বাংলাদেশ সুপ্রীম কোর্ট
হাইকোর্ট বিভাগ
(দেওয়ানী রিভিশন অধিক্ষেত্র)

উপস্থিতঃ

বিচারপতি জনাব মোঃ আশরাফুল কামাল

সিভিল রিভিশন নং ৩৭৪৩/২০১৯

ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ

-----বাদী-দরখাস্তকারী

-বনাম-

বাংলাদেশ ক্যামিকেল ইন্ডাষ্ট্রিজ কর্পোঃ ও অন্য

------ বিবাদী-প্রতিবাদীদ্বয়

সিনিয়র এ্যাডভোকেট প্রবীর নিয়োগী সংগে

এ্যাডভোকেট মাহদীন চৌধুরী

-------বাদী-দরখাস্তকারী পক্ষে

এ্যাডভোকেট মোঃ আবদুন নূর সংগে

এ্যাডভোকেট মোঃ গোলাম সামদানী

----বিবাদী-প্রতিবাদীদ্বয় পক্ষে

শুনানীর তারিখঃ ২৭.০৭.২০২২, ১১.০৮.২০২২ এবং রায় প্রদানের তারিখ ঃ ১৪.০৮.২০২২।

বিচারপতি মোঃ আশরাফুল কামালঃ

বাদী-দরখাস্তকারী কর্তৃক দেওয়ানী কার্যবিধির ধারা ১১৫ উপ-ধারা ১ মোতাবেক দরখাস্ত দাখিলের প্রেক্ষিতে অত্র বিভাগ কর্তৃক বিগত ইংরেজী ১০.১২.২০১৯ তারিখে নিম্নবর্ণিত উপায়ে অত্র রুলটি ইস্যু করা হয়েছিলঃ

> *"Records be called for.*
>
> *Let a Rule be issued calling upon the opposite parties to show cause as to why the Order dated 14.11.2019 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 597 of 2015 so far as it relates to fixing the application for extension of ad-interim order of injunction/status quo filed under Section 151 of the Code of Civil Procedure along with the application filed under Order IX Rule 9(A) of the Code of Civil Procedure for restoration of Arbitration Miscellaneous Case 597 of 2015 to its original file and number on recalling the order dated 28.10.2019 by which the said case was dismissed for default should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.*
>
> *The Rule is made returnable within 4(four) weeks from date.*

Pending hearing of the Rule, the parties are directed to maintain status-quo in respect of the bank guarantee Nos. 03/15, 04/15, 05/15 and 06/15 all dated 03.03.2015 for the amount of USD 5,03,963, USD 4,73,750 USD 5,08,679 and USD 4,73,750 respectively for a period of 6(six) months from date.

The learned Advocate for the petitioner is directed to put in the requisites for service of notices upon the opposite parties in usual course and through registered post within 72(seventy two) hours."

মোকদ্দমাটি নিষ্পত্তির লক্ষ্যে ঘটনার সংক্ষিপ্ত বর্ণনা এই যে,

ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ দরখাস্তকারী হয়ে বিজ্ঞ জেলা জজ, ঢাকা আদালতে বাংলাদেশ ক্যামিকেল ইন্ডাষ্ট্রিজ কর্পোরেশন ও অন্য একজনকে প্রতিপক্ষ শ্রেণীভুক্ত করে সালিশী আইন, ২০০১ এর ৭ক ধারার আওতায় দরখাস্ত দাখিল করলে অত্র সালিশী বিবিধ মোকদ্দমা নং-৫৯৭/২০১৫ এর কার্যক্রম শুরু হয় এবং দরখাস্তকারী অন্তবর্তীকালীন নিষেধাজ্ঞার আদেশ প্রাপ্ত হয়। অতঃপর বিগত ইংরেজী ২৮.১০.২০১৯ তারিখ অত্র মোকদ্দমাটি শুনানীর জন্য দিন ধার্য থাকলে দরখাস্তকারী শুনানী না করে শুনানীর জন্য সময়ের প্রার্থনা করেন এবং অন্তবর্তীকালীন নিষেধাজ্ঞার পূর্বতন আদেশ বর্ধিতের আবেদন করেন। বিজ্ঞ আদালত দরখাস্ত দুটি শুনানী করে প্রত্যাখান করেন এবং দরখাস্তকারীকে মোকদ্দমা শুনানী করার নিমিত্ত তৈরী হওয়ার জন্য নির্দেশ প্রদান করেন। অতঃপর আদালত মোকদ্দমাটি শুনানীর জন্য গ্রহণ করলে দরখাস্তকারী পক্ষ অনুপস্থিত থাকেন। ফলশ্রুতিতে বিজ্ঞ আদালত মোকদ্দমাটি তদ্বীর এর অভাবে খারিজ করেন। অতঃপর দরখাস্তকারীপক্ষ দেওয়ানী কার্যবিধির আদেশ ৯ নিয়ম ১ ও ধারা ১৫১ মোতাবেক দরখাস্ত দাখিল করে বিগত ইংরেজী ২৮.১০.২০১৯ তারিখের খারিজাদেশ বাতিলের প্রার্থনায় বিজ্ঞ জেলা জজ আদালতে আরবিট্রেশন মিস মামলা নং-৫৯৭/২০১৫ দায়ের করেন। বিজ্ঞ জেলা জজ, ঢাকা উপরিল্লিখিত দরখাস্ত শুনানী অন্তে বিগত ইংরেজী ১৪.১১.২০১৯ তারিখে আদেশ প্রদান করেন। উক্ত আদেশে বিজ্ঞ আদালত মিস মোকদ্দমাটি শুনানীর জন্য বিগত ইংরেজী ০৩.০২.২০২০ তারিখ ধার্য করেন। বিগত ইংরেজী ১৪.১১.২০১৯ তারিখের উপরিল্লিখিত আদেশে দরখাস্তকারীর অন্তবর্তীকালীন নিষেধাজ্ঞার আদেশ বর্ধিত না করায় সংক্ষুব্ধ হয়ে দরখাস্তকারী অত্র সিভিল রিভিশন মোকদ্দমাটি দাখিল করে রুলটি প্রাপ্ত হন।

বাদী-দরখাস্তকারী পক্ষে বিজ্ঞ সিনিয়র এ্যাডভোকেট প্রবীর নিয়োগী সংগে এ্যাডভোকেট মাহদীন চৌধুরী বিস্তারিতভাবে যুক্তিতর্ক উপস্থাপন করেন।

অপরদিকে, বিবাদী-প্রতিবাদীগণ পক্ষে বিজ্ঞ এ্যাডভোকেট আবদুন নূর বিস্তারিতভাবে যুক্তিতর্ক উপস্থাপন করে বলেন যে, বাংলাদেশ কেমিক্যাল ইন্ডাষ্ট্রিজ কর্পোরেশন ১ লাক্ষ মেট্রিক টন ইউরিয়া সার সংগ্রহ করার জন্য বিগত ইংরেজী ০৭-০৭-২০০৪ তারিখ ০৪ (চার) টি টেন্ডার আহবান করলে মেসার্স রুক্সিন গ্রুপ কর্পোরেশন সর্বনিন্ম দরদাতা সাব্যস্ড় হয় এবং তাদের স্থানীয় প্রতিনিধি মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ অনুকূলে ৪টি কার্যাদেশ বিজ্ঞপ্তি প্রদান করে বিগত ইংরেজী ২১-০৯-২০১৪ তারিখের মধ্যে পারফরমেন্স গ্যারান্টি দাখিলের নির্দেশ প্রদান করা হয়। কিন্তু, মেসার্স রুক্সিন গ্রুপ কর্পোরেশন এবং তাদের স্থানীয় প্রতিনিধি মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন নির্ধারিত সময়ে পারফরমেন্স

গ্যারান্টি দাখিলে ব্যর্থ হয় এবং সময় বর্ধিত করনের আবেদন করে। অবশেষে বিগত ইংরেজী ২৫-০৯-২০১৪ তারিখ পারফরমেন্স গ্যারান্টি দাখিল করে। বাংলাদেশ কেমিক্যাল ইন্ডাষ্ট্রিজ কর্পোরেশন বিগত ইংরেজী ২৯-০৯-২০১৪ তারিখ দুটি চুক্তি ও ক্রয়াদেশ সম্পন্ন করে যাতে মেসার্স রুক্সিন গ্রুপ কর্পোরেশন এর পক্ষে তাদের স্থানীয় প্রতিনিধি মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ ম্যানেজিং ডাইরেক্টর স্বাক্ষর করে। অতঃপর বাংলাদেশ কেমিক্যাল ইন্ডাষ্ট্রিজ কর্পোরেশন বিগত ইংরেজী ০১-১০-২০১৪ তারিখ বেসিক ব্যাংক, দিলকুশা শাখায় ০৪টি ঋণপত্র খোলে। চুক্তি, ক্রয়াদেশ ও ঋণপত্রের শর্ত মোতাবেক শিপমেন্টের শেষ দিন ছিল ০৫-১১-২০১৪। কিন্তু পরবর্তীতে কোম্পানী ঋণপত্রের ক্লজ এফ-৫৯ পরিবর্তন করে মেসার্স রুক্সিন গ্রুপ কর্পোরেশন এর পরিবর্তে শানডং রুক্সিন ইন্টারন্যাশনাল ট্রেডিং কোং লিঃ এর নাম অন্তর্ভূক্ত করার জন্য আবেদন করে যা বাংলাদেশ কেমিক্যাল ইন্ডাষ্ট্রিজ কর্পোরেশন বিগত ইংরেজী ১৬-১০-২০১৪ তারিখের জবাবে প্রিন্সিপাল ও তাদের স্থানীয় প্রতিনিধিকে জানায় যে বেনিফিশারি পরিবর্তন করা সম্ভব নয় এবং তাদের কে জাহাজ নির্বাচন করার জন্য অনুরোধ করা হয় যাতে নির্ধারিত সময়ে শিপমেন্ট এর কাজ সম্পন্ন হয়। বাংলাদেশ কেমিক্যাল ইন্ডাষ্ট্রিজ কর্পোরেশন বিগত ইংরেজী ২৭-১০-২০১৪ তারিখে প্রিন্সিপাল ও তাদের স্থানীয় প্রতিনিধিকে নির্ধারিত সময়ে শিপমেন্ট করার লক্ষে জাহাজ নির্বাচন করার জন্য অনুরোধ করে। অতঃপর, মেসার্স রুক্সিন গ্রুপ কর্পোরেশন বিগত ইংরেজী ২৮-১০-২০১৪ তারিখ শিপমেন্ট সময় বিগত ইংরেজী ০৫-১১-২০১৪ হতে বিগত ইংরেজী ০৫-১২-২০১৪ বর্ধিতকরণ ও স্থানান্তরযোগ্য ঋণপত্রের জন্য আবেদন করে। বিসিআইসি ২৯-১০-২০১৪ তারিখের পত্রযোগে জানায় যে, শিপমেন্ট সময় বর্ধিতকরনের আবেদন বিসিআইসি কর্তৃপক্ষ বিবেচনায় করে নাই যেহেতু ইউরিয়া দেশের চাহিদা মিটানোর জন্য অতি জর"রি ভিত্তিতে দরকার ও ব্যাংকিং নিয়ম অনুযায়ী স্থানান্ড়রযোগ্য ঋণপত্রের সুযোগ নাই। মেসার্স ব্রান্ডউয়িন ট্রেডিং কর্পোরেশন লিঃ মেসার্স র"ক্সিন গ্র"প কর্পোরেশন পক্ষে জাহাজ নির্বাচনের লক্ষে বিগত ইংরেজী ৩১-১০-২০১৪ পত্র ইস্যু করে এবং বিসিআইসি কর্তৃপক্ষকে নির্বাচিত জাহাজ গ্রহণের অনুরোধ করে যাতে বিগত ইংরেজী ০৫-১১-২০১৪ তারিখের মধ্যে সার সরবরাহ করা যায়। কিন্তু, র"ক্সিন গ্র"প কর্পোরেশন পুনরায় বিগত ইংরেজী ০২-১১-২০১৪ তারিখের পত্র যোগে বিগত ইংরেজী ০৫-১১-২০১৪ তারিখ হতে বিগত ইংরেজী ২৮-১১-২০১৪ পর্যন্ড় সময় বর্ধিতকরণের জন্য আবেদন করে। পুনরায় বিগত ইংরেজী ০৩-১১-২০১৪ তারিখের পত্র যোগে খোঁড়া অজুহাতে সময় বর্ধিতকরণের জন্য আবেদন করে। ইতিমধ্যে মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ শিপমেন্ট সময় বিগত ইংরেজী ২৮-১১-২০১৪ তারিখ পর্যন্ড় বর্ধিত করার আবেদন করে। বিসিআইসি কর্তৃপক্ষ প্রিন্সিপাল ও স্থানীয় প্রতিনিধির চাহিদা অনুযায়ী বিগত ইংরেজী ২৮-১১-২০১৪ তারিখ পর্যন্ড় সময় বর্ধিত করে। শিপমেন্ট করার নিমিত্তে বিসিআইসি কর্তৃক নিয়োজিত প্রি-শিপমেন্ট ইন্সপেকশন কোং বহুবার ই-মেইল যোগে র"ক্সিন গ্র"প কর্পোরেশন ও তাদের স্থানীয় প্রতিনিধি মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ এর সাথে প্রি-শিপমেন্ট ইন্সপেকশন করার জন্য যোগাযোগ করতে ব্যর্থ হয়। বিসিআইসি বিগত ইংরেজী ১৩-১১-২০১৪ তারিখের পত্র মারফত বর্ধিত সময়ে শিপমেন্ট করার জন্য অনুরোধ করে ব্যর্থতায় বিনা নোটিশে পারফরমেন্স গ্যারান্টি বাতিল ও বাজেয়াপ্ত করা হবে বলা হয়। কিন্তু শানডং র"ক্সিন ইন্টারন্যাশনাল ট্রেডিং কোং লিঃ মেসার্স র"ক্সিন গ্র"প কর্পোরেশন এর পরিবর্তে বিগত ইংরেজী ২০-১১-২০১৪ তারিখে পত্র মারফত

ঋণপত্রে বেনিফিশারি র ক্সিন গ্র প কর্পোরেশন এর পরিবর্তন শানডং র ক্সিন ইন্টারন্যাশনাল ট্রেডিং কোং লিঃ সরবরাহকারী/উৎপাদনকারী পরিবর্তন, শিপমেন্ট সময় ডিসেম্বরের শেষ পর্যন্ড় বর্ধিতকরণ ও হস্ড়ান্ড়রযোগ্য ঋণপত্র খোলার জন্য অনুরোধ করে। বিগত ইংরেজী ২৬-১১-২০১৪ তারিখ শানডং র ক্সিন ইন্টারন্যাশনাল ট্রেডিং কোং লি: বিসিআইসি কর্তৃপক্ষকে জানায় যে উলি খিত পরিবর্তন সাপেক্ষে ১ লাখ মেট্রিক টন ইউরিয়া শিপমেন্ট করার জন্য প্রস্তুত আছে এবং প্রি-শিপমেন্ট ইন্সপেকশন করার জন্য আহবান করে। বিসিআইসি কর্তৃক নিয়োজিত প্রি-শিপমেন্ট ইন্সপেকশন কোং জানায় যে, তারা প্রি-শিপমেন্ট ইন্সপেকশন করার জন্য লোকেশন ও কোন কার্গো জাহাজ খুজিয়া পায় নাই। এমতাবস্থায়, বিসিআইসি বাংলাদেশ দূতাবাস, চায়নাকে অবহিত করে এবং বিসিআইসি কে ১ লাখ মেট্রিক টন ইউরিয়া শিপমেন্ট করার জন্য প্রস্তুত আছে কিনা জানানোর জন্য অনুরোধ করে। বিসিআইসি কর্তৃক নিয়োজিত প্রি-শিপমেন্ট ইন্সপেকশন কোং বিগত ইংরেজী ৩০-১১-২০১৪ তারিখ শানডং র ক্সিন ইন্টারন্যাশনাল ট্রেডিং কোং লিঃ এর সাথে যোগাযোগ করে এবং তারা ইয়ানত্রাই পোর্ট পরিদর্শন করে জানায় যে, ১,০০,০০০.০০ (এক লাখ) টনের মধ্যে কেবল ২০০০ (দুই হাজার) মেট্রিক টন ইউরিয়া শিপমেন্ট করার জন্য প্রস্তুত আছে। অধিকন্তু, বিসিআইসি ইন্টারনেট যোগে নির্বাচিত জাহাজ অনুসন্ধান করে যাহা ইয়ানত্রাই বন্দর হতে বহু দূরে পাওয়া যায়। মেসার্স র ক্সিন গ্র প কর্পোরেশন এবং তাদের স্থানীয় প্রতিনিধি মেসার্স ব্রান্ডউয়িন ট্রেডিং কর্পোরেশন লিঃ নির্ধারিত বিগত ইংরেজী ০৫-০১-২০১৪ তারিখ, বর্ধিত সময় বিগত ইংরেজী ২৮-১১-২০১৪ তারিখ সার সরবরাহ করতে ব্যর্থ হয়। দেশের খাদ্যে নিরাপত্তার কথা চিন্ড় করে শিপমেন্ট পিরিয়ড বিগত ইংরেজী ৩১-১২-২০১৪ তারিখ পর্যন্ড় বর্ধিত করা হয় কিন্তু তারা সার সরবরাহ করতে ব্যর্থ হয়। বিসিআইসি পুনরায় বিগত ইংরেজী ১৫-০২-২০১৫ তারিখ পর্যন্ড় বর্ধিত করে। মেসার্স ব্রান্ডউয়িন ট্রেডিং কর্পোরেশন লিঃ বিগত ইংরেজী ১৫-০১-২০১৫ তারিখ তাদের নামে ঋণপত্র রি-ইস্যু করার জন্য আবেদন করে। বিসিআইসি বিগত ইংরেজী ২৫.০১.২০১৫ তারিখ ঋণপত্র সংশোধনের জন্য টাকা ৪৪,৬০,০৭০.৫০, নতুন ঋণপত্র খোলা জন্য টাকা ৭৫,০০,০০০.০০ জমা দেওয়া ও পিজি সময় বৃদ্ধির জন্য অনুরোধ করে। মেসার্স ব্রান্ডউয়িন ট্রেডিং কর্পোরেশন লিঃ উক্ত শর্তাবলি পূরণের পরিবর্তে মন্ত্রণালয়ে আবেদন করে এবং কপি বিসিআইসি কে সংযুক্ত করে। ফলে, শিল্প মন্ত্রণালয় বিগত ইংরেজী ১১-০২-২০১৫ তারিখ বিধিমোতাবেক ব্যবস্থা গ্রহণের নির্দেশ প্রদান করে। অতঃপর বিসিআইসি বিগত ইংরেজী ১৫-০২-২০১৫ তারিখ মেসার্স ব্রান্ডউয়িন ট্রেডিং কর্পোরেশন লিঃ কে চুক্তি বাতিল ও পিজি বাজেয়াপ্তের নোটিশ প্রদানে করে। মেসার্স ব্রান্ডউয়িন ট্রেডিং কর্পোরেশন লিঃ পুনরায় বিগত ইংরেজী ২২-০২-২০১৫ তারিখ মন্ত্রণালয়ে আবেদন করে শিপমেন্ট সময় বিগত ইংরেজী ৩০-০৪-২০১৫ তারিখ পর্যন্ড় বর্ধিত করার আবেদন করে এবং কপি বিসিআইসি কে সংযুক্ত করে এবং শিল্প মন্ত্রণালয়ের নির্দেশ মোতাবেক বিগত ইংরেজী ৩০-০৪-২০১৫ তারিখ পর্যন্ড় সময় বর্ধিত করা হয় এবং ঋণপত্র সংশোধনের জন্য টাকা ৪৪,৬০,০৭০.৫০, নতুন ঋণপত্র খোলা জন্য টাকা ৭৫,০০,০০০.০০ জমা দেওয়া ও পিজি সময় বৃদ্ধির জন্য অনুরোধ করে। পরবর্তীতে বিসিআইসি বিগত ইংরেজী ০৫-০৩-২০১৫ তারিখ ০৪টি চুক্তি মেসার্স ব্রান্ডউয়িন ট্রেডিং কর্পোরেশন লিঃ এর সাথে সম্পাদন করে এবং বিগত ইংরেজী ১০-০৩-২০১৫ তারিখ ঋণপত্র খোলে। কিন্তু ঋণপত্র খোলার ২০ দিন পরে মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ ০২টি নতুন উৎপাদনকারী প্রতিষ্ঠানের নাম অর্ন্ড়ভূক্ত করার আবেদন করে এবং বিগত ইংরেজী ১২-০৪-২০১৫ তারিখ

