limit or otherwise affect such inherent power of the Court to pass such orders staying such proceedings before it by prevailing the spirit of arbitration in Bangladesh. In the Arbitration Act 2001 provisions and procedure is certainly better than the previous Arbitration Act 1940. The current Act promotes arbitration as an alternative dispute resolution which is the very ideal for the current development of international commerce and investment. We are getting benefited from the Arbitration Act 2001 with the effect of having amendment to the Act and still there are issues which need to be fine-twined. However, it is suggested that the competent courts in Bangladesh will be sensible to intervene in matters where parties have unequivocally elected to arbitrated disputes which may arise and will hence adopt interpretations which best serve to facilitate arbitration rather than militating arbitration process.

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CONFLICTS OF INTEREST:

The authors declare no conflicts of interest.

ENDNOTES:

1) Vide Notification No. SRO 87-Law/2001, dated 09-04-2001, *Published in Bangladesh Gazette extraordinary* dated 10-04-2001.
2) Sunday A. Fagbemi, 'the Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015). 6 AFE Babalola University, *J. of Sust. Dev. Law & Policy* ,231.
3) Okezie Chukwumerije, 'A Choice of Law in International Commercial Arbitration' (Q. Books 1994) 161.
4) Ar. Gör. eyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent' (2012). **241**, Dicey and Morris and Collins, *The Conflict of Laws*, Vol. **2** 14th edn *London: Sweet & Maxwell*, 2010, para. 32-004.
5) Article 19 of the UNCITRAL Model Laws.
6) Section 7 of the Arbitration Act, (2001).
7) Section 7 of the Arbitration Act, (2001).
8) Section 34 of the 1940 Act.
9) Section 7, Section **10**(2) of the Arbitration Act, 2001.
10) Section 7.
11) Section 34 of the Arbitration Act, (1940).
12) Section 34; Novelty Cinema Lyallpur v Firdaus Films. PLD 1958 Lahore 208; PLR 1958(2) WP 233.
13) Novelty Cinema Lyallpur v Firdaus Films. PLD 1958 Lahore 208; PLR 1958(2) WP 233.
14) M.A. Chowdhury vs. M/s Mitsui, 22 DLR (SC) (1970)-334; A.B.C Laminart Pvt. Ltd. vs. A.P. Agencies, AIR 1989 (SC) 1239.
15) M/s. L.T. Societa vs. M/s. Lakshminarayan, AIR, (1959). Calcutta-669.
16) Chiltagong Port Authority Vs. M/S, Crete Construction Company Ltd, (1979). 31 DLR (AD) 138.
17) MV Aghia Thalassini v Abu Bakar Siddique, (1980). 32DLR (AD)107.
18) Mohammad Ibrahim and Sons v Karachi Municipal Corporation PLD, (1960). (WP) Karachi 916.
19) Gov of Bangladesh vs M/s. Mashriqui Textiles, (1983). 35 DLR (AD) 123.
20) Section 20 of the Arbitration Act, (1940).
21) Queensland Insurance Co. Ltd. v. Abdul Rahman PLD, (1957). Dacca 171; 8 DLR 688.
22) Abu Bakar Siddique vs, MV Aghia Thalassini, (1977). 30 DLR 94.
23) State Bank of Pakistan v Messrs Naqson 22 DLR (WP) 285.
24) Chiltagong Port Authority v. M/S, Crete Construction Company Ltd. (1979). 31 DLR (AD) 138.
25) Chiltagong Port Authority v. M/S, Crete Construction Company, p. 138.
26) Seafarers Inc vs. Province of East Pakistan 20 DLR (SC) 225.
27) MM Yeaseen v Irving R Boody and Co. PLD 1957 Karachi 756; PLR 1957(2) WP 346.
28) Indo-Pakistan Corporation Ltd v KC Sethia Ltd. 8 DLR 55.
29) M.A. Chowdhury vs. M/s Mitsui, 22 DLR (SC) (1970)-334; A.B.C Laminart Pvt. Ltd. vs. A.P. Agencies, AIR, (1989). (SC) 1239.
30) Pakistan Trading Co v MM Ispahani Ltd, PLD, (1960). Dacca 11 DLR 405.
31) Southern Solar Power Limited vs. PBDP, 25 BLC (2020)-501; Indo-Pakistan Corporation Ltd v KC Sethia Ltd. 8 DLR 55.
32) New Bengal Shippin g Co v Eric Lancaster Stump, PLD, (1952). Dacca 22; PLR 1951 Dacca 1.
33) Badsha Mia v Nurul Huq, 18 DLR 237.
34) Michael v. Serajuddin, AIR1963 (SC) 1044; M.A. Chowdhury vs. Messrs. Mitsui O.S.K. Lines, Ltd., **22,** DLR, (SC) 334.
35) Badsha Mia, 237.
36) 1992 MLD 60; PLD 1986 Kar 1; NLR 1986 AC 130 (DB).