আরও একটি নতুন উৎপাদনকারী প্রতিষ্ঠানের নাম অন্ড়র্ভূক্ত করার আবেদন করে। মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ শিপমেন্ট এর মাত্র ১০ দিন সময় শেষ হওয়ার পূর্বে বিগত ইংরেজী ১৯-০৪-১৫ তারিখ এক আবেদনে জানায় যে নতুন চারটি উৎপাদনকারী প্রতিষ্ঠান অন্ড়র্ভূক্ত ও ঋণপত্র সংশোধন সাপেক্ষে তারা এক লাখ টন সার সরবরাহ করতে পারবে। পুনারায় বিগত ইংরেজী ২২-০৪-২০১৫ তারিখ একই আবেদন করে। বিসিআইসি বিগত ইংরেজী ৩০-০৭-২০১৫ তারিখ চুক্তি বাতিল ও পি.জি. বাজেয়াপ্ত কেন করা হবে না মর্মে নোটিশ প্রদান করে এবং বিগত ইংরেজী ১১-০৮-২০১৫ তারিখ মেসার্স ব্রান্ডউইন ট্রেডিং কর্পোরেশন লিঃ এর সাথে চুক্তি বাতিল ও পি.জি. বাজেয়াপ্ত করে।

অত্র সিভিল রিভিশন দরখাস্ত এবং নথী পর্যালোচনা করলাম। দরখাস্তকারী পক্ষে বিজ্ঞ সিনিয়র এ্যাডভোকেট জনাব প্রবীর নিয়োগী এবং প্রতিবাদীদ্বয় পক্ষে বিজ্ঞ এ্যাডভোকেট মোঃ আবদুন নূর এর যুক্তিতর্ক শ্রবণ করলাম।

পূবালী ব্যাংক বনাম বিএডিসি (১৯৮২) বিএলডি ১৭ মোকদ্দমায় যে অভিমত প্রদান করা হয়েছে তা নিম্নে অবিকল অনুলিখন হলোঃ

> *"The bank has agreed to make an unconditional payment on demand without any further question and without reference to the contract. The words "without any further question and without reference to the contractor" make it clear that the bank is not to be an arbitrator in a dispute between the purchaser and the supplier whether in respect of the performance of the contract or otherwise. On an allegation made by the purchaser that there has been a failure of performance on the part of the supplier, the bank is bound unconditionally to pay the amount on demand. The only condition of the bank guarantee is that the purchaser should make a demand on the bank and when this has been done, the condition of the guarantee has been fulfilled and the bank is bound to make the payment without any further question and without reference to the contractor. As to what the purchaser is entitled to recover from the supplier as liquidated damage and/or penalty for the default of the supplier is a question between the purchaser and the supplier. The bank cannot raise this plea. The question as to what part has not been performed is not also relevant."*

উত্তরা ব্যাংক বনাম কিলবার্ন লিঃ [বিএলডি ১৯৮১ (এডি) ২৩১] মোকদ্দমায় আপীল বিভাগ অভিমত প্রদান করেন যে, ***"No temporary injunction restraining the enforcement of the guarantee."***

গুরুত্বপূর্ণ বিধায় বাংলাদেশ সুপ্রীম কোর্ট হাইকোর্ট বিভাগের **Civil Petition for Leave to Appeal No. 275 of 1996** নিম্নে অবিকল অনুলিখন হলোঃ

"IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)

Civil Petition for Leave to Appeal No. 275 of 1996

Decided On: 11.08.1996

Appellants: ***Fatullah Agro-Product Industries***

Vs.

Respondent: ***Bangladesh Agricultural Development Corporation***

Hon'ble Judges:

A. T. M. Afzal, C. J., Mustafa Kamal, Latifur Rahman, Mohammad Abdur Rouf and Bimalendu Bikash Roy Chowdhury, JJ,

Counsels:

For Appellant/Petitioner/Plaintiff: Habibul Islam Bhuiyan, Senior Advocate, Instructed by Md. Sajjadul Huq, Advocate-on-Record.

For Respondents/Defendant: Md. Aftab Hossain, Advocate-on-Record.

JUDGMENT

Bimalendu Bikash Roy Chowdhury, J.

1. In this petition Fatullah Agro-Product Industries, a proprietorship firm owned by one Abul Hashem Dewan seeks leave to appeal from the judgment and order of the High Court Division, dated 18 January 1996 passed in Civil Revision No. 2222 of 1992. discharging the Rule and thereby upholding the order of the Subordinate Judge, Third Court, Dhaka, dated 29 July 1993 dismissing Arbitration Miscellaneous Case No. 481 of 1993. In the year 1990 the respondent, Bangladesh Agricultural Development Corporation, shortly BADC, invited tenders for supply of one lac running feet of upper well casing pipes to be financed by a credit provided by Asian Development Bank. Petitioner's bid being the highest was accepted and an agreement was executed between the parties on 15 August 1990. In terms of the agreement certain raw

materials were imported at the cost of BADC. But the petitioner could not have the consignment cleared for different objections raised by the Customs authority. As a result the petitioner could not manufacture the required upper well casing and deliver the same to BADC within the stipulated time. There having been a failure on the part of the petitioner to comply with the terms of the agreement BADC by its letter dated 21 November 1992 terminated the contract and directed the petitioner to handover the raw materials to them. The petitioner then invoked arbitration clause of the agreement. He also filed Arbitration Miscellaneous Case No. 483 of 1993 in the Third Court of Subordinate Judge, Dhaka under section 41(b) of the Arbitration Act with a prayer for an order of injunction restraining BADC from encashing the Bank guarantee furnished by the petitioner and taking delivery of the raw materials stored in the bonded warehouse.

2. The respondent contested the case on the grounds inter alia that the case was not maintainable as it was not filed by the proper person, that the petitioner had not prima facie case for injunction and that the balance of convenience and inconvenience was also against him. A further objection was taken that the raw materials were placed in open sky and unless those were immediately released and used for manufacture of upper well casing the production of food grains would suffer for want thereof.

3. The learned Subordinate Judge sustained the objections of the respondent and dismissed the case by order dated 29 July 193. The petitioner then moved the High Court Division in revisional and a Division Bench of the said Court discharged the Rule.

4. Both the Court took the view that the petitioner had no prima facie case for injunction. That apart the balance of convenience and inconvenience was also against him and the threatened loss had money compensation.

5. It is argued on behalf of the petitioner that the High Court Division has acted illegally in refusing the prayer of the petitioner for injunction in the facts and circumstances of the case. ***We find no substance in this argument. It is fairly settled that the courts are reluctant to interfere with commercial transactions which have been entered into by the parties through performance***

> ***of guarantee or letter of guarantee. The arbitration miscellaneous case is in respect of the termination of the agreement of the petitioner by BADC and not in respect of the Bank Guarantee and the raw materials. In case of success of the petitioner in the arbitration proceedings his threatened loss may be adequately compensated by money. We find no cogent reason to differ from the view of the High Court Division in refusing the prayer of the petitioner for injunction.***
>
> ***No error of law is involved in this case. The petition is dismissed."***

গুরুত্বপূর্ণ বিধায় এবিব ইন্ডিয়া লিমিটেড বনাম পাওয়ার গ্রীড বাংলাদেশ লিমিটেড, অন্যান্য [২০২০ এ. এল. আর (এইচসিডি)] মোকদ্দমায় প্রদত্ত অভিমতের প্যারা নং ২৪-৬৫ নিম্নে অবিকল অনুলিখন হলোঃ-

> *"24. Having heard the arguments and reading the relevant statutory laws plus the case-laws cited from the various Law Journals, it appears to this Court that while the petitioner is seeking to resort to the factual background of the dispute for the purpose of obtaining an interim Order from this Court on encashment of the Bank Guarantees, the PGCB is insisting upon this Court to remain confined only to the legal issue, namely, whether the instant petition is maintainable in the backdrop of operation of URDG-758. Since it has been viewed by this Court hereinbefore that the factual issues would be adjudicated upon by the arbitration tribunal, hence,* ***this Court's task is to dwell on the legal issues. And, the apparent legal issues to be dealt with by this Court are (i) what is a Bank Guarantee and whether Bank Guarantee's payment can be stopped (ii) whether Section 7A of the Arbitration Act mandates this Court to stop encashment of a Bank Guarantee (iii) whether the Bank Guarantees in question are the subject-matter of the ongoing arbitration, (iv) whether the petitioner deserves an interim order of injunction upon encashment of the Bank Guarantees under the provisions of the CPC and (v) whether there is any judicially-sanctioned exceptions to the general rule regarding injunction over encashment of a Bank Guarantee that a Bank Guarantee is an independent and separate contract and the existence of any dispute between the parties to any contract is not a ground for issuance of any injunction Order to restrain enforcement of a Bank Guarantee.***

25. Given that this petition aims at restraining encashment of two Bank Guarantees, therefore, I should, at first, be acquainted with the expression "Bank Guarantee" and, also, I should examine whether its encashment can ever be stopped. The terminology "guarantee" stems from the Spanish word 'garante' in the 17th Century, meaning 'a person giving something as security'. Precisely, thus, when a Bank furnishes any security, the said security is understood as the Bank Guarantee. Broadly, to say, Bank Guarantee is an independent deed of contract between the Bank and the beneficiary albeit the Bank enters into the said contract at the instance of a third party. By entering into contract, the Bank guarantees to the beneficiary that if the third party (at whose request the Bank is issuing the Bank Guarantee) does not pay the debt, or does not pay the bid money required for participation in the tender, or does not return the money taken as advance, or does not pay the rent, or does not perform the contract as per the terms of the contract, then, the Bank shall pay the amount of money guaranteed by it in the deed of Bank Guarantee on demand by the beneficiary. There are, thus, several types of Bank Guarantees, namely, (1) Financial Guarantees (2) Advance or deferred payment Guarantees (3) Bid Bond Guarantees (4) Rental Guarantees (5) Customs Guarantees (6) Guarantee of Warranty Execution and (7) Retention or Performance Guarantees. Therefore, the definition of Bank Guarantee may be formulated as follows: when a Bank or any lending institution ensures/guarantees in writing that if the debtor fails to settle a debt, the Bank shall cover it, the said piece of document may be called Financial Bank Guarantee; when Bank stands as guarantor for returning the advance taken by the seller and paid by the buyer, it may be called 'Advance payment Guarantee'; when Bank takes the risk of paying the bid money for the purpose of helping its customer for participation in commercial tenders, it may be called 'Bid Bond Guarantee', when a tenant of any property approaches the Bank to ensure the land-lord that in case of the tenant's failure to pay rent, the Bank shall pay it, it may be called 'Rental Guarantee'; when for releasing goods from the customs authority Bank extends support to its customer it may be called 'Customs Guarantee', some time Bank stands as guarantor for execution of warranty, it may be called "Guarantee of Warranty Execution"; And, in case of performance of contract, when a Bank ensures by execution of a deed declaring therein that money shall be paid by it, if its customer fails to meet up the condition/s of the underlying contract regarding time or quality or any other stipulation, the said deed is known as 'Retention or Performance Bank Guarantee'.

26. After knowing about the definition of the Bank Guarantee, this Court may now examine whether payment of a Bank Guarantee can be stopped. In order to effectively deal with the petitioner's argument, I must take into consideration the wordings engraved in the deed of the Bank Guarantees in question, in particular, to see (i) whether the Bank Guarantees in question are independent contracts, (ii) who are the parties of the said contracts, (iii) whether the contracts (Bank Guarantees) are irrevocable and (iv) whether the petitioner has any right, at all, to say

anything about the Bank Guarantees in question. Let me look at the contents (particulars as well as the terms and conditions) of the contracts (deed of Bank Guarantees).

NOT OVER BDT 22,867,203/- ONLY

(subsequently increased to BDT 44,247,366)

Retention Bank Guarantee

The Hongkong and Shanghai Banking Corporation Limited, *Correspondence Address: ……..*

Beneficiary:

Power Grid Company of Bangladesh Ltd

Date: 17 January 2019

Retention Guarantee No. REBDAK900671

HSBC GUARANTEE NO. REBDAK900671 Date: 17 January 2019

Amount: BDT 22,867,203/- (Bangladeshi Taka Twenty Two Million Eight Hundred Sixty Seven Thousand Two Hundred Three Only).

We have been informed that…….. ABB India Limited having its address……..(Contractor)…….At the request of the Contractor, we The Hongkong and Shanghai Banking Corporation Limited, Correspondence Address:…… hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount: BDT22,867,203/- (Bangladesh Taka Twenty Two Million Eight Hundred Sixty Seven Thousand Two Hundred Three Only) upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligations under the contract without your needing to prove or to show grounds for your demand or the sum specified therein.

This guarantee shall expire no later than the 30th day of June 2019.

Consequently, any demand for payment under this guarantee must be received by us at this office on or before that date.

This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 758. (underlined by me)

27. Another Bank Guarantee in question, being the Bank Guarantee No. REBDAK 900674, is for an amount of INR 65,613,906, which subsequently was increased to INR 137,903,838. However, its all other contents (terms and conditions as well as the particulars) are similar to those of the first-one and, thus, their quotations are not needed.

28. It is vividly evident from the Bank Guarantee/s quoted above that each Bank Guarantee is an independent contract between the Bank (Guarantor) and the PGCB (beneficiary). And, from the wordings that have been underlined by me, which are in fact the terms and conditions of the Bank Guarantee in question, it is crystal clear that the HSBC Bank has guaranteed in irrevocable terms that upon first demand in writing by the PGCB, the HSBC Bank shall pay the agreed amount to the PGCB, without raising any question. Therefore, in this case, there is no scope for the petitioner to stop encashment of these two Bank Guarantees.

29. More importantly, Banks across the globe issue all types of Bank Guarantees under the provisions of ICC Uniform Rules for Demand Guarantees (URDG-758). As per Article 4(b) of the URDG-758, once a Bank Guarantee is issued, it is irrevocable and, therefore, whenever the beneficiary would make a demand to encash the Bank Guarantee, the Bank is mandatorily duty bound to instantaneously pay the money. On the other hand, Article 5(a) of URDG-758 stipulates as follows:

> *A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary.*

30. However, by virtue of Article 24 of the URDG-758 the Banks are empowered to reject the demand on the ground of discrepancy in the document i.e. in the Bank Guarantee. It follows that as per the provisions of URDG-758, a Bank Guarantee is an independent contract between the Bank and its beneficiary and it cannot be stopped by the guarantor (the Bank), let alone by the third party, except finding any discrepancy in the Bank Guarantee. To put in a simpler version all that this Court intends to state that since a Bank Guarantee is an irrevocable undertaking given by a Bank to pay an amount in favour of its beneficiary as and when the demand is made by the beneficiary without reference to any dispute between the parties to the underlying contract, there is no scope to stop its encashment by the Bank, not to speak of by the third party, save and except raising a dispute by the Bank regarding its authenticity or any other discrepancy.

31. Even if the Bank raises a dispute showing discrepancy in the Bank Guarantee, the dispute must be resolved through the competent civil Court located within the jurisdiction of the Bank. Article 35(a) of URDG-758 stipulates as follows:

> *Unless otherwise provided in the guarantee, any dispute between the guarantor and the beneficiary relating to the guarantee shall be settled exclusively by the competent court of the country of the location of the guarantor's branch or office that issued the guarantee.*

32. In this case, no dispute has been raised by either of the parties of these unconditional Bank Guarantees, i.e. the Bank and the PGCB. Even if any dispute is raised, such dispute shall be settled by the Courts. Evidently, since the instant application under Section 7A on the Arbitration Act has been filed by the petitioner, who is not a party to the said Bank Guarantees, the petitioner is not at all competent to raise any dispute. Even the Bank, in this case, is estopped from raising any dispute

inasmuch as the Bank Guarantees in question are unconditional and, furthermore, there is no arbitration clause in these Bank Guarantees.

33. Question was raised, although feebly and that too only in verbal submissions, as to whether ICC Uniform Rules for Demand Guarantees (URDG-758) are mandatorily binding upon the Banks of this country. International Chamber of Commerce (ICC) was founded in the year 1919 by a handful visionary entrepreneurs and internationally reputed business magnets with an aim of fostering international trade and commerce through promoting and protecting open markets for goods and services and the free flow of capital. Its primary activities, among others, are (i) the establishment of rules, (ii) dispute resolution and (iii) policy advocacy. In the year 1923, it established the International Court of Chamber and, then, in 1933, it published the first Rules for the Uniform Customs and Practice for Documentary Credits (UCP) which were subsequently updated on many occasions. In 1936, ICC published the International Commerce Terms, which is popularly known as 'Incoterms'. With the above background, ICC was granted accreditation to the United Nations Conference on International Organization (UNCIO), through which UN Charter was created. As an affiliated organization of the UN, by now, nearly 5 (five) crore companies of more than 100 (hundred) countries of the world are the members of this UN-affiliated organization and it is unimaginable for our country to carry out international trade, commerce and business without following and obeying the UCP-600, URDG-758 and Incoterm Rules framed by the ICC. In fact, our country has adopted the aforesaid Rules as biblical provisions for running its international business, trade and commerce. Even if, for the sake of argument, the ICC Rules are conceded to be not applicable mandatorily here in this tiny Delta, however, by incorporating the provisions of URDG-758 as the terms of the contracts (the Bank Guarantees in question) by the parties of the contract i.e. Bank and the PGCB, it has become inseparable parts of the Bank Guarantees in question. Therefore, it can safely be concluded that the issue as to whether or not the provisions of URDG-758 are to be abided by mandatorily by Bangladesh is not relevant for adjudication of a case involving examination of the question as to whether a Bank Guarantee's encashment can be stopped. Rather, the relevant issue of this kind of case is what are the terms and conditions of the contract in question (i.e. the terms of the Bank Guarantee). Admittedly, the terms of each of these two Bank Guarantees are that (1) the guarantee is irrevocable; (2) the guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary; (3) Unless otherwise provided in the guarantee, any dispute between the guarantor and the beneficiary relating to the guarantee shall be settled exclusively by the competent Court of the country of the location of the guarantor's branch or office that issued the

guarantee. If the above-mentioned three terms and conditions are, though the replica of Articles 4(b), 5(a) and 35(a) of URDG-758 respectively, considered as the original version of the contracts (i.e. the Bank Guarantees in question), there would not be any scope to raise the question as to whether URDG-758 is a mandatory law for our country or not.

34. Let me now take up the second and third issue, namely, whether Section 7A of the Arbitration Act mandates this Court to stop encashment of a Bank Guarantee, and whether the Bank Guarantee is the subject-matter of the arbitration which is to be kicked off very shortly. For this purpose, it would be profitable if the provisions of Section 7A of the Arbitration Act are known and, accordingly, the same are quoted below:

Section 7A of the Arbitration Act:

Powers of Court and High Court Division to make interim orders-(1) Notwithstanding anything contained in Section 7 unless the parties agree otherwise, upon prayer of either parties, before or during continuance of the proceedings or until enforcement of the award under Section 44 or 45 in the case of international commercial arbitration the High Court Division and in the case of other arbitrations the Court may pass order in the following matters:-

(a) To appoint guardian for minor or insane to conduct on his/her behalf arbitral proceedings.

(b) To take into interim custody of or sale of or other protective measures in respect of goods or property included in the arbitration agreement.

(c) To restrain any party to transfer certain property or pass injunction on transfer of such property which is intended to create impediment on the way of enforcement of award.

(d) To empower any person to seize, preserve, inspect, to take photograph, collect specimen, examine, to take evidence of any goods or property included in arbitration agreement and for that purpose to enter into the land or building in possession of any party.

(e) To issue ad-interim injunction;

(f) To appoint receiver; and

(g) To take any other interim protective measures which may appear reasonable or appropriate to the Court or the High Court Division.

(2) The similar powers of the Court or the High Court Division as are available in relation to any other legal proceedings shall be available to the Court or the High Court Division as the case may be, while passing orders under subsection (1).

(3) Before passing order upon application received under sub-section (1) the Court or the High Court Division shall serve notice upon the other party:

Provided that if the Court or the High Court Division is satisfied that in the event the order is not passed instantaneously, the purpose of making interim measures shall be frustrated, there shall be no necessity of serving such notice.

(4) If the Court or the High Court Division is satisfied that Arbitration Tribunal has no power to initiate proceedings in any matter under sub-section (1) or the Arbitration Tribunal has failed to pass order in such matter, the Court or the High Court Division as the case may be, shall be competent to pass order under this section.

(5) The Court or the High Court Division if considers appropriate shall be competent to cancel, alter or amend the order passed under this section.

(6) Where any Arbitration Tribunal or any institution or person empowered in any matters relating to orders passed under sub section (1) passed any order in such matters, the order passed by the Court or High Court Division as the case may be, in the same matter, shall be entirely or the relevant part thereof, inoperative.

35. From a minute perusal of the entire provisions of Section 7A of the Arbitration Act, it appears to me that while Paragraphs (a) to (g) of sub-Section (1) of Section 7A of the Arbitration Act specify the subjects in which this Court is empowered to pass Orders, sub-Section (2) of Section 7A of the Arbitration Act equips this Court with the further powers, which are usually available to a civil Court for dealing with any legal proceedings. There is no mentioning anywhere in the Paragraphs (a) to (g) of Section 7A(1) of the Arbitration Act about Bank Guarantee. In fact, all the above-mentioned paragraphs are the tools for preserving, protecting and safeguarding the subject-matter/s of the contract.

36. Here in this case, there are two contracts; the first is the Contract between the petitioner and the PGCB for setting up 10 (ten) power Sub-stations and the second contract is between the PGCB (beneficiary of the Bank Guarantee) and the HSBC Bank (the guarantor of the Bank Guarantee) about ensuring payment of money by the Bank to the PGCB, as and when the latter would demand the money by merely stating that the Bank's customer is in breach of the terms of the Contract. Evidently, the petitioner is a party to the first Contract (the underlying Contract) and, accordingly, if there is any dispute about the subject-matter of the first Contract, the petitioner is entitled to pray for an appropriate interim Order from this Court for mitigating the exigencies delineated in Paragraphs (a) to (g) of Section 7A (1) of the Arbitration Act. But, in the second contract, (i) the petitioner is not a party to the contract, (ii) there is no arbitration clause in the second contract and, also, (iii) there is no dispute between the parties (Bank and the PGCB) of the second contract (Bank Guarantee). So, evidently the second contract (i.e. Bank Guarantee) is not the subject-matter of this arbitration, which has already been

commenced by the parties. Thus, I hold that the provisions of Section 7A are not applicable to the second contract (i.e. for the Bank Guarantee).

37. Now, let me see whether this petitioner deserves a temporary injunction on encashment of these two Bank Guarantees in question under the provisions of the CPC. The relevant provisions of the CPC are Order XXXIX Rule 1 of the CPC, which are quoted below:

> *Where in any suit it is proved by affidavit or otherwise-*
>
> *(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or*
>
> *(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,*
>
> *the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders. (underlined by me)*

38. From a minute perusal of the above law, it appears that the above provisions of law are applicable in suit. However, for ease of things, let it be presumed that by virtue of the provisions of Section 141 of the CPC, the provisions of Order XXXIX Rule 1 are applicable here in this case. The scheme of the above law, as appears to this Court, is to provide equitable remedy to the applicant as well as to save pending suit/proceedings from being frustrated till its disposal. There have been a significant number of qualitative judicial pronouncements all over the common-law jurisdictions on the above law. The most fundamental ratio laid down by the Courts of all the jurisdictions are that for granting ad-interim injunction, the applicant must satisfy the Court that (i) there is prima facie case, (ii) the balance of convenience and inconvenience is in favour of the applicant and (iii) if the injunction is not granted the applicant shall suffer irreparable loss and injury.

39. In this case, apparently there is no scope of making out a prima facie case by the petitioner in favour of non-encashment of the said Bank Guarantees, for, when an unconditional Bank Guarantee is given, the beneficiary is entitled to realize such a Bank Guarantee in terms thereof irrespective of any pending disputes relating to the terms of the underlying Contract, and the Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The Bank Guarantees have been issued under the ICC Uniform Rules for Demand Guarantee, ICC Publication No. 758 and the said URDG-758 mandatorily requires the Banks to make instantaneous payment of the Bank Guarantees whenever asked by the beneficiary of a Bank Guarantee, as has been held hereinbefore. The petitioner is a foreign contractor and only protection accorded to the PGCB is by way of Bank Guarantees and restraining of the same shall make the objective of Bank Guarantee

redundant. The balance of convenience and inconvenience, thus, clearly lies in favour of the PGCB. The petitioner also shall not suffer any loss which cannot be compensated in the arbitration and, as such, in case of encashment, the petitioner shall not suffer any irreparable harm and injury. Since there is no prima facie case, this Court does not even need to examine as to whether the balance of inconvenience is in favour of the petitioner or whether the petitioners shall actually suffer any irreparable loss. Thus, this Court holds that the petitioner does not deserve an Order of injunction under the provisions of the CPC.

40. Now, let me examine the judicially-sanctioned exceptions to the general rule regarding injunction over encashment of a Bank Guarantee. The general rule is that no prohibition order should be passed by a Court over encashment of a Bank Guarantee, as the same is the contractual obligation of the Bank with its beneficiary.

41. The most established judicially-sanctioned exception is the commission of fraud. Before 1941, the Courts all over the world recognised fraud only about the genuineness of Letter of Credit and Bank Guarantee. But after the case of Sztejn Vs J Heary Schroder Banking Corporation et; 177 Miscelleneous 719, NYS 2d 631 or [1941] 31 NYS 2nd 631, the Courts in the USA and, thereafter, following the case of Discount Records Ltd Vs Barclays Bank Ltd and another [1975] 1 ALL ER 1071, most of the jurisdictions across the world recognised that fraud may exist - not only in preparation and presentation of LC or Bank Guarantee, but also in connection of the underlying contract. The said principle has also been laid down by our Apex Court in the case of Uttara Bank Vs Macneil & Kilburn Ltd 33 DLR (AD) 298. However, since in this case, the petitioner has not sought to base its case on the principle of fraud as an exception, any further discussion and examination thereon (on the principle of fraud exception) may be avoided.

42. There is no other judicially-sanctioned exception to the above-mentioned general rule regarding prohibition over encashment of Bank Guarantee. However, the learned Advocate for the petitioner has argued that (i) if irretrievable injustice, harm and injury is caused to the applicant, (ii) if invocation of the Bank Guarantee is not in terms of the Bank Guarantee, (iii) if the applicant has substantially performed the contract within the original contractually stipulated time and (iv) if there has been a delay in handing over of site for construction on the part of the employer, in that scenario, the Courts of different foreign jurisdictions have interfered with encashment of a Bank Guarantee by the beneficiary. In an endeavour to substantiate his argument, he has referred to the following cases (i) Svenska Handels Banken Vs Indian Charge Chrome (1994) 1 SCC 502, (ii) Dwarikesh Sugar Industries Ltd Vs Prem Heavy Engineering Works 1997(2) Arb. LR 350, (iii) U.P. State Sugar Corpn Vs Sumac International Ltd (1997) 1 SCC 568, (iv) U.P. Coop, Federation Ltd Vs Singh Consultants and Engineers (P) Ltd (1988) 1 SCC 174, (v) Nangia Construction (India) Ltd Vs International Airport Authority of India, AIR 1992 Del 242, (vi) National Project Const. Corporation Vs

G. Ranjan, AIR 1985 Cal 23 and (vii) Hindustan Construction Co. Ltd Vs State of Bihar & Ors AIR 1999 SC 710.

43. Let me now, take up all the afore-said cases one after another in order to see whether any ratio is laid down therein, so as to consider the said ratio to be judicially-sanctioned exception to the general rule about prohibition on encashment of a Bank Guarantee.

44. In the case of UP State Sugar Corpn. Vs Sumac International Ltd (1997) 1 SCC 568, when by filing two applications under Section 41(b) of the Indian Arbitration Act, interim stay against encashment of Bank Guarantees was sought, the Civil Judge, Senior Division, Muzaffarnagar dismissed the applications. In revision, the applications were allowed by the High Court and an injunction was granted restraining the appellant from enforcing the Bank Guarantees. However, on appeal against the Judgment of the High Court, the Supreme Court of India held that the law relating to invocation of such Bank Guarantees is by now well - settled. When in the course of commercial dealings an unconditional Bank Guarantee is given or accepted, the beneficiary is entitled to realize such a Bank Guarantee in terms thereof irrespective of any pending disputes. The Bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a Bank Guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realization of such a Bank Guarantee. It observed that the Courts have, so far, carved out only two exceptions, namely, (i) fraud and (ii) irretrievable harm or injustice. The Court further observed that where a fraud in connection with such a Bank Guarantee would vitiate the very foundation of such a Bank Guarantee, and where allowing the encashment of an unconditional Bank Guarantee would result in irretrievable harm or injustice to one of the parties concerned, the Courts should stop encashment of a Bank Guarantee.

45. The Court held that to avail of the exception of irretrievable harm or injustice, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Citing an example, the Court observed that irretrievable injury has to be of the nature noticed in the case of Itek Corporation Vs The First National Bank of Boston etc (566 Fed Supp. 1210), wherein the exporter had sought an order terminating its liability on standby Letters of Credit issued by an American Bank in favour of an Iranian Bank as part of the contract due to commencement of the Islamic Revolution in Iran, and the Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran as there were sanctions imposed by both countries against each other under these circumstances and realization of the Bank Guarantee/Letters of credit would cause irreparable harm to the plaintiff. Thus, the Indian Supreme Court did not find any grievance in this cited-case which would cause irretrievable harm and injury to the applicant. In arriving at the above decision, the Court

referred to the case of State of Maharashtra & Another Vs M/S National Construction Company, Bombay & Another (JT 1996(1) SC 156) and observed that the rule is well established that a Bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the Bank under a performance guarantee is created by the document itself. Once the documents are in order, the Bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The Indian Supreme Court has further observed in the afore-cited case that the Courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee. The Supreme Court of India, then, in line with the case of Hindustan Steelworks Construction Ltd Vs Tarapore & Co. & Anr. (JT 1996 (6) SC 295), referred the matter to arbitration and set aside the High Court Judgment and vacated the injunction granted by the High Court.

46. In the case of Himadri Chemicals Industries Ltd Vs Coal Tar Refining Company (2007) 8 SCC 110, it was held that Bank Guarantee is an independent and separate contract and the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantee. In holding the above-mentioned view, the Court relied on the case of UP Coop. Federation Ltd Vs. Singh Consultants and Engineers (P) Ltd (1988) 1 SCC 174 and the case of UP State Sugar Corporation Vs Sumac International Ltd and dismissed the appeal upon vacating the Order of injunction against Bank Guarantee which was granted by the High Court. In dismissing the appeal, the Indian Supreme Court opined that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit; (i) while dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract, (ii) the Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer, (iii) the Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit, (iv) since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit, (v) fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation and (vi) allowing encashment of an unconditional Bank Guarantee or a Letter of

Credit would result in irretrievable harm or injustice to one of the parties concerned. In this cited - case, the Indian Supreme Court found that irretrievable injury was not caused to the appellant by a refusal to grant an order of injunction restraining the encashment of the Letter of Credit for two reasons: (i) exceptional circumstances have not been made out by the appellant which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds. A case of apprehension is not acceptable, (ii) interest of the respondent already protected by issuance of Bank Guarantee in an Admiralty Suit in respect of the same set of goods. It is to be noticed here in this cited-case that although the beneficiary of the Bank Guarantee was a foreigner who did not have any asset in India, nevertheless, the Indian Supreme Court held that only because the respondent has no assets in India would not lead the Court to hold that the appellant was entitled to an injunction on the ground that he would suffer an irretrievable injury.

47. In the case of Omaxe Const. Ltd Vs. UOI-(2004) 2 Arb LR 1985 Cal 23, an application under Order XXXIX Rules 1 and 2 of the CPC was filed seeking an order of temporary injunction in favour of the plaintiff restraining the defendants, their agents and employees from enforcing/encashing the performance guarantee. The Court found that the disputes are connected with the main underlying contract and, therefore, the Court held that they cannot have any relevance to the liability of the Bank under the guarantee given by it. Since the Bank has given unconditional Bank Guarantee, the Bank is under an obligation to pay on demand. Accordingly, the prayer for injunction was rejected by the Court.

48. In the case of UP Coop, Federation Ltd Vs Singh Consultants and Engineers (P) Ltd (1988) 1 SCC 174, the respondent filed a petition under Section 41 of the Arbitration Act 1940 in the Court of the Civil Judge, Lucknow praying for an order restraining the appellant from realizing and encashing the Bank Guarantees. The learned Civil Judge declined to issue any injunction and dismissed the application. Being aggrieved by the aforesaid decision, the respondent went up before the Allahabad High Court. The learned Single Judge of the Allahabad High Court allowed the revision petition and held that the invocation of the performance guarantees were illegal and further held the contentions of the appellant that the performance guarantees constituted independent and separate contracts between the guarantor Bank and the beneficiary and created independent rights, liabilities and obligations under the guarantee bonds themselves, as being technical pleas. In appeal, against the above Judgment, the Supreme Court of India, after referring extensively to English and Indian cases on the subject, held that the guarantee must be honoured in accordance with its terms. The Supreme Court of India observed that the Bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The Bank must pay according to the tenor of its guarantee on demand without proof or condition. The High Court proceeded on the

basis that this was not an injunction sought against the Bank but against the appellant. But the net effect of the injunction is to restrain the Bank from performing the Bank Guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. There cannot be any basis in the case for apprehension that irretrievable damage would be caused, if any. Accordingly, the appeal was allowed upon setting aside the High Court's Judgment.

49. In the case of Svenska Handels Banken Vs Indian Charge Chrome (1994) 1 SCC 502, the Supreme Court of India once again reiterated that a confirmed Bank Guarantee/irrevocable Letter of Credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. It was observed by the Apex Court of India that irretrievable injury has to be of the nature noticed in the case of Itek Corporation Vs The first National Bank of Boston etc. (566 Fed Supp. 1210). On the question of fraud the Court confirmed the observations made in the case of UP Cooperative Federation Ltd and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else. Appeal, resultantly, was accepted by the Supreme Court of India with costs, upon setting aside the Judgment and Order of the High Court.