37) GM Ploff AG v Sertaj Engineering Co Ltd, 22 DLR (WP) 331.
38) 1992 CLC 1062 (DB).
39) Md Easak v Raja Mia 20 DLR 1120.
40) 226 IC; 444; AIR 1947 Lah 215 (DB).
41) Queensland Insurance Co. Ltd v Abdur Rahman, PLD, (1957) Dacca, **171**; 8 DLR 688.
42) Government of People's Republic of Bangladesh v Ekramul Haque 2 BLC 411.
43) Novelty Cinema Lyallpur v Firdaus Films, PLD, (1958). Lahore 208; PLR 1958 (2) WP 233.
44) Khawaja Muhammad Usaf v North-West Frontier Province, (1955). PLD 72.
45) Section 34 of the Arbitration Act, (1940). MM Yaseen virving R Boody & Co., PLD, 1957 Karachi 756.
46) 8 DLR 55.
47) Michael v. Serajuddin, AIR1963 (SC) 1044; M.A. Chowdhury vs. Messrs. Mitsui O.S.K. Lines, Ltd., **22** DLR (SC) 334.
48) M.A. Chowdhury vs Messrs. Mitsui O.S.K. Lines Ltd.; James Millar Vs Whitworth, (1970) 1A11ER796.
49) A.B.C Laminart Pvt. Ltd. vs. A.P. Agencies, AIR 1989 (SC) 1239.
50) Section 7 of the Arbitration Act 200.
51) Article II (3) of the New York Convention, (1958).
52) Section 151 of the Code of Civil Procedure 908.
53) Md. Hazrat Ali vs. Joynal Abedin, (1986). BLD (AD) 45; Abdul Mohit vs. Social Investment Bank, 61 DLR (AD) 82.
54) Bangladesh Air Service (Pvt.) Ltd. vs. British Airways PLC, 17 BLD (AD) (1997) 249.
55) Section 34 of the Arbitration Act, (1940).
56) M.A. Chowdhury vs. M/s Mitsui, 22 DLR (SC) (1970)-334; A.B.C Laminart Pvt. Ltd. vs. A.P. Agencies, AIR 1989 (SC) 1239; M/s. L.T. Societa vs. M/s. Lakshminarayan, AIR 1959 Calcutta 669.
57) G Delaume, Transnational Contractss (1978). Vol **2** at c. 13.07; and B Poznanski, 'The nature and extent of an Arbitrator's Powers in International Commercial Arbitration' (1987). **4**, *Journal of International Arbitration* (No **3**), 71-108.
58) Section 7 of the Arbitration Act 2001; Assaduzzaman Khan, Renato Nazzini, 'How far is the Practice of International Commercial Arbitration Independent in Malaysia?' 2015, The Law Review, p. 442.
59) Article II of the New York Convention 1958.
60) A party will be required to make an application for stay before the court prior to taking any step in those proceedings. This principle is embodied in the Section 9 of the English Arbitration Act 1996.
61) Section 3 of the (2001). Arbitration Act; Atlanska Plovidba v Consignaciones Astrianas SA (2004). EWHC1273.
62) Canda Shipping vs. TT Katikaayu, 54 DLR, (2002). 93; Uzbekistan Airways vs. Air Spain Ltd., 10 BLC (2005) 614; STX Corporation Ltd. vs. Meghna Group, 64 DLR, (2012) 550; HRC Shipping case, 12 MLR 265; Southern Solar Case, 25 BLC 501.
63) Forum non-conveniens is a discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case.
64) Section 10 of the Arbitration Act, (2001). Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 631 (1985). Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro, 712 F.2d 50, 53-54 (3d Cir. 1983); David L. Threlkeld & Co. v. Metallgesellschaft Ltd, 923 F.2d 245, 248 (1991); Samson Res. Co. v. Int'l Bus. Partners, Inc., 906 F. Supp. 624 (N.D. Okla. 1995).
65) Globo Piu, Import and Export ltd v. BCIC (Civil), Civil Revision 655/2015.
66) Globo Piu, Import and Export ltd, 655/2015.
67) Md. Humayun Kabir v. Oman Air S.A.O.C and others, HCD, Judgment on: 12.12.2021.
68) Canda Shipping vs. TT Katikaayu, 54 DLR (2002) 93; Unicol Bangladesh vs. Maxwell, 56 DLR (AD) 166; Uzbekistan Airways vs. Air Spain Ltd., 10 BLC (2005) 614.
69) Canda Shipping, 54 DLR (2002)-93; Unicol Bangladesh, 56 DLR (AD)166; Uzbekistan Airways vs. Air Spain Ltd., 10 BLC (2005)-614.