50. In the case of Dwarikesh Sugar Industries Ltd Vs Prem Heavy Engineering Works 1997 (2) Arb. LR 350, the Court, upon referring to the case of case of UP State Sugar Corporation, held that fraud has to be an established one. In the absence of established fraud and not a mere allegation of fraud, and that also having been made only in the injunction application, the Court could not, in the present case, have granted an injunction relating to the encashment of the Bank Guarantees. Secondly, irretrievable injury has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution. The Indian Supreme Court further held that in encashment of Bank Guarantee, the applicability of the principle of undue enrichment has no application. The appeal was allowed by the Supreme Court enabling the beneficiary to encash the Bank Guarantee and the Judgment and Order of the Allahabad High Court was set aside.

51. In the case of Nangia Construction (India) Ltd Vs International Airport Authority of India AIR 1992 Del 242, Bank Guarantee was given in relation to possession of land. The Court held that when the land is with the respondent/authority and there is no hindrance by the petitioner, the Court did not think the Bank Guarantee can be encashed because the Bank could only be made liable if it had been the case of the respondent/authority that the land has not been handed over to the respondent. Since it is stated at the Bar that the possession of the land has been taken over by the respondent/authority, the authority cannot be

permitted to enrich itself by also encashing the Bank Guarantee, for which the security was taken. Therefore, taking these factors into consideration, the Court was of the view that special equity is in favor of the petitioner because if the respondent is allowed to encash the Bank Guarantee it would amount to irretrievable injustice to the petitioner. It is opined by this Court that since the Judgment was passed by the Delhi High Court, it is highly likely that an appeal might have been preferred by the Nangia Corporation (petitioner), but the learned Advocate Mr Akhtar Imam could not provide this Court with the information.

52. In the case of National Project Const. Corporation Vs G. Ranjan AIR 1985 Cal 23, it was a conditional Bank Guarantee and the trial Court injuncted its encashment. However, the Calcutta High Court held that there is no prima facie reason as to why the Bank Guarantee cannot be enforced by the beneficiary subject, of course, to the fulfillment of the conditions as laid down therein. Beneficiary' right to realize that balance is not dependent upon adjudication of the dispute raised and proposed to be referred to Arbitration. To this extent, the Bank Guarantee can very well be enforced on its own terms irrespective of any other consideration and, accordingly, injunction was vacated by the Court.

53. In the case of Hindustan Construction Co. Ltd Vs State of Bihar and Others AIR 1999 SC 710, the suit was filed by the beneficiary against the Bank. When the issuing Bank declined to encash the Bank Guarantee on the ground that invocation of Bank Guarantee was not done by the person who is the actual beneficiary, injunction was granted by the Court holding that invocation of Bank Guarantee was done by the wrong person. In view of the scenario of the afore-cited case that the suit was filed by the beneficiary of the Bank Guarantee, not by the third party, and the beneficiary being a party to this separate, distinct and independent contract of Bank Guarantee, the beneficiary was competent to approach the Court invoking civil jurisdiction. He did not invoke Arbitration Act. When the Court found that the Bank Guarantee was furnished to the Chief Engineer and there is no definition of Chief Engineer in the Bank Guarantee, nor is it provided therein that Chief Engineer would also include Executive Engineer, the Bank Guarantee could be invoked by none except the Chief Engineer, the invocation was, thus, wholly wrong and the Bank was under no obligation to pay the amount covered by the "Performance Guarantee" to the Executive Engineer.

54. After examining all the cases referred to and relied upon by the petitioner, it surfaces that none of the above-examined cases discussed the provisions of the Uniform Rules for Demand Guarantee, ICC Publication No. 758, particularly, Article 4(b) (Bank Guarantee is irrevocable) Article 5 (independence of guarantee) and Article 35 (jurisdiction of Courts). More importantly, all the above cases were referred to by the learned Advocate for the petitioner in a bid to show to this Court that apart from fraud exception, there are other judicially-sanctioned exceptions which permit the Courts to stop encashment of a Bank Guarantee. But, upon carrying out the above meticulous examination, this Court finds (i) fraud

and (ii) irretrievable loss as the judicially-sanctioned exceptions to the general rule regarding prohibition upon encashment of Bank Guarantee. In all these cases, it was held that no injunction can be granted against Bank Guarantee unless a clear case of fraud is established and, secondly, encashment shall lead to irretrievable damage which cannot be reimbursed or recovered if ultimately succeeds. The second judicially-sanctioned principle is nothing new in common-law jurisdiction. The Courts of our country unhesitatingly grant injunction over any civil dispute, including contractual nature of civil dispute such as the Bank Guarantee, if the applicant can satisfy the Court that (i) there is an arguable case for the applicant and (ii) the loss cannot be recovered or reimbursed.

55. In this case, the petitioner's only plea is that encashment of Bank Guarantees would badly damage its business reputation amounting to irretrievable harm to the petitioner. However, this Court does not find the above plea to be of such a grave nature which would have a severe impact causing crippling of the petitioner's business entity, because the petitioner would not be blacklisted to participate in the future tender/bid of any country due to encashment of the Bank Guarantees in question. In any event, if the petitioner succeeds in arbitration, he will be compensated for the loss, if any suffered.

56. Now, let me embark upon the cases of our jurisdiction which were referred to and relied upon by the learned Advocate for the petitioner in an expectation to persuade this Court that since previously all the higher Courts of Bangladesh i.e. the Single Bench as well as the Division Bench of the High Court Division and the Appellate Division of the Supreme Court of Bangladesh, have granted injunction over encashment of the Bank Guarantees in numerous cases, the present presiding Judge of this Single Bench of the High Court Division should not make an exception thereto.

57. In the case of Summit Bibiyana Vs Bangladesh 5 CLR (HCD) (2017) 354, a Division Bench presided over by his Lordship Justice Md. Nuruzzaman held that the decisions cited before the Court were passed under Order 39 Rules 1 and 2 of the CPC, not under Section 7Ka(1) (Uma) of the Arbitration Act, 2001. Arbitration law is a special law and shall prevail over general law (para-40). Injunction was granted over encashment of the Bank Guarantee by the Court. It is to be noticed that because of the failure of the learned Advocates to properly assist the Court in the afore-cited case, no issue was framed by the Court on whether the Court is empowered to stop encashment of a Bank Guarantee by issuing an Order of Injunction in an application under Section 7A of the Arbitration Act, 2001; secondly, no discussion on the provisions of the Uniform Rules for Demand Guarantee, ICC Publication No. 758 was made; thirdly, no discussion on Bank Guarantee being independent and separate contract and the fact that any dispute existing in relation to the underlying agreement cannot be a ground for passing an order of injunction to restrain encashment of Bank Guarantee and such

encashment of Bank Guarantee shall cause irretrievable harm or injustice to the party concerned, i.e. the beneficiary of the Bank Guarantee were made in this case. Most importantly, the learned Advocates of both the sides utterly failed to place before the Court that our Appellate Division, in the case of Fatullah Agro-product Industries Vs BADC 17 BLD (AD) 49, having dealt with the same fact, i.e. a case arising out of the Arbitration Act, refused to stop encashment of a Bank Guarantee upon holding that;

> *It is fairly well settled that Courts are reluctant to interfere with commercial transactions entered into by the contending parties through performance of guarantee or Letter of Guarantee. The arbitration case is in respect of the impugned termination of the agreement, not in respect of the Bank Guarantee and the raw materials in question. In case of success of the petitioner in the arbitration proceedings, his threatened loss may be adequately compensated by money and as such there is no case for injunction.*

58. In the case of Desktop Computer Vs ST Electronics 15 BLC 644, a Single Bench of this Court, presided over by his Lordship Justice Syed Refaat Ahmed, found the Bank Guarantees to be conditional and are to a great degree and somewhat inextricably linked with the underlying contractual arrangements between the petitioner and the respondent No. 1 (Para 3). His Lordship found that the Bank Guarantees were ineffective as they were in violation of the relevant laws of Bangladesh and held that the Bank Guarantees are prohibited by law, particularly, the Foreign Exchange Regulation Act and, accordingly, the Court restrained encashment of the Bank Guarantees. It is worthwhile to mention here that in this case, because of the failure of the learned Advocates to properly assist the Court in the afore-cited case, no issue was framed by the Court on whether the Court is empowered to stop encashment of a Bank Guarantee by issuing an Order of Injunction in an application under Section 7A of the Arbitration Act and no discussion on the provisions of the Uniform Rules for Demand Guarantee, ICC Publication No. 758 was made and, consequently, the Court missed to consider the crucial aspect of a Bank Guarantee that it is an independent and separate contract and the fact that any dispute existing in relation to the underlying agreement cannot be a ground for passing an order of injunction to restrain encashment of Bank Guarantee and, also, whether such encashment shall cause irretrievable harm or injustice to the party concerned, i.e. the beneficiary of the Bank Guarantee.

59. In the case of Drileltee-Maxwell Joint Venture Vs GTCL 21 BLC (HCD) 122, a Single Bench presided over by his Lordship Justice AKM Abdul Hakim, in an application under Section 7A of the Arbitration Act, stopped encashment of Bank Guarantee. In this case as well, because of the failure of the learned Advocates to properly assist the Court in the afore-cited case, there was no findings of the Court on the separablility and independence of Bank Guarantee from the underlying contract and no

issue was framed by the Court on whether the Court is empowered to stop encashment of a Bank Guarantee by issuing an order of Injunction in an application under Section 7A of the Arbitration Act. Also, no discussion on the provisions of the Uniform Rules for Demand Guarantee, ICC Publication No. 758 was made and, consequently, the Court missed to give its findings that a Bank Guarantee being independent and separate contract and the fact that any dispute existing in relation to the underlying agreement cannot be a ground for passing an order of injunction to restrain encashment of Bank Guarantee or whether such encashment would cause irretrievable harm or injustice to the party concerned, i.e. the beneficiary of the Bank Guarantee.

60. In the case of Dhaka Telephone Company Limited Vs Bangladesh and others, (which is an unreported Judgment and Order dated 22.10.2019 passed in Writ Petition No. 11747 of 2015), a Writ Petition was filed challenging cancellation of PSTN license of the petitioner. BTRC issued letter seeking encashment of Bank Guarantee while the writ petition was pending. The petitioner, then, filed application for stay. Since there was a dispute on the amount of claim of BTRC, the Court held that BTRC cannot claim encashment of Bank Guarantee furnished by the petitioner beyond the admitted amount. Although the Court acknowledged that it has been decided by our Appellate Division repeatedly that the Bank Guarantees are separate contracts, but nevertheless the Court partially allowed the application and stayed encashment of Bank Guarantees beyond Tk. 2,20,12,369.00. This is, again, to be mentioned here that because of the failure of the learned Advocates to properly assist the Court in the afore-cited case, no issue was framed by the Court in the cited-case on whether the Court is empowered to stop encashment of a Bank Guarantee by issuing an order of injunction in an application under Section 7A of the Arbitration Act and no discussion on the provisions of the Uniform Rules for Demand Guarantee, ICC Publication No. 758 was made and, consequently, no findings of the Court on Bank Guarantee being independent and separate contract and the fact that any dispute existing in relation to the underlying agreement cannot be a ground for passing an order of injunction to restrain encashment of Bank Guarantee came out. Also, there was no finding as to whether such encashment shall cause irretrievable harm or injustice to the party concerned, i.e. the beneficiary of the Bank Guarantee.

61. It follows that the case-laws of our jurisdiction and foreign jurisdiction referred to and relied upon by the learned Advocate for the petitioner do not help the petitioner to obtain an Order of Injunction on encashment of the Bank Guarantees in question for the following reasons:

(1) These two Bank Guarantees in question are independent and separate contracts between the Bank and the PGCB. Since the petitioner is not a party to these contracts (i.e. of the two Bank Guarantees), he cannot challenge the action of a party (the PGCB) to the said contracts (i.e. action of the beneficiary of the Bank Guarantees).

(2) Only the party to a Bank Guarantee (i.e. the Bank) is competent to raise a valid and bonafide dispute on the encashment of a Bank Guarantee, for example, (i) if a wrong person invokes the encashment of the Bank Guarantee or (ii) if the Bank finds any other discrepancy in the Bank Guarantee.

(3) Since all the Banks all over the world usually issue the Bank Guarantees specifically incorporating the conditions that (i) it is irrevocable, (ii) it is a separate and independent contract from the underlying contract, (iii) existence of any dispute between the parties to the underlying contract cannot be a ground by the Bank or its customer (at whose instance the Bank Guarantee was issued) to stop its encashment, (iv) the Bank is in no way concerned with or bound by the underlying relationship and (v) if any dispute arises between the Bank and the beneficiary, it shall be adjudicated upon by the competent civil Court located within the jurisdiction of the Bank, therefore, there is no scope to apply the provisions of Section 7A of the Arbitration Act, unless an arbitration clause is incorporated by the Bank and the beneficiary in the separate contract of Bank Guarantee. The first and foremost requirement for invoking arbitration is to have an arbitration clause in the contract. But in these two Bank Guarantees (contracts), it has specifically been incorporated that the dispute shall be resolved through civil Court and, therefore, there is no scope for even the Bank to commence arbitration if any discrepancy was found by the Bank.

(4) No case of irretrievable harm or irreparable loss was made out in this case to satisfy this Court that the harm or loss is not reimbursable, reparable or recoverable. In fact, this Court found that there would be no harm or loss for the petitioner if the Bank Guarantees are encashed.

62. It leads me to hold that there is no substance in the arguments placed by the learned Advocate for the petitioner and the Rule is liable to be discharged. Accordingly, as per the terms of the instant Rule, after wrapping up the hearing of this case, the learned Advocate for the petitioner was informed about the decision of this Court by giving an opportunity to pass this Court's decision onto the petitioner that the petitioner is now at liberty to non-prosecute the Rule, otherwise there shall be a cost of TK. 10,00000/- (ten lacs) as per the terms of the Rule, which is reproduce herein below:

> *Taking into the consideration the submissions of the learned Advocate for the petitioner for issuance of a Rule and granting interim order, I am of the view that there is apparently no legal issue for examination by this Court by issuing a Rule in this application. However, upon relying on the humble prayer of the learned Advocate for the petitioner that he shall be able to differentiate the facts of this case from the facts of the reported cases, this Court is inclined to issue a Rule subject to the condition that at the*

time of hearing of the substantive application if the petitioner fails to satisfy this Court regarding maintainability of this application, he shall be under an obligation to non-prosecute the application. If he does not non-prosecute this application and wishes to receive a full-fledged Judgment, in that event, this Court shall slap an exemplary costs of Tk. 10,00,000/- (ten lacs) upon the petitioner.

Accordingly, let a Rule be issued calling upon the opposite party to show cause within 06.01.2010 as to why they shall not be restrained from en cashing the Bank Guarantees Nos. REBDAK900671 and REBDAK 900674 dated 17.01.2019, and amendments vide letters dated 24.03.2019 and 20.06.2019 respectively (Annexures C, C1, C2 and C3) till disposal of the dispute through arbitration and/or such other or further order or orders passed as to this Court may seem fit and proper.

Pending hearing of the Rule, the opposite party is hereby restrained from en-cashing the Bank Guarantees Nos. REBDAK900671 and REBDAK 900674 dated 17.01.2019 and amendments vide letters dated 24.03.2019 and 20.06.2019 (Annexures C, C1, C2 and C3) for a period of 21 (twenty one) days i.e. till 06.01.2020.

63. The legal issues concerning prohibition on encashment of a Bank Guarantee and Letter of Credit are no longer a res nova and, therefore, this Court usually, at the time of motion hearing, puts its best efforts to convince the learned members of the Bar not to press the application on the said issue for obtaining a Rule. Given the prevailing trend of the learned members of the Bar to persistently insist upon this Court to issue a Rule, despite this Court's verbal expression as to not having any merit in the case, this Court, in an endeavour to mitigate the situation, was thinking for long to invent a device to issue Rule, instead of rejecting the petition in limine, so that the members of the Bar cannot complain of destroying their profession. Because, now-a-days, it has been a trend of the learned members of the Bar to castigate an Hon'ble Judge as a closefisted Judge or miser-Judge, (K…cb wePvicwZ) or a rigid-Judge (DKzb evQv wePvicwZ) or an over-intellectual Judge (†ekx cwÛZ wePvicwZ) etc, if a motion is rejected outright by the Court. Against the aforesaid backdrop, this Court, in an endeavour to strike a balance, has introduced issuance of a Rule in the afore-quoted terms, so that after a case is placed by the learned Advocate at length before the Court, if the learned Advocate fails to satisfy the Court about the merit of the case, he voluntarily prays to the Court for non-prosecution the Rule. This Court in the cases of (1) Shanta Chandra Vs Bangladesh 12 ALR 2018(1) HCD 243 (relevant para-30), (2) Chittagong Dry Dock Ltd Vs MT Fadl-E Rabbi 15 ALR 2019(1) HCD 273 (relevant para-31) and (3) Shahabuddin Vs Bangladesh Bank 2019 ALR (HCD) Online 199 (relevant Para-26) gibed the learned members of the Bar for failing to play the expected ideal role as the officers of this Court.

64. In that line, the above-quoted Rule was issued on 15.12.2019 and the petitioner was allowed 21 (twenty one) days time from the date of issuance of the Rule to show to this Court that the ratio laid down in the latest decisions of this Court, namely, the cases of (1) Southern Solar Power Ltd and another Vs Bangladesh Power Development Board and others reported in 2019(2) 16 ALR (HCD) 91 and (2) Frigo Mekanik Vs Bangladesh Milk Producers' Cooperative Union Ltd. 2019(2) 16 ALR (HCD) 357, are not applicable in this case. Hence, the petitioner was under an obligation to take necessary preparation accordingly. When the matter appeared in the list after 21 (twenty one) days on 06.01.2020 allotting a time-slot for one hour from 3pm to 4pm, the learned Senior Advocate for the petitioner sought adjournment for taking preparation enabling him contesting the Rule wholeheartedly. Thereafter, on two further occasions, the learned Senior Advocate for the petitioner was allowed time to get fully prepared. Eventually, the learned Senior Advocate having been assisted by his very able junior Ms Rashna Imam came up with a huge bundle of case-laws and this Court with great patience had to go through all these case-laws. In other words, the petitioner was allowed to place his case at length. After hearing his submissions for a number of days, when this Court expressed its view that there is no merit in the Rule and the petitioner may opt to non-prosecute the Rule to save the consequential costs, the learned Advocate for the petitioner Ms Rashna Imam expressed her desire to receive a full-fledged Judgment containing all the statements and submissions made by them as well as recording this Court's findings and observations in detail on the case-laws referred to by them. That is how, this Court was obligated to pen down this lengthy Judgment on an issue which is well-settled, not only in our jurisdiction but also in most of the common-law countries, that the encashment of a Bank Guarantee cannot be restrained on the ground of financial loss or business reputation, because the financial claim can always be resolved in the arbitration and, more so, the Bank Guarantees being separate and distinct from the underlying contract, there is no scope for a third party to raise a dispute about a Bank Guarantee. Since this Court is being constrained to author this detailed Judgment despite this Court's earnest effort to avoid it (by making repeated verbal observations in the open-Court in course of this case's hearing that the issue being no more a res integra, there is no need of de novo hearing for its further examination and consideration by this Court), I find it appropriate to slap costs of TK. 10,00000/- (ten lacs) upon the petitioner as per the terms of issuance of the instant Rule.

65. Before parting with this Judgment, it should be jotted down here that, in handing down this long Judgment, this Court has immensely been benefitted by the emphatic assistance rendered by the learned Advocate for the PGCB, Mr. Margub Kabir. His written submissions, which were though succinct but applicative, were very useful in rebutting the arguments pleaded by the learned Advocates for the petitioner.
In the result, the Rule is discharged with a cost of TK. 10,00000/- (ten lacs). "

বাদী ব্র্যান্ড উইন কর্পোরেশন লিমিটেড এর সালিশী আইন, ২০০১ এর ৭(ক) মোতাবেক দাখিলীয় দরখাস্তটি গুরুত্বপূর্ণ বিধায় নিম্নে অবিকল অনুলিখন হলোঃ-

IN THE COURT OF THE DISTRICT JUDGE, DHAKA
(SPECIAL ORIGINAL JURISDICTION)

ARBITRATION MISCELLANEOUS CASE NO. 597 OF 2015

IN THE MATTER OF:

An application under Section 7Ka of the Arbitration Act, 2001.

-AND-

IN THE MATTER OF:

Brandwin Trading Corporation Limited, registered office at Amin Court (7th Floor), 62-63, Motijheel Commercial Area and corporate office of MIDAS Center (7th Floor), House No. 5, Road No. 16 (New and Old 27), Dhanmondi, Dhaka-1209, represented by Power of Attorney holder, namely Alok Barua.

--------- ***PETITIONER.***

1. *Bangladesh Chemical Industries Corporation (BCIC), BCIC Bhavan, 30-31, Dilkusha C/A, Dhaka- 1000. represented by its Chairman;*
2. *Janata Bank Limited, Foreign Exchange Corporate Branch, 57, Purana Paltan, Dhaka-1000.*

--------- ***OPPOSITE PARTIES.***

The humble petition of the petitioner above named respectfully-

"1. That the petitioner is a limited company incorporated under the Companies Act, 1994 having its address given at the cause title. The petitioner was incorporated as a limited company with the objective of carrying out various sort of business including supplying fertilizers to the government from abroad or local market. The petitioner is represented by Attorney holder issued by the Managing Director of the Company.

2. That the opposite party No.1 is Bangladesh Chemical Industries Corporation (BCIC), fully owned by the Ministry of Industries, represented by its Chairman. The opposite party No.2 is the Guarantee issuing bank, Janata Bank Limited and the addresses of the petitioner and opposite parties are stated in the casue tilte which are correct addresses for the purpose of service of notices, affidavit etc.

3. That the opposite party No.1 in course of its business announced an open tender on 07.07.2014 vide memo No. PUR-3,2604/2014-2015 for procurment of 1,00,000 MT granular urea fertilizer to be delivered in Chittagong port in maximum 2(two) shipments on liner terms basis and carrying of bagged urea to different goddowns at the risk and responsibility of the bidder.

4. That the petitioner, as local agent of M/S Ruixing Group Corporation Limited, a fertilizer manufacturer of Ruixing Industrial Park, Dongping, Shandong, China, Participated in the tender, came out as the successful bidder and as such received 4(four) separate work orders from the opposite party No. 1 on 10.09.2014 vide memo No. PUR-3,2603/2014-2015, No. PUR-3,2603/2014-2015/565, No. PUR-3,2603/2014-2015/566 and No. PUR-3,2603/2014-2015/567 respectively for supplying the said 25,000 MT granular urea fertilizer though Chittagong port.

5. That it was stated in the above work order bearing memo No. No. PUR-3,2603/2014-2015/564, No. PUR-3,2603/2014-2015/565, No. PUR-3,2603/2014-2015/566 and No. PUR-3,2603/2014-2015/567 respectively all dated 10.09.2014 that the petitioner has to furnish performance security in the form of bank guarantee issued by any schedule bank to the tune of 5% of the total CRF (C) value for satisfactory execution of contract and as such the petitioner, as local agent of the said Ruxing Industrial park has furnished the same within the due time limit; i.e. within 21.09.2014.

6. That the said manufacturer M/S Ruixing Group Corporation Limited was causing delay to supply the said granular urea fertilizer and so this petitioner was asked to supply the said urea fertilizer. Therefore the petitioner agreed to supply the same and then vide letters dated 21.01.2015 and 22.01.2015 applied to the opposite party No.1 to issue work orders in favour of the petitioner by amending the name of the beneficiary in the letter of credit (L/C) and therefore upon accepting the request of the petitioner the opposite party No.1 issued a letter of acceptance on 26.01.2015 vide memo No. PUR-3,2603/2604/2605/2606/273 stating that L/C amendments fees amounting to Tk. 44,60,070.50 (Taka forty four lac sixty thousand seventy and paisa fifty) only need to be paid by the petitioner along with an L/C openeing charge of Tk. 75,00,000.00 (Taka seventy five lac) only and also the performance guarantees in the name of the petitioner.

7. That the opposite party No.1 therefore on 23.02.2015 published a notice notifying that shipment for the said urea fertilizer has been extended up to 30.04.2015 and the performance guarantees must be amended in the name of the petitioner and must be submitted to the opposite party No. 1.

8. That the petitioner in accordance with the conditions of the said letter of acceptance bearing memo No. PUR-3,2603/2604/2605/2506/273 dated 26.01.2017 submitted 4 performance guarantees No. 03/2015c 04/2015, 05/2015 and 06/2015 all dated 03.03.2015 for the amount of USD 503,963, USD 473,750, USD 508,679 and 473,750 respectively in favour of the opposite party No. 1 from the opposite party No. 2 bank.

9. That the petitioner also notified to the opposite party No. 1 vide letter dated 02.03.2015 that it has submitted the payment order of TK. 44,60,070.50 (Taka forty four lac sixty thousand seventy and paisa fifty) as L/C amendment charge and Tk. 75,00,000.00 (Taka seventy five lac) only as L/C opening charge.

10. (Taka seventy five lac) That after receiving payment of all the required charges and the said performance guarantees in the form of bank guarantees in the form of bank guarantees from the petitioner, the opposite party No.1 signed 4(four) separate agreements bearing memo Nos. PUR-3,2603/2014-2015/CT-597(F)/688, PUR-3,2603/2014-2015/CT-597(F)/689, PUR-3,2603/2014-2015/CT-597(F)/690 and PUR-3,2603/2014-2015/CT-597(F)/691 respectively all dated 05.03.2015 with the petitioner wherein it was stated that the granular urea fertilizers needs to be shipped within 30.04.2015.

11. That the petitioner thereafter for importing the said urea fertilizers have opened a number of L/Cs in the opposite party No. 2 Bank (Janata Bank Limited) wherein applicant has been named as BCIC and this petitioner as the beneficiary.

12. That the petitoner for successful importation of the said urea fertilizer wrote 4 letters all dated 30.03.2015 to the opposite party No.1 seeking some amendments in the L/C as soon as possible but the opposite party No.1 through letter dated 06.04.2015 bearing memo No. 3,2603/2014-2015/1034 refused to amend the L/C stating that inclusion of the new manufacturer's name in the L/C is beyond the terms of the contract wherein there was no particular clause in the contract which states that such amendment is not allowed.

13. That the petitioner on 07.04.2015 and 12.04.2015 again sent letters to the opposite party No.1 seeking some amendments in the said L/Cs like inclusion of another 2 Chinese manufactures in the said contract since without such inclusion in the L/C it has become impossible for the petitioner to ship the urea fertilizer in due time. It is pertinent to mention here that the said contract does not bar inclusion of any such manufacturer as long as the country of origin remains the same; i.e. the country of origin remains China.

14. That the petitioner thereafter wrote 2 letters to the opposite party No.1 both dated 08.04.2015, asking for its confirmation of nomination of the vessel "MV C. FRIEND (EX J. SUDA0" and MV MELPOMENT" since each of the ships will caryy 25,000 MT granular urea from China to Chittagong, Bangladesh.

15. That in reply to the petitioner's above letters dated 12.04.2015, the opposite party No.1 vide memo No. 3,2603/2014-2015/1093 dated 12.04.2015 stated that the petitioner needs to

name the manufacturer to effect supply under subject nomination and time of starting of the bagging otherwise there would be no positive response from the opposite party No.1's side. It is pertinent to mention here that the petitioner had already notified about the name of the manufactures vide its letters dated 30.03.2015 and 07.04.2015 but the opposite party No.1 repeatedly kept asking for the names of the manufactures.

16. That the petitioner on 15.04.2015 and 16.04.2015 wrote separate letters to the opposite party No.1 asking for its confirmation of nomination of the vessel "MV WAN YANG 36" respectively as each of these ships will carry 25,000 MT granular urea fertilizer from China to Chittagong Bangladesh.

17. That upon receipt of the said L/Cs the petitioner has opened back to back L/C s from the same bank by keeping lien of the opposite party No.1's L/Cs paying a huge amount of commission and charges for the same. Therefore, the ultimate suppliers; i.e. the beneficiary of petitioner's L/Cs have procured the said urea fertilizers and supplied the same to different Chinese ports for shipment to Bangladesh through the nominated vessels.

18. That in reply to the petitioner's letters dated 15.04.2015 and 16.04.2015 the opposite party No.1 on 16.04.2015 vide Memo No. PUR-3,2603/2014-2015/1117 stated that the opposite party No.1 does not know against which contract the vessels "MV ABM DISCOVERY" and MV WAN YANG 36" have been nominated and therefore asked the petitioner to provide the name of the manufacturer. The opposite party No.1 repeatedly replied to the petitioner's letters in the same language even though the petitioner had already notified him about the name of the manufactures vide its letters dated 30.03.2015 and 07.04.2015.

19. That the petitioner lastly on 19.04.2015 wrote 2 letters to the opposite party No.1 asking for its acceptance of the above said vessels alongwith a request to depute approved nominated PSI agent to inspect the fertilizers in different Chinese ports form where shipment of the same will be made to Bangladesh.

20. That the opposite party No.1 after receiving the petitioner's letter dated 19.04.2015, replied to the petitiner on 20.04.2015 vide memo No. PUR-3,2603/2014-2015/1128 stating that the opposite party No.1 is unable to accommodate the petitioner's request since the request made is beyond the mutually agreed terms and conditions of the contract. However, the opposite party No. 1 in any of its letters did not state any reason as to why such request from the petitioner is beyond the scope of the contract or which particular clause of the contract would be breached had this petitioner's requests were accepted.

21. That the petitioner is supposed to ship the said urea fertilizer within 30.04.2015 but due to the reluctant attitude of the

opposite party No.1 no such shipment was made till today and as such the petitioner finally wrote to the opposite party No.1 on 22.04.2015 explaning its position and all the events that took place regarding importation of the said fertilizers and requested the opposite party No.1 to accept its proposals for amendment in the L/Cs extend the time for shipment, confirm nomination of vessels and arrenge preshipment inspection through the opposite party No.1's nominated agent.

22. That the opposite party No.1 vide its letter dated 26.04.2015 bearing memo No. PUR-3,2603/2014-2015/1172 replied to the petitioner's letter dated 30.04.2015 stating that there is no further scope to consider the requests made by the petitioner.

23. The opposite party No.1 therefore on 30.07.2007 wrote to the petitioner stating that by failing to supply the said urea fertiliser in the time the petitioner has breached the said contract and also asked the petitioner to show cause within 7(seven) days as to why said contracts, stated above, shall not be terminated and why the bank guarantees submitted by the petitioner shall not be forfeited.

24. That the opposite party No.1 appears to take the view that the petitioner's legitimate claim for accept its proposals for amendment in the L/Cs, extend the time for shipment, confirm nomination of vessels and arrange pre-shipment inspection through BCIC's nominated agend is not acceptable since the opposite party No.1 is of the view that this will cause a breach of the terms of the said contracts which were mutually agreed by the parties. However, the petitioner contends that as a makeshift supplier of the said urea fertilizer the opposite party No.1 is under obligation to accept the legitimate requests of the petitioner for successful execution of the 4(four) agreements. Furthermore, the petitoner also contends that since there are three manufacturers listed in the agreement and country of origin was named China, acceptance of further manufacturers of furtilizers from the same country (i.e China) and shipping the same from different Chinese ports to Chittagong, Bangladesh through the nominated vessels upon proper preshipment inspection would not breach the terms or conditions of the said agreements because the opposite party No.1 in its tender invitations has expressly stated that Request of change of country of origin other than the origin mentioned in the offer shall not be entertained/consider later on. Therefore, a dispute has arisen between the parties which is thereby referred to arbitral triabunal by this petitioner on 05.08.2015 and accordingly served an arbitration notice dated 05.08.2015 under Clause 24 (i.e. arbitration clause) of the said agreements in order to resolve the dispute. However, the opposite party No.1 did not reply to such notice till date.

25. That on 12.08.2015 the officials of the opposite party No.1, wrote 4 (four) separate letters bearing memo No. (i) BCIC/AC(bank)/404.06/87.212/129,(ii)BCIC/AC(Bank)/404.06/87. 212/132, (iii)BCIC/AC (Bank)/404.06/87.212/132, (iii)BCIC/AC (Bank)/404.06/87.212/132 and (iv) BCIC/AC(Bank)/404.06/ 87.212/130 respectively to the opposite party No.2 seeking encashment of the bank guarantees submitted by the petitioner.

26. That it is stated that all the 4(four) agreements stated above are identical in terms of the conditions and each of them signed between the parties for supplying 25,000 MT granular urea fertilizer. All the agreements have the following clause incorporated as arbitration clause:

Clause 24 ARBITRATION

24.01 The Purchaser and the Supplier/Contractor and the Supplier/Contractor shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connectgion with the Order/Contract.

24. 02 If the Purchaser and the Supplier/Contractor have not been able to resolve the order/contract dispute amicably through direct negotiation, the dispute may be referred to the award of a sole arbitrator to be agreed by the parties, failing which the same shall be referred to arbitration by 2(two) arbitrators, one to be nominated by the Purchaser and the other by the Supplier/Contractor. In the case of the said arbitrators not agreeing them, the same shall be referred to an umpire to appointed by the arbitrators in writing before proceeding with references. The decision/award of the sole arbitrator or of the arbitrators or of the umpire as the case may be shall be final and binding on the parties. The provisions of Arbitration Act, 2001 and Rules there under and any statutory modification thereof shall be deemed to apply to the said arbitration.

27. That it is submitted that if the opposite party No.2 accepts opposite party No.1's request for enchasing the said bank guarantees the arbitration proceedings initiated by this petitiner would be rendered infructurous and therefore interference from this Hon'ble Codurt is necessary for securing ends of justice.

28. That it is submitted that since the parties have arbitration agreement and the pettioner issued its letter invoking the arbitration agreement (Clause 24 of the said agreements), the learned Court has special statutory jurisdiction under Section 7Ka of the Arbitration Act, 2001 to pass necessary order(s) to preserve the subject matter of the dispute.

29. That it is submitted that the subject matter of the ***arbitration would be amongst others, the Bank Guarantee issued by opposite party No. 2 bearing Memo No. 03/2015, 04/2015, 05/2015 and 06/2015 all dated 03.03.2015 for the amount of USD 503,963, USD 473,750, USD 508,679 and 437,750 all dated 03.03.2015 respectively and as such the subject matter of the arbitration may kindly be preserved till conclusion and determination of the dispute between the parties through arbitration proceeding.*** *It is submitted that if the subject matter is not preserved as prayed for, the arbitration proceeding as well as the instant proceedings shall become infructuous.*

30. That it is submitted that the application is bona fide and has been filed only for the purpose of preservation of the subject matter of dispute till adjudication by an arbitral tribunal in accordance with the procedure set out in Clause 24 (arbitration clause) of the said agreements all dated 05.03.2015. If the order as prayed for is not passed, the whole purpose of resolving the pending dispute through arbitration will be frustrated and the petitioner prejudiced and shall suffer irreparable loss and injury.

31. That it is submitted that the petitioner has a strong prima facie c ase and balance of convenience and inconvenience is absolutely in favour the petitioner and against the opposite parties No.1 and 2. If the order as prayed for is not passed, the petitioner shall suffer irreparable loss and injury and the whole purpose of arbitration as well as this application shall be frustrated.

32. That the cause of action arose in Dhaka since the said agreements bearing Memo No. PUR-3.2603/2014-2015/CT-597(F)/688, PUR-3.2603/2014-2015/CT-597(F)/689, PUR3.2603 /2014-2015/CT-597(F)/690 and PUR-3.2603/2014-2015/CT-597(F)/691 all dated 05.03.2015 were singed and executed in Dhaka; the bank guarantee have been deposited in favour of the opposite party No.1 having office at Dhaka and those are being kept under the custody of opposite party No.2 at Dhaka; the said 4(four) letters by the opposite party No.1 bearing memo No. (i) BCIC/AC(Bank)/404.06/87.212/129 (ii) BCIC/AC(Bank)/404.06/ 87.212/132, (iii) BCIC/AC(Bank)/404.06/87.212/132 and (iv) BCIC/AC(Bank)/404.06/87.212/130 all dated 12.08.2015 seeking encashment of the said bank guarantees were issued by the Opposite Party No.1 from Dhaka; the Notice to form an arbitral

tribunal was delivered at Dhaka and therefore this learned Court has territorial jurisdiction over the subject matter of the dispute.

33. That the petitioner by a separate Firisti has filed a list of documents which are photocopies in support of this petition. The petitioner craves leave of the Court to swear affidavit by this photocopy of the documents. The petitioner undertakes that it will file all the originals which it is supposed to have in course of business at the time of hearing. The petitioner also craves leave of the learned Court to file additional documents, if required, at the time of hearing."