70) Accom Travels and Tours Limited. Kabir v. Oman Air S.A.O.C and others, (2021). p.55; Assaduzzaman, 'State liability for the conduct of its entities in international investment arbitration' (2012). *International Journal of Private Law*, 276.
71) HRC Shipping Ltd v MV X-Press Manaslu and Others LCLR, (2012). Vol.**2**, pp.207.
72) Article 1(3) of the UNCITRAL Model Law.
73) Article 1(2) of the UNCITRAL Model Law.
74) Article 35 & 36 of the UNCITRAL Model Law.
75) STX Corporation Ltd v Meghna Group of Industries Ltd and others, AA No.16 of 2009 (unreported).
76) Section 7A of the Arbitration Act 2001.
77) STX Corporation Ltd v Meghna Group of Industries Limited and others, (unreported). Para 13.
78) Article 111 of Bangladesh Constitution states: "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."
79) Egyptian Fertilizer Case, para.7.
80) Egyptian Fertilizer Case, para.3.
81) Managing Director, Rupali Bank Ltd and others v Tafazal Hossain & others, (1997). 44 DLR (AD) 260.
82) Interim measure declared by the ICC on 30 June 2012 in favour of Egyptian Fertilizer.
83) Egyptian Fertilizer Case, para.4.
84) Section 115 of Code of Civil Procedure of Bangladesh, 1908.
85) INTRACO (BD) Joint Venture v the Government of the People's Republic of Bangladesh (AA No. 9 & 10 of 2013); Roads and Highways Dept. v Hanil Engineering Construction Company Ltd and another (AA No. **4** of 2012); Roads and Highways Dept. v Najir Basic Joint Venture (Bangladesh) Ltd and others (AA No. 20 of 2012).
86) Egyptian Fertilizer Case, para.11.
87) Egyptian Fertilizer Case, para. 13.
88) Egyptian Fertilizer Case, para. 15.
89) Canda Shipping Case, 54 DLR (2002) 93.
90) Frigo Mekanik Insaat Tesisat Ve Taahut Sanayi Ve Ticarest A.S. v. Bangladesh Milk Producers' Co-operative Union Limited (BMPCUL), (2019). **2** 16 ALR (HCD) 357
91) Southern Solar Power and another v. BPDB and others, (2019). (2) 16 ALR (HCD) 91
92) Frigo Mekanik Insaat Tesisat Ve Taahut Sanayi Ve Ticarest A.S. v. Bangladesh Milk Producers' Co-operative Union Limited (BMPCUL), (2019). (2) 16 ALR (HCD) 357.
93) A.B.C Laminart Pvt. Ltd. v. A.P. Agencies, AIR (1989). (SC) 1239.
94) Unicol Bangladesh vs. Maxwell, 56 DLR (AD) 166, para 15.
95) Occidental vs. Maxwell, 9 BLC, (2004)-96.
96) Uzbekistan Airways vs. Air Spain Ltd., 10 BLC, (2005). 614.
97) Silkways Cargo Serviecs Limited v. Malaysian Airlines System and Others 1 Lclr, (2012). HCD 402.
98) Accom Travels and Tours Limited v. Oman Air S.A.O.C and others, (2021). Accom Travels and Tours Limited, represented by its authorized person Md. Humayun Kabir v. Oman Air S.A.O.C and others.
99) Section 151 of the Code of Civil Procedure 1908.
100) Canda Shipping v. TT Katikaayu, 54 DLR, (2002). **93**; Unicol Bangladesh vs. Maxwell, 56 DLR (AD) 166; Uzbekistan Airways v. Air Spain Ltd., 10 BLC, (2005) 614.

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