গুরুত্বপূর্ণ বিধায় ICC Uniform Rules for Demand Guarantees (URDG) ICC Publication No. 758 (2010) নিম্নে অবিকল অনুলিখন হলোঃ

Icc uniform rules for demand guarantees (urdg)
Icc publication no. 758 (2010)

INTRODUCTION

The Uniform Rules for Demand Guarantees sets out the roles and responsiblities of all parties at each key stage of a demand guarantee, and reflects "best practice" in the guarantee business. The last publication came into effect on July 1st, 2010 and supersedes the first 1992 rules.

It is the goal of URDG 758 to encourage acceptance in the use of demand guarantees worldwide and take the legitimate interest of the applicant, the guarantor and the beneficiary and balance them with a guarantee or a counter-guarantee, as the case may be.

Article 1

Application Of URDG

a) The Uniform Rules for Demand Guarantees ("URDG") apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them.

b) Where, at the request of the counter-guarantor, a demand guarantee is issued subject to the URDG, the counter-guarantee shall also be subject to the URDG, unless the counter-

guarantee excludes the URDG. However, a demand guarantee does not become subject to the URDG merely because the counter-guarantee is subject to the URDG.

c) Where, at the request or with the agreement of the instructing party, a demand guarantee or counter- guarantee is issued subject to the URDG, the instructing party is deemed to have accepted the rights and obligations expressly ascribed to it in these rules.

d) Where a demand guarantee or counter-guarantee is issued on or after 1 July 2010 states that it is subject to the URDG without stating whether the 1992 version or the 2010 revision is to apply or indicating the publication number, the demand guarantee or counter- guarantee shall be subject to the URDG 2010 revision.

Article 2
Definitions

In these rules:

***Advising party** means the party that advises the guarantee at the request of the guarantor;*

***Applicant** means the party indicated in the guarantee as having its obligation under the underlying relationship supported by the guarantee. The applicant may or may not be the instructing party;*

***Application** means the request for the issue of the guarantee;*

***Authenticated,** when applied to an electronic document, means that the party to whom that document is presented is able to verify the apparent identity of the sender and whether the data received have remained complete and unaltered;*

***Beneficiary** means the party in whose favour a guarantee is issued;*

***Business day** means a day on which the place of business where an act of a kind subject to these rules is to be performed is regularly open for the performance of such an act;*

***Charges** mean any commissions, fees, costs or expenses due to any party acting under aguarantee governed by these rules;*

***Complying demand** means a demand that meets the requirements of a complying presentation;*

Complying presentation *under a guarantee means a presentation that is in accordance with, first, the terms and conditions of that guarantee, second, these rules so far as consistent with those terms and conditions and, third, in the absence of a relevant provision in the guarantee or these rules, international standard demand guarantee practice;*

Counter-guarantee *means any signed undertaking, however named or described, that is given by the counter-guarantor to another party to procure the issue by that other party of a guarantee or another counter-guarantee, and that provides for payment upon the presentation of a complying demand under the counter-guarantee issued in favour of that party;*

Counter-guarantor *means the party issuing a counter-guarantee, whether in favour of aguarantor or another counter-guarantor, and includes a party acting for its own account;*

Demand *means a signed document by the beneficiary demanding payment under a guarantee;*

Demand guarantee or guarantee *means any signed undertaking, however named or described, providing for payment on presentation of a complying demand;*

Document *means a signed or unsigned record of information, in paper or in electronic form, that is capable of being reproduced in tangible form by the person to whom it is presented. In these rules, a document includes a demand and a supporting statement;*

Expiry *means the expiry date or the expiry event or, if both are specified, the earlier of the two;*

Expiry date *means the date specified in the guarantee on or before which a presentation may be made;*

Expiry event *means an event which under the terms of the guarantee results in its expiry, whether immediately or within a specified time after the event occurs, for which purpose the event is deemed to occur only:*

a) when a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor, or

b) if no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the guarantor's own records.

Guarantee, *see demand guarantee;*

Guarantor *means the party issuing a guarantee, and includes a party acting for its own account;*

Guarantor's own records *means records of the guarantor showing amounts credited to or debited from accounts held with the guarantor, provided the record of those credits or debits enables the guarantor to identify7 the guarantee to which they relate;*

Instructing party *means the party, other than the counter-guarantor, who gives instructions to issue a guarantee or counter-guarantee and is responsible for indemnifying the guarantor or, in the case of a counter-guarantee, the counter-guarantor. The instructing party may or may not be the applicant;*

Presentation *means the delivery of a document under a guarantee to the guarantor or the document so delivered. It includes a presentation other than for a demand, for example, a presentation for the purpose of triggering the expiry of the guarantee or a variation of its amount;*

Presenter *means a person who makes a presentation as or on behalf of the beneficiary or the applicant, as the case may be;*

Signed, *when applied to a document, a guarantee or a counter-guarantee, means that an original of the same is signed by or on behalf of its issuer, whether by an electronic signature that can be authenticated by the party to whom that document, guarantee or counter- guarantee is presented or by handwriting, facsimile signature, perforated signature, stamp, symbol or other mechanical method;*

Supporting statement *means the statement referred to in either article 15 (a) or article 15 (b);*

Underlying relationship *means the contract, tender conditions or other relationship between the applicant and the beneficiary on which the guarantee is based.*

Article 3

Interpretation

In these rules:

a) Branches of a guarantor in different countries are considered to be separate entities.

b) Except where the context otherwise requires, a guarantee includes a counter-guarantee and any amendment to either, a guarantor includes a counter- guarantor, and a

beneficiary includes the party in whose favour a counter-guarantee is issued. c) Any requirement for presentation of one or more originals or copies of an electronic document is satisfied by the presentation of one electronic document.

d) When used with a date or dates to determine the start, end or duration of any period, the terms:
i. "from", "to", "until", "till" and "between", include;
and
ii "before" and "after"
exclude, the date or dates mentioned.

e) The term "within", when used in connection with a period after a given date or event, excludes that date or the date of that event but includes the last date of that period.

f) Terms such as "first class", "well-known", "qualified", "independent", "official", "competent" or "local" when used to describe the issuer of a document allow any issuer except the beneficiary or the applicant to issue that document.

Article 4
Issue and effectiveness

a) A guarantee is issued when it leaves the control of the guarantor.

b) A guarantee is irrevocable on issue even if it does not state this.

c) The beneficiary may present a demand from the time of issue of the guarantee or such later time or event as the guarantee provides.

Article 5
independence of guarantee and counter-guarantee

a) A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any

relationship other than a relationship between the guarantor and the beneficiary.

b) A counter-guarantee is by its nature independent of the guarantee, the underlying relationship, the application and any other counter-guarantee to which it relates, and the counter-guarantor is in no way concerned with or bound by such relationship. A reference in the counter- guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the counter-guarantee. The undertaking of a counter- guarantor to pay under the counter-guarantee is not subject to claims or defences arising from any relationship other than a relationship between the counter-guarantor and the guarantor or other counter- guarantor to whom the counter-guarantee is issued.

Article 6

Documents v. goods, services or performance

Guarantors deal with documents and not with goods, services or performance to which the documents may relate.

Article 7

Non-documentary conditions

A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the guarantee does not specify any such document and the fulfillment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee.

Article 8

Content of instructions and guarantees

All instructions for the issue of guarantees and guarantees themselves should be clear and precise and should avoid excessive detail.

It is recommended that all guarantees specify:

a. The applicant;

b. The beneficiary;

c. The guarantor;

d. A reference number or other information identifying the underlying relationship;

e. A reference number or other information identifying the issued guarantee or, in the case of a counter- guarantee, the issued counter-guarantee;

f. The amount or maximum amount payable and the currency in which it is payable;

g. The expiry of the guarantee;

h. Any terms for demanding payment;

i. Whether a demand or other document shall be presented in paper and/or electronic form;

j. The language of any document specified in the guarantee; and

k. The party liable for the payment of any charges.

Article 9

Application not taken up

Where, at the time of receipt of the application, the guarantor is not prepared or is unable to issue the guarantee, the guarantor should without delay so inform the party that gave the guarantor its instructions.

Article 10

Advising of guarantee or amendment

a. A guarantee may be advised to a beneficiary through an advising party. By advising a guarantee, whether directly or by utilizing the services of another party ("second advising party"), the advising party signifies I to the beneficiary and, if applicable, to the second I advising party, that it has satisfied itself as to the I apparent authenticity of the guarantee and that the advice accurately reflects the terms and conditions of the guarantee as received by the advising party.

b. By advising a guarantee, the second advising party signifies to the beneficiary that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the I terms and conditions of the guarantee as received by the I second advising party.

c. An advising party or a second advising party advises a I guarantee without any additional representation or any I undertaking whatsoever to the beneficiary.

d. If a party is requested to advise a guarantee or an amendment but is not prepared or is unable to do so, it should without delay so inform the party from whom it received that guarantee, amendment or advice.

e. If a party is requested to advise a guarantee, and agrees to do so, but cannot satisfy itself as to the apparent authenticity of that guarantee or advice, it shall without delay so inform the party from which the instructions appear to have been received. If the advising party or second advising party elects nonetheless to advise that guarantee, it shall inform the beneficiary or second advising party that it has not been able to satisfy itself as to the apparent authenticity of the guarantee or advice.

f. A guarantor using the services of an advising party or a second advising party, as well as an advising party using the services of a second advising party, to advise a guarantee should whenever possible use the same party to advise any amendment to that guarantee.

Article 11

Amendments

a. Where, at the time of receipt of instructions for the issue of an amendment to the guarantee, the guarantor for whatever reason is not prepared or is unable to issue that amendment, the guarantor shall without delay so inform the party that gave the guarantor its instructions.

b. An amendment made without the beneficiary's agreement is not binding on the beneficiary. Nevertheless the guarantor is irrevocably bound by an amendment from the time it issues the amendment, unless and until the beneficiary rejects that amendment.

c. Except where made in accordance with the terms of the guarantee, the beneficiary may reject an amendment of the guarantee at any time until it notifies its acceptance of the amendment or makes a presentation that complies only with the guarantee as amended.

d. An advising party shall without delay inform the party from which it has received the amendment of the beneficiary's notification of acceptance or rejection of that amendment.

e. Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.

f. A provision in an amendment to the effect that the amendment shall take effect unless rejected within a certain time shall be disregarded.

Article 12

Extent of guarantor's liability under guarantee

A guarantor is liable to the beneficiary only in accordance with, first, the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount.

Article 13

Variation of amount of guarantee

A guarantee may provide for the reduction or the increase of its amount on specified dates or on the occurrence of a specified event which under the terms of the guarantee results in the variation of its amount, and for this purpose the event is deemed to have occurred only:

a. when a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor, or

b. if no such document is specified in the guarantee, when the occurrence of the event becoming determinable from the guarantor's own records or from an index specified in the guarantee.

Article 14

Presentation

a. A presentation shall be made to the guarantor:

i. at the place of issue, or such other place as is specified in the guarantee, and

ii. on or before expiry.

b. A presentation has to be complete unless it indicates that it is to be completed later. In that case, it shall be completed on or before expiry.

c. Where the guarantee indicates that a presentation is to be made in electronic form, the guarantee should specify the format, the system for the data delivery and the electronic address for that presentation. If the guarantee does not so specify, a document may be presented in any electronic format that allows it

to be authenticated or in paper form. An electronic document that cannot be authenticated is deemed not to have been presented.

d. Where the guarantee indicates that a presentation is to be made in paper form through a particular mode of delivery but does not expressly exclude the use of another mode, the use of another mode by the presenter shall be effective if the presentation is received at the place and by the time indicated in paragraph (a) of this article.

e. Where the guarantee does not indicate whether a presentation is to be made in electronic or paper form, any presentation shall be made in paper form.

f. Each presentation shall identify the guarantee under which it is made, such as by stating the guarantor's reference number for the guarantee. If it does not, the time for examination indicated in article 20 shall start on the date of identification. Nothing in this paragraph shall result in an extension of the guarantee or limit the requirement in article 15 (a) or (b) for any separately presented documents also to identify the demand to which they relate.

g. Except where the guarantee otherwise provides, documents issued by or on behalf of the applicant or the beneficiary, including any demand or supporting statement, shall be in the language of the guarantee. Documents issued by any other person may be in any language.

Article 15

Requirements for demand

a. A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.

b. A demand under the counter-guarantee shall in any event be supported by a statement, by the party to whom the counter-guarantee was issued, indicating that such party has received a complying demand under the guarantee or counter-guarantee issued by that party. This statement may be in the demand or in a separate signed document accompanying or identifying

the demand.

c. The requirement for a supporting statement in paragraph (a) or (b) of this article applies except to the extent the guarantee or counter-guarantee expressly excludes this requirement. Exclusion terms such as "The supporting statement under article 15 [(a)] [(b)] is excluded" satisfy the requirement of this paragraph.

d. Neither the demand nor the supporting statement may be dated before the date when the beneficiary is entitled to present a demand. Any other document may be dated before that date. Neither the demand, nor the supporting statement, nor any other document may be dated later than the date of its presentation.

Article 16

Information about demand

The guarantor shall without delay inform the instructing party or, where applicable, the counter-guarantor of any demand under the guarantee and of any request, as an alternative, to extend the expiry of the guarantee. The counter-guarantor shall without delay inform the instructing party of any demand under the counter- guarantee and of any request, as an alternative, to extend the expiry of the counter-guarantee.

Article 17

Partial demand and multiple demands; amount of demands

a. A demand may be made for less than the full amount available ("partial demand").

b. More than one demand ("multiple demands") may be made.

c. The expression "multiple demands prohibited" or a similar expression means that only one demand covering all or part of the amount available may be made.

d. Where the guarantee provides that only one demand may be made, and that demand is rejected, another demand can be made on or before expiry of the guarantee.

e. A demand is a non-complying demand if:

i. it is for more than the amount available under the guarantee, or

ii. any supporting statement or other documents required by the guarantee indicate amounts that in total are less than the amount demanded. Conversely, any supporting statement or other

document indicating an amount that is more than the amount demanded does not make the demand a non-complying demand.

Article 18

Separateness of each demand

a. Making a demand that is not a complying demand or withdrawing a demand does not waive or otherwise prejudice the right to make another timely demand, whether or not the guarantee prohibits partial or multiple demands.

b. Payment of a demand that is not a complying demand does not waive the requirement for other demands to be complying demands.

Article 19

Examination

a. The guarantor shall determine, on the basis of a presentation alone, whether it appears on its face to be a complying presentation.

b. Data in a document required by the guarantee shall be examined in context with that document, the guarantee and these rules. Data need not be identical to, but shall not conflict with, data in that document, any other required document or the guarantee.

c. If the guarantee requires presentation of a document without stipulating whether it needs to be signed, by whom it is to be issued or signed, or its data content, then:

i. the guarantor will accept the document as presented if its content appears to fulfill the function of the document required by the guarantee and otherwise complies with article 19 (b), and

ii. if the document is signed, any signature will be accepted and no indication of name or position of the signatory is necessary.

d. If a document that is not required by the guarantee or referred to in these rules is presented, it will be disregarded and may be returned to the presenter.

e. The guarantor need not re-calculate a beneficiary's calculations under a formula stated or referenced in a guarantee.

f. The guarantor shall consider a requirement for a document to be legalized, visaed, certified or similar as satisfied by any signature, mark, stamp or label on the document which appears to satisfy that requirement.

Article 20

Time for examination of demand; payment

a. If a presentation of a demand does not indicate that it is to be completed later, the guarantor shall, within five business days following the day of presentation, examine that demand and determine if it is a complying demand. This period is not shortened or otherwise affected by the expiry of the guarantee on or after the date of presentation. However, if the presentation indicates that it is to be completed later, it need not be examined until it is completed.

b. When the guarantor determines that a demand is complying, it shall pay.

c. Payment is to be made at the branch or office of the guarantor or counter-guarantor that issued the guarantee or counter-guarantee or such other place as may be indicated in the guarantee or counter- guarantee ("place for payment").

Article 21

Currency of payment

a. The guarantor shall pay a complying demand in the currency specified in the guarantee.

b. If, on any date on which a payment is to be made under the guarantee:

i. the guarantor is unable to make payment in the currency specified in the guarantee due to an impediment beyond its control; or

ii. it is illegal under the law of the place for payment to make payment in the specified currency,

The guarantor shall make payment in the currency of the place for payment even if the guarantee indicates that payment can only be made in the currency specified in the guarantee. The instructing party or, in the case of a counter-guarantee, the counter-guarantor, shall be bound by a payment made in such currency. The guarantor or counter-guarantor, may elect to be reimbursed either in the currency in which payment was made or in the currency specified in the guarantee or, as the case may be, the counter-guarantee.

c. Payment or reimbursement in the currency of the place for payment under paragraph (b) is to be made according to the applicable rate of exchange prevailing there when payment or

reimbursement is due. However, if the guarantor has not paid at the time when payment is due, the beneficiary may require payment according to the applicable rate of exchange prevailing either when payment was due or at the time of actual payment.

Article 22

Transmission of copies of complying demand

The guarantor shall without delay transmit a copy of the complying demand and of any related documents to the instructing party or, where applicable, to the counter- guarantor for transmission to the instructing party. However, neither the counter-guarantor nor the instructing party, as the case may be, may withhold payment or reimbursement pending such transmission.

Article 23

Extend or pay

a. Where a complying demand includes, as an alternative, a request to extend the expiry, the guarantor may suspend payment for a period not exceeding 30 calendar days following its receipt of the demand.

b. Where, following such suspension, the guarantor makes a complying demand under the counter- guarantee that includes, as an alternative, a request to extend the expiry, the counter-guarantor may suspend payment for a period not exceeding four calendar days less than the period during which payment of the demand under the guarantee was suspended.

c. The guarantor shall without delay inform the instructing party or, in the case of a counter guarantee, the counter-guarantor, of the period of suspension of payment under the guarantee. The counter-guarantor shall then inform the instructing party of such suspension and of any suspension of payment under the counter-guarantee. Complying with this article satisfies the information duty under article 16.d.

d. The demand for payment is deemed to be withdrawn if the period of extension requested in the demand or otherwise agreed by the party making that demand is granted within the time provided under paragraph (a) or (b) of this article. If no such period of extension is granted, the complying demand shall be paid without the need to present any further demand.

e. The guarantor or counter-guarantor may refuse to grant any extension even if instructed to do so and shall then pay.

f. The guarantor or counter-guarantor shall without delay inform the party from whom it has received its instructions of its decision to extend under paragraph (d) or to pay.

g. The guarantor and the counter-guarantor assume no liability for any payment suspended in accordance with this article.

Article 24

Non-complying demand, waiver and notice

a. When the guarantor determines that a demand under the guarantee is not a complying demand,it may reject that demand or, in its sole judgement, approach the instructing party, or in the case of a counter-guarantee, the counter-guarantor, for a waiver of the discrepancies.

b. When the counter-guarantor determines that a demand under the counter-guarantee is not a complying demand, it may reject that demand or, in its sole judgement, approach the instructing party for a waiver of the discrepancies.

c. Nothing in paragraphs (a) or (b) of this article shall extend the period mentioned in article 20 or dispense with the requirements of article 16. Obtaining the waiver of the counter-guarantor or of the instructing party does not oblige the guarantor or the counter- guarantor to waive any discrepancy.

d. When the guarantor rejects a demand, it shall give a single notice to that effect to the presenter of the demand. The notice shall state:

i. that the guarantor is rejecting the demand, and

ii. each discrepancy for which the guarantor rejects the demand.

e. The notice required by paragraph (d) of this article shall be sent without delay but not later than the close of the fifth business day following the day of presentation.

f. A guarantor failing to act in accordance with paragraphs (d) or (e) of this article shall be precluded from claiming that the demand and any related documents do not constitute a complying demand.

The guarantor may at any time, after providing the notice required in paragraph (d) of this article, return any documents presented in paper form to the presenter and dispose of the

electronic records in any manner that it considers appropriate without incurring any responsibility.

h. For the purpose of paragraphs (d), (f) and (g) of this article, guarantor includes counter guarantor.

Article 25

Reduction and termination

a. The amount payable under the guarantee shall be reduced by any amount:

i. paid under the guarantee,

ii. resulting from the application of article 13, or

iii. indicated in the beneficiary's signed partial release from liability under the guarantee.

b. Whether or not the guarantee document is returned to the guarantor, the guarantee shall terminate:

i. on expiry,

ii. when no amount remains payable under it, or

iii. on presentation to the guarantor of the beneficiary's signed release from liability under the guarantee.

c. If the guarantee or the counter-guarantee states neither an expiry date nor expiry event, the guarantee shall terminate after the lapse of three years from the date of issue and the counterguarantee shall terminate 30 calendar days after the guarantee terminates.

d. If the expiry date of a guarantee falls on a day that is not a business day at the place for presentation of the demand, the expiry date is extended to the first following business day at that place.

e. Where, to the knowledge of the guarantor, the guarantee terminates as a result of any of the reasons indicated in paragraph (b) above, but other than because of the advent of the expiry date, the guarantor shall without delay so inform the instructing party or, where applicable, the counter-guarantor and, in that case, the counter-guarantor shall so inform the instructing party.

Article 26

Force majeure

a. In this article, "force majeure" means acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor

that interrupt its business as it relates to acts of a kind subject to these rules.

b. Should the guarantee expire at a time when presentation or payment under that guarantee is prevented by force majeure: i. each of the guarantee and any counter-guarantee shall be extended for a period of 30 calendar days from the date on which it would otherwise have expired, and the guarantor shall as soon as practicable inform the instructing party or, in the case of a counter-guarantee, the counter guarantor of the force majeure and the extension, and the counter-guarantor shall so inform the instructing party;

ii. the running of the time for examination under article 20 of a presentation made but not yet examined before the force majeure shall be suspended until the resumption of the guarantor's business; and

iii. a complying demand under the guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if that guarantee has expired, and in this situation the guarantor shall be entitled to present a demand under the counter- guarantee within 30 calendar days after cessation of the force majeure even if the counter-guarantee has expired.

c. Should the counter-guarantee expire at a time when presentation or payment under that counter-guarantee is prevented by force majeure:

i. the counter-guarantee shall be extended for a period of 30 calendar days from the date on which the counter-guarantor informs the guarantor of the cessation of the force majeure. The counter- guarantor shall then inform the instructing party of the force majeure and the extension;

ii. the running of the time for examination under article 20 of a presentation made but not yet examined before the force majeure shall be suspended until the resumption of the counter guarantor's business; and

iii. a complying demand under the counter-guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if the counter-guarantee has expired.

d. The instructing party shall be bound by any extension, suspension or payment under this article.

e. The guarantor and the counter-guarantor assume no further liability for the consequences of the force majeure.

Article 27

Disclaimer on effectiveness of documents

The guarantor assumes no liability or responsibility for:

a. The form, sufficiency, accuracy, genuineness, falsification, or legal effect of any signature or document presented to it;

b. The general or particular statements made in, or superimposed on, any document presented to it;

c. The description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance or data represented by or referred to in any document presented to it; or

d. The good faith, acts, omissions, solvency, performance or standing of any person issuing or referred to in any other capacity in any document presented to it.

Article 28

Disclaimer on transmission and translation

a. The guarantor assumes no liability or responsibility for the consequences of delay, loss in transit, mutilation or other errors arising in the transmission of any document, if that document is transmitted or sent according to the requirements stated in the guarantee, or when the guarantor may have taken the initiative in the choice of the delivery service in the absence of instructions to that effect.

b. The guarantor assumes no liability or responsibility for errors in translation or interpretation of technical terms and may transmit all or any part of the guarantee text without translating it.

Article 29

Disclaimer for acts of another party

A guarantor using the services of another party for the purpose of giving effect to the instructions of an instructing party or counter-guarantor does so for the account and at the risk of that instructing party or counter-guarantor.

Article 30

Limits on exemption from liability

Articles 27 to 29 shall not exempt a guarantor from liability or responsibility for its failure to act in good faith.

Article 31

Indemnity for foreign laws and usages

The instructing party or, in the case of a counter-guarantee, the counter-guarantor, shall indemnify the guarantor against all obligations and responsibilities imposed by foreign laws and usages, including where those foreign laws and usages impose terms into the guarantee or the counter-guarantee that override its specified terms. The instructing party shall indemnify the counter-guarantor that has indemnified the guarantor under this article.

Article 32

Liability for charges

a. A party instructing another party to perform services under these rules is liable to pay that party's charges for carrying out its instructions.

b. If a guarantee states that charges are for the account of the beneficiary and those charges cannot be collected, the instructing party is liable to pay those charges. If a counter-guarantee states that charges relating to the guarantee are for the account of the beneficiary and those charges cannot be collected, the counter- guarantor remains liable to the guarantor, and the instructing party to the counter-guarantor, to pay those charges.

c. Neither the guarantor nor any advising party should stipulate that the guarantee; or any advice or amendment of it, is conditional upon the receipt by the guarantor or any advising party of its charges.

Article 33

Transfer of guarantee and assignment of proceeds

a. A guarantee is transferable only if it specifically states it is "transferable", in which case it may be transferred more than once for the full amount available at the time of transfer. A counter guarantee is not transferable.

b. Even if the guarantee specifically states that it is transferable, the guarantor is not obliged to give effect to a request to transfer that guarantee after its issue except to the extent and in the manner expressly consented to by the guarantor.

c. A transferable guarantee means a guarantee that may be made available by the guarantor to a new beneficiary ("transferee") at the request of the existing beneficiary ("transferor").

d. The following provisions apply to the transfer of a guarantee:

i. a transferred guarantee shall include all amendments to which the transferor and guarantor have agreed as of the date of transfer; and

ii. a guarantee can only be transferred where, in addition to the conditions stated in paragraphs (a), (b) and (d)(i) of this article, the transferor has provided a signed statement to the guarantor that the transferee has acquired the transferor's rights and obligations in the underlying relationship.

e. Unless otherwise agreed at the time of transfer, the transferor shall pay all charges incurred for the transfer.

f. Under a transferred guarantee, a demand and any supporting statement shall be signed by the transferee. Unless the guarantee provides otherwise, the name and the signature of the transferee may be used in place of the name and the signature of the transferor in any other document.

g. Whether or not the guarantee states that it is transferable, and subject to the provisions of the applicable law:

i. the beneficiary may assign any proceeds to which it may be or may become entitled under the guarantee; ii. however, the guarantor shall not be obliged to pay an assignee of these proceeds unless the guarantor has agreed to do so.

Article 34

Governing law

a. Unless otherwise provided in the guarantee, its governing law shall be that of the location of the guarantor's branch or office that issued the guarantee.

b. Unless otherwise provided in the counter-guarantee, its governing law shall be that of the location of the counter-guarantor's branch or office that issued the counter-guarantee.

Article 35

Jurisdiction

a. Unless otherwise provided in the guarantee, any dispute between the guarantor and the beneficiary relating to the

guarantee shall be settled exclusively by the competent court of the country of the location of the guarantor's branch or office that issued the guarantee.

b. Unless otherwise provided in the counter-guarantee, any dispute between the counter- guarantor and the guarantor relating to the counter-guarantee shall be settled exclusively by the competent court of the country of the location of the counter-guarantor's branch or office that issued the counter-guarantee.

গুরুত্বপূর্ণ বিধায় The International Chamber of Commerce (the "ICC") এর *Documentary Instruments Dispute Resolution Expertise ("DOCDEX") "Rules" নিম্নে অবিকল অনুলিখন হলোঃ*

PREAMBLE

The DOCDEX Rules (the "Rules") of the International Chamber of Commerce (the "ICC") are for use in proceedings called Documentary Instruments Dispute Resolution Expertise ("DOCDEX"), which are administered by the ICC International Centre for ADR (the "Centre"), a separate administrative body within the ICC.

ARTICLE 1

Definitions

In the Rules:

(i) "Appendix" means the Appendix entitled "Fees and Costs" set out hereinafter and at www.iccdocdex.org, where it may from time to time be updated.

(ii) "Appointed Experts" means a panel of three experts and "Appointed Expert" any member of that panel appointed by the Centre, having regard to the guidance provided by the Technical Adviser pursuant to Article 7(4), to render a Decision as defined below.

(iii) "Banking Commission" means the ICC Banking Commission.

(iv) "Claimant"/"Claimants" means a party or parties that submit(s) a Claim to the Centre in the manner described in Article 3 for a Decision as defined below.

(v) "Decision" means the final decision rendered by the Appointed Experts pursuant to Article 9.

(vi) "Form" means one of the four forms set out hereinafter, available to download at[www.iccdocdex.org.](http://www.iccdocdex.org)
(vii) "ICC Banking Rules" means any set of rules or standard practices issued from time to time by the Banking Commission, such as the ICC Uniform Customs and Practice for Documentary Credits (UCP), the ICC Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (URR), the ICC Uniform Rules for Collections (URC) and the ICC Uniform Rules for Demand Guarantees (URDG).
(viii) "Respondent"/"Respondents" means a party or parties named as such in the Claim.
(ix) "Technical Adviser" means one of the Banking Commission's technical Advisers or alternate technical Advisers appointed by the Chair of the Banking Commission to provide guidance as indicated in Articles 2(1), 7(3) and 7(4) and comments on any draft Decision of the Appointed Experts as indicated in Article 9(2).

ARTICLE 2
Scope

1. *The Rules are available for any dispute which the Centre, in consultation with the Technical Adviser and subject to Articles 2(2) and 2(3) of the Rules, may agree to administer and which relates to:*
   - *a documentary credit,*
   - *a standby letter of credit,*
   - *a bank-to-bank reimbursement,*
   - *a collection,*
   - *a demand guarantee or counter-guarantee,*
   - *a forfaiting transaction,*
   - *a bank payment obligation (BPO), or*
   - *any other trade finance-related instrument, undertaking or agreement.*

2. *When a dispute falling within the scope of Article 2(1) of the Rules arises, a party may refer the dispute to the Rules to obtain an independent, impartial and prompt expert decision on the basis of the terms and conditions of the relevant instrument, undertaking or agreement, any applicable ICC Banking Rules and international standard practice in trade finance.*

3. *If the dispute arises out of or is in connection with an instrument, undertaking or agreement that does not provide for the application of ICC Banking Rules, it shall be administered under the Rules only if each Claimant and each Respondent so agree. Their agreement shall be recorded on Forms 1 and 2.*

4. *The Rules provide for expedited proceedings, with no opportunity for the oral examination of fact or expert witnesses or for oral submissions at a hearing. Accordingly, the Rules are not appropriate where such examination or submissions are required to resolve any factual or legal issues raised by the Claim.*

5. *Proceedings under the Rules are not arbitral proceedings and a Decision is not an arbitral award.*

6. *A Decision shall not be binding on any Claimant or Respondent unless each Claimant and Respondent agrees that the Decision shall be contractually binding upon them. Any such agreement shall be recorded on Forms 1 and 2.*

ARTICLE 3
Claim

1. *A Claimant shall apply for a Decision by submitting a claim to the Centre using Form 1 (the "Claim"). The Claim shall be accompanied by all documents that the Claimant considers necessary to support its Claim. The Claim and all accompanying documents shall be supplied to the Centre in electronic form, together with one hard copy for each Respondent.*

2. *A Claimant may submit a Claim individually or jointly with one or more other Claimants.*

3. *At the time of submitting a Claim, the Claimant shall pay the fee specified in the Appendix.*

4. *Subject to Article 3(6) of the Rules, the Centre shall acknowledge receipt of the Claim and the fee to the Claimant.*

5. *Subject to Article 3(6) of the Rules, once the Centre has received the electronic and hard copies of the Claim and the fee, it shall send a hard copy of the Claim and any accompanying documents to each Respondent identified in the Claim for its Answer, as provided in Article 11(1) of the Rules.*

6. *If the Centre finds a Claim or part of a Claim to be outside the scope of the Rules, or considers in its discretion that the administration of a Claim or part of a Claim would not be in the spirit of the Rules, the Centre may reject all or part of that Claim at any time, before or after acknowledging receipt, and in such event shall so inform the Claimant and any Respondent to which the Centre has sent a copy of the Claim. The Centre shall also refund all or part of any fee received pursuant to Article 3(3) of the Rules, as appropriate.*

7. *In considering whether or not to reject a Claim or part of a Claim prior to the appointment of the Appointed Experts, the Centre may seek guidance from the Technical Adviser pursuant to Articles 2(1) and 7(3) of the Rules. Following the appointment of the Appointed Experts, the Centre shall reject a Claim or part of a Claim if informed by a majority of the Appointed Experts pursuant to Article 8(3) that they consider it to be outside the scope of the Rules.*

ARTICLE 4

Answer

1. *A Respondent may submit an answer to a Claim (the "Answer") using Form 2. The Answer, if any, shall be accompanied by any additional documents that the Respondent considers necessary to support its Answer.*

2. *The Answer and all accompanying documents shall be supplied to the Centre only in electronic form in accordance with Article 11(2) of the Rules. The Centre shall forward the Answer and any accompanying documents to the Claimant and any other Respondent.*

3. *A Respondent may submit its Answer individually or jointly with one or more other Respondents.*

4. *An Answer must be received by the Centre within the period it specifies when sending the Claim to each Respondent, which shall not exceed 30 days, save exceptional circumstances. Any Answer received by the Centre after the expiry of the specified period shall be disregarded.*

5. *If a Respondent does not submit an Answer, the proceedings shall nonetheless continue.*

ARTICLE 5
Supplementary Information and Additional Documents

1. *The Centre may request a Claimant or Respondent to submit supplementary information or copies of documents that the Centre considers relevant to the rendering of a Decision, whereupon such information or documents shall be submitted using Form 3 (the "Supplement").*

2. *A Supplement shall be submitted to the Centre within 14 days of its request, in electronic form only. The Centre shall forward the Supplement to each Claimant and Respondent.*

3. *A Supplement shall be submitted to the Centre only in response to a request from the Centre. Any unsolicited submission made to the Centre by any Claimant or Respondent shall be disregarded. The Centre may, at its discretion, accede to a request from a Claimant or Respondent for permission to make a new or additional submission, whereupon such submission shall be supplied in the form of a Supplement within the period indicated by the Centre.*

4. *No submission by any person other than a Claimant or Respondent shall be admitted in the proceedings and any such submission received by the Centre shall be disregarded.*

ARTICLE 6
Filing and Finality of Submissions

1. *In addition to the requirements set out in Articles 3(1), 4(1) and 5(1) of the Rules with regard to the form of a Claim, Answer and Supplement, the Centre may require any document to be submitted in hard copy or for the electronic copy to be submitted in a particular electronic form.*

2. *All fields in the relevant Form shall be completed concisely, in English, and shall contain all necessary information clearly presented.*

3. *If a document accompanying a Claim, Answer or Supplement contains data not drafted in English, it shall be accompanied by an English translation, unless the Centre agrees otherwise in writing.*

4. *A Claim, Answer and Supplement shall be considered final as received and may not be amended.*

ARTICLE 7

Appointment of Experts

1. *The Banking Commission maintains a list of experts (the "List") having experience in, and knowledge of, trade finance transactions. The Chair of the Banking Commission is the repository of the List and can add or remove experts from the List at any time, as need be.*

2. *The Centre shall transmit a copy of the Claim to the Technical Adviser after verifying the Technical Adviser's independence with respect to the parties referred to in the Claim.*

3. *The Technical Adviser shall, if requested, offer guidance to the Centre on whether the Claim falls within the scope of the Rules.*

4. *The Technical Adviser shall also provide guidance on the area(s) of expertise that the Claim requires and that the Appointed Experts should possess. Having regard to this guidance, the Centre shall make the appointments and designate one of the Appointed Experts to act as president (the "President").*

5. *Each Appointed Expert must be and remain impartial and independent of the parties involved in the dispute.*

6. *An Appointed Expert shall not act or have acted, nor shall any Claimant or Respondent seek to have an Appointed Expert act, in any judicial, arbitral or similar proceedings relating to the dispute that is or was the subject of proceedings under the Rules, whether as a judge, an arbitrator, an expert or fact witness, or a representative or Adviser.*

7. *Before any appointment, prospective Appointed Experts shall sign a statement of acceptance, availability, impartiality and independence and shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question their independence in the eyes of any Claimant or Respondent, as well as any circumstances that could give rise to reasonable doubts as to their impartiality. The Centre shall take any such disclosure into account before making the appointment.*

8. *An Appointed Expert shall immediately disclose in writing to the Centre any facts or circumstances of a similar nature to those referred to in Article 7(7) of the Rules concerning the Appointed Expert's impartiality or independence which may arise during the proceedings.*

9. *By accepting to serve, an Appointed Expert undertakes to carry out the Appointed Expert's responsibilities in accordance with the Rules.*

10. *An Appointed Expert who becomes unable to carry out the functions entrusted by the Centre shall so inform the Centre without delay. When the Centre deems that an Appointed Expert is unable to carry out the Appointed Expert's role under the Rules, it shall immediately give notice of termination to such Appointed Expert. The Centre shall inform the other Appointed Experts of such*

termination and make another appointment from the List.

11. *Upon receipt of a notice of termination, an Appointed Expert shall promptly dispose of any documents received from the Centre in an appropriate manner as agreed with the Centre.*

ARTICLE 8

The Proceedings

1. *Unless the Centre has rejected the Claim pursuant to Article 3(6) of the Rules, the Centre shall transmit the Claim, any Answer and any Supplement(s) to the Appointed Experts.*

2. *When considered necessary by the Appointed Experts, the President may ask the Centre to request any Claimant or Respondent to submit a Supplement in accordance with Article 5 of the Rules.*

3. *If the Appointed Experts consider that the Claim is outside the scope of the Rules, they shall so inform the Centre, which shall reject the Claim pursuant to Article 3(6) of the Rules.*

4. *Notwithstanding any disagreement between the Claimant and Respondent as to whether the Claim falls within the scope of the Rules, the Appointed Experts shall continue with the proceedings and render a Decision to the extent that they consider the Claim to fall within the scope of the Rules.*

5. *Following deliberations among the Appointed Experts, the President shall prepare and submit to the Centre a draft of the Decision for scrutiny pursuant to Article 9(2) of the Rules. The draft Decision shall be submitted within 30 days of receipt by the Appointed Experts of all information and documents they consider necessary for determining the issues in dispute.*

6. *In exceptional circumstances, and upon a reasoned request submitted by the President, the*

Centre may extend the time limit for the Appointed Experts to render their draft Decision.

7. *There shall be no oral hearing before the Appointed Experts.*

ARTICLE 9
The Decision

1. *The Decision shall be drafted in English using Form 4.*

2. *Upon receipt of the draft Decision from the President, the Centre shall transmit it forthwith to the Technical Adviser for scrutiny. The Technical Adviser may lay down modifications as to the form of the draft Decision and, without affecting the Appointed Experts' liberty of decision, may also draw their attention to points of substance. No Decision shall be rendered by the Appointed Experts until it has been approved by the Technical Adviser as to its form.*

3. *The Decision may be made unanimously or on a majority basis and shall so indicate.*

4. *The Decision shall be deemed to have been made on the date stated therein.*

5. *The Appointed Experts shall render the Decision exclusively on the basis of the Claim, any Answer and any Supplement, the terms and conditions of the trade finance-related instrument, undertaking or agreement, the ICC Banking Rules that may be applicable and international standard practice in trade finance.*

6. *Once a Decision has been made, the Centre shall make it available to each Claimant and to any Respondent that has submitted an Answer pursuant to Article 4 of the Rules.*

ARTICLE 10
Costs

1. *The costs of the DOCDEX proceedings shall be the standard fee set out in the Appendix. The standard fee shall be non-refundable, unless the Centre rejects all or part of the Claim pursuant to Article 3(6) of the Rules.*

2. *An additional fee may be fixed by the Centre, at its discretion, taking into account the facts and documents underlying the dispute and subject to the maximum specified in Article 2 of the Appendix.*

3. *The Centre shall fix a time limit for the payment of the additional fee. The Centre may instruct the Appointed Experts to suspend their work until the additional fee has been paid.*

ARTICLE 11

Notifications or Communications; Time Limits

1. *A hard copy of the Claim shall be sent by the Centre to each Respondent pursuant to Article 3(5) of the Rules. It shall be sent by delivery against receipt, registered post or courier to the address of the Respondent provided by the Claimant in the Claim.*

2. *Subject to Article 11(1) of the Rules, all notifications or communications to and from the Centre shall be made by email or by any other means of telecommunications, excluding fax, that provides a record of the sending thereof. Such notifications or communications shall be made to the last email or other electronic address of the Claimant or Respondent, or its representative for whom the same are intended, as notified for this purpose by the party in question. If the Respondent fails to notify the Centre of an email or other electronic address, then the Centre may use the address for the Respondent that is provided by the Claimant.*

3. *A notification or communication shall be deemed to have been made on the day it was received by*

the Claimant or Respondent itself or by its representative, or would have been received if made in accordance with Article 11(2) of the Rules.

4. *Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 11(3) of the Rules. When the day following such date is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.*

ARTICLE 12

General

1. *The Centre may authorize the publication of any Decision, provided that the identities of each Claimant, Respondent and any other person or entity named in the Claim, Answer or any Supplement are not disclosed.*

2. *Any information or documents given by the Centre to the Technical Adviser or the Appointed Experts in connection with proceedings under the Rules shall be used by the Technical Adviser and the Appointed Experts only for the purpose of such proceedings and shall be treated by them, as well as by the Centre, as confidential.*

3. *The Centre, the Technical Adviser and the Appointed Experts shall not reveal the identities of the Appointed Experts and the Technical Adviser to any Claimant, Respondent or other person.*

4. *In all matters not expressly provided for in the Rules, the Technical Adviser, the Appointed Experts and the Centre shall act in the spirit of the Rules.*

5. *The Technical Adviser, the Appointed Experts, the Centre, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with any proceedings or Decision under the Rules, except to the extent such limitation of liability is prohibited by applicable law.*

6. *The version of the Rules that is applicable at the time of submission of a Claim shall apply to the proceedings, unless otherwise agreed by each Claimant and Respondent.*

গুরুত্বপূর্ণ বিধায় সালিশী মোকদ্দমা নং-৫৯৭/২০১৫-এ প্রদত্ত বিগত ইংরেজী ২৮.১০.২০১৯ তারিখের ২৮ ও ২৯ নং আদেশদ্বয় নিম্নে অবিকল অনুলিখন হলোঃ

আদেশ নং- ২৮

"অদ্য শুনানীর জন্য দিন ধার্য আছে। দরখাস্তকারীপক্ষ বিজ্ঞ কৌশুলী এক দরখাস্ত দাখিল করিয়া বর্ণিত কারণে শুনানীর জন্য সময়ের প্রার্থনা করিয়াছে। দরখাস্তকারী পক্ষ পৃথক এক দরখাস্ত দাখিল করিয়া বর্ণিত কারণে অন্তবর্তীকালীন নিষেধাজ্ঞার আদেশ বর্ধিত করার জন্য সময়ের প্রার্থনা করিয়াছে। প্রতিপক্ষ পক্ষে একখানা দরখাস্ত দাখিল করিয়া বর্ণিত কারণে শুনানীর জন্য সময়ের প্রার্থনা করিয়াছে।

The case is fixed for hearing. Both parties have files separate petitioners for time for hearing of the case. Both petitions for time are rejected. Both parties are directed to ready for hearing.

Dictated & Corrected by mel

Sd/- Md. Helal Chowdhury
District Judge, Dhaka.

Sd/- Md. Helal Chowdhury
District Judge, Dhaka.

আদেশ নং- ২৯

Petitioner did not taken any step pursuant into order No. 28. As such the arbitration case is dismissed for default.

The order of status-quo passed by this courts on 16.08.2015 is vacated.

Sd/- Md. Helal Chowdhury
District Judge, Dhaka.

Sd/- Md. Helal Chowdhury
District Judge, Dhaka.

গুরুত্বপূর্ণ বিধায় বাদী কর্তৃক দাখিলকৃত দেওয়ানী কার্যবিধির আদেশ ৯ নিয়ম ১ ও ১৫১ ধারার অধীনে মোকদ্দমাটি পুনরুজ্জীবিত করার আবেদন পত্রটি নিম্নে অবিকল অনুলিখন হলোঃ

'' দরখাস্তকারীর বিনীত নিবেদন এই যে,

১। বাদী দরখাস্তকারী ২০০১ সালের আরবিট্রেশন আইনের ৭(ক) ধারায় দরখাস্ত রুজু করিয়া প্রার্থীত প্রতিকার প্রার্থনা করেন।

২। গত ২৮.১০.১৯ ইং তারিখে অত্র মোকদ্দমাটি শুনানীর জনা দিন ধার্য ছিল এবং বাদী দরখাস্তকারী প্রতিপক্ষগণ মোকদ্দমায় সময়ের আবেদন করেন। দরখাস্তকারী যখন দেখেন যে প্রতিপক্ষ ও সময়ের আবেদন করিয়াছে তখন নিশ্চিত সময় হইব মনে করিয়া দরখাস্তকারী পক্ষের এডভোকেট আদালত কক্ষ ত্যাগ করেন।

৩। বিজ্ঞ আদালত পক্ষগনের সময়ের দরখাস্ত শুনানী না করায় উভয়ের দরখাস্ত নামঞ্জুর করিয়া উভয় পক্ষকে শুনানীর জন্য প্রস্তুতির জন্য আদেশ প্রদান করেন। আদেশটি দরখাস্তকারী পক্ষের গোচরীভুত না থাকায় দরখাস্তকারী পক্ষের এডভোকেট সাহেব আদালত ত্যাগ করেন। কিন্তু আদালত দরখাস্তকারী পক্ষের কোন পদক্ষেপ না পাইয়া মোকদ্দমাটি খারিজ করেন। ইহাতে বাদীপক্ষের এ্যাডভোকেট এর ভুলের জন্য দরখাস্তকারী পক্ষের অপূরনীয় ক্ষতির হইয়াছে।

সেমতে বিনীত প্রার্থনা বিজ্ঞ আদালত দয়াপরবশে এবং ন্যায় বিচারের স্বার্থে দরখাস্তকারী পক্ষের নিকট হইতে নূন্যতম কস্ট আদায় করিয়া গত ২৮.১০.২০১৯ ইং তারিখের খারিজ আদেশ রদ, রহিত, বাতিল করিয়া মোকদ্দমাটি পুনরুজ্জীবিত করিয়া শুনানীর জন্য দিন ধার্য্য করিতে মর্জি হয়।

এবং

তজ্জন্য দরখাস্তকারী বিজ্ঞ আদালতের নিকট চিরকৃতজ্ঞ থাকিবেন।

<u>হলফনামা</u>

আমি মোঃ রিপন আলী, পিতা- মোঃ কামরুজ্জামান, মাতা- শরীফা বেগম, বয়স- ২৮ বছর, বর্তমান সাং- বিজয়পথ ৫নং বাসা, শাহজাদপুর, থানা- ভাটারা, জেলা- ঢাকা, স্থায়ী সাং- হাউজনগর, পোঃ মনাকষা, থানা- শিবগঞ্জ, জেলা- চাপাইনবাবগঞ্জ, ধর্ম- ইসলাম, পেশা- শিক্ষানবিশ আইনজীবি, জাতীয়তা- বাংলাদেশ আমি অত্র মোকদ্দমার তদ্বীরকারক শপথ পূর্বক ঘোষণা করিতেছি যে,

১। আমি অত্র মোকদ্দমার দরখাস্তকারী পক্ষের তদ্বীরকারক এবং অত্র মোকদ্দমা সম্পর্কে সম্যক অবগত আছি।

২। দরখাস্ত ও হলফনামার বিবরণ আমার জ্ঞান ও বিশ্বাস মতে সম্পূর্ণ সত্য ও নির্ভূল।

অদ্য ১৪.১১.২০১৯ ইং তারিখে বেলা ১২.০৫ ঘটিকার সময় বিজ্ঞ আদালতের হলফকারী কমিশনারের সম্মুখে স্বয়ং উপস্থিত হইয়া হলফনামায় নিজ স্বাক্ষর করিলাম। ইতি, তাং-

স্বা/- মোঃ রিপন আলী
হলফকারীর স্বাক্ষর

হলফকারী আমার পরিচিত। তিনি আমার সম্মুখে অত্র হলফনামায় সহি স্বাক্ষর করিলে আমি তাকে সনাক্ত করিলাম।

স্বা/- অস্পষ্ট
এ্যাডভোকেট''

গুরুত্বপূর্ণ বিধায় বিজ্ঞ জেলা জজ, ঢাকা কর্তৃক আরবিট্রেশন মামলা নং ৫৯৭/২০১৫-এ বিগত ইংরেজী ১৪.১১.২০১৯ তারিখের আদেশ নিম্নে অবিকল অনুলিখন হলোঃ

*''**আদেশ নং ৩০,***

তারিখঃ ১৪.১১.২০১৯

দরখাস্তকারীপক্ষ দেঃ কাঃ বিঃ আইনের ৯ আদেশ ৯(ক) বিধি ও ১৫১ ধারা মতে হলফনামা সহ এক দরখাস্ত দ্বারা বর্ণিত কারণে অত্র মোকদ্দমার গত ২৮.১০.২০১৯ ইং তারিখের খারিজাদের রদ রহিত বাতিল করিয়া মোকদ্দমাটি পুনরুজ্জীবিত করার প্রার্থনা করিয়াছে। দরখাস্তকারী পক্ষ অপর এক দরখাস্ত দ্বারা বর্ণিত কারণে বিগত ১৬.০৮.২০১৫ ইং তারিখের অন্তবর্তীকালীন নিষেধাজ্ঞার আদেশ বর্ধিত করার প্রার্থনা করিয়াছে। কপি জারী হয় নাই। দেখিলাম। ০৩.০২.২০২০ শুনানী।

স্বা/ঃ মোঃ হেলাল চৌধুরী
জেলা জজ, ঢাকা।

অত্র সালিশী মোকদ্দমা নং- ৫৯৭/২০১৫ এর উপরিল্লিখিত সালিশী আইন, ২০০১ এর ৭(ক) ধারার দরখাস্তটি সহজ সরল পাঠে এটি স্পষ্ট প্রতীয়মান যে, দরখাস্তের ১নং প্রতিপক্ষ বাংলাদেশ ক্যামিকেল ইন্ডাষ্ট্রিজ কর্পোরেশন বরাবর ২নং প্রতিপক্ষ জনতা ব্যাংক লিঃ কর্তৃক ইস্যুকৃত ব্যাংক গ্যারান্টিসমূহ যেন ১নং প্রতিপক্ষ বাংলাদেশ ক্যামিকেল ইন্ডাষ্ট্রিজ কর্পোরেশন নগদায়ন করতে না পারে তৎমর্মে ২নং প্রতিপক্ষ জনতা ব্যাংক লিমিটেডকে অন্তবর্তীকালীন নিষেধাজ্ঞার আদেশ দ্বারা বারিত করতে দায়ের করা হয়েছে।

প্রথমেই দেখা যাক, দরখাস্তকারী/বাদী অত্র আকারে এবং প্রকারে অত্র সালিশী মোকদ্দমা নং- ৫৯৭/২০১৫ দাখিল করতে আইনত অধিকারী কিনা? অত্র সালিশী মোকদ্দমাটি অত্র আকারে এবং প্রকারে চলতে পারে কিনা? ১নং প্রতিপক্ষ বাংলাদেশ ক্যামিকেল ইন্ডাষ্ট্রিজ কর্পোরেশন বরাবর ২নং প্রতিপক্ষ জনতা ব্যাংক লিঃ কর্তৃক ইস্যুকৃত ব্যাংক গ্যারান্টিসমূহ সংশ্লিষ্টতায় দরখাস্তকারী/বাদী সালিশী আইন, ২০০১ এর ৭(ক) ধারা মোতাবেক দরখাস্ত দাখিল করতে কিংবা কোন অন্তবর্তীকালীন নিষেধাজ্ঞার আদেশ পেতে আইনত হকদার কিনা?

গুরুত্বপূর্ণ বিধায় চুক্তি আইন, ১৮৭২ এর ধারা ১২৬ নিম্নে অবিকল অনুলিখন হলোঃ

> ***"126. "Contract of guarantee", "surety", "Principal debtor" and "creditor"-*** *A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."*

আইন কমিশন কর্তৃক প্রকাশিত "আইন-শব্দকোষ" এ **Contract of Guarantee** সম্পর্কে বলা হয়েছে যে,

> ***"contract of guarantee*** *গ্যারান্টির চুক্তি; জামিন চুক্তি; নিশ্চয়তা চুক্তি জামিনের নিশ্চয়তার জন্য করা চুক্তি। এইজন্য তৃতীয় পক্ষের প্রয়োজন হয়।* ***The Contract Act, 1872*** *এর ১২৬ ধারা-অনুযায়ী পরিশোধের চুক্তি। কোনো তৃতীয় পক্ষ তাহার প্রতিশ্রুতি পালন বা দায় পরিশোধ না করিলে তাহার পক্ষে কেহ ঐ প্রতিশ্রুতি পালন করিবে কিংবা দায় পরিশোধ করিবে মর্মে চুক্তি যাহা জামিন চুক্তি হিসাবে গন্য হইবে।"*

সুতরাং, এটি দ্ব্যর্থহীনভাবে বলা যায় যে, চুক্তি আইনের ধারা ১২৬ এর বিধান মোতাবেক ***"Contract of guarantee"*** তথা নিশ্চয়তা চুক্তি বলতে

এমন একটি স্বতন্ত্র ও স্বাধীন চুক্তিকে বুঝায় যেটি তৃতীয় পক্ষের প্রতিশ্রুতি প্রতিপালন বা দায় পরিশোধের অঙ্গীকার করে।

"Contract of Guarantee" তথা নিশ্চয়তা চুক্তি একটি স্বাধীন ও স্বতন্ত্র চুক্তি **(Independent Contract)**। এটি প্রদান করা হয় মূল দেনাদার ***(Principal Debtor)*** এর পক্ষে এবং পাওনাদার ***(Creditor)*** এর বরাবরে। কিন্তু মূল দেনাদার ***(Principal Debtor)*** এই স্বতন্ত্র চুক্তি **(Independent Contract)** তথা ***"Contract of Guarantee"*** তথা নিশ্চয়তা চুক্তির কোন পক্ষ নয়। নিশ্চয়তা চুক্তি **(Contract of Guarantee)**-তে দুটি পক্ষ থাকে। একপক্ষ নিশ্চয়তা প্রদানকারী ব্যক্তি বা প্রতিষ্ঠান।

ব্যাংক কর্তৃক তিন ধরনের নিশ্চয়তা চুক্তি তথা **Contract of Guarantee** প্রদান করা হয়। যথা- ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)**।

মূল চুক্তি পত্র থেকে ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)** এর উৎপত্তি হলেও এসব স্বাধীন চুক্তি পত্রের সাথে মূল চুক্তি পত্রের কোন সম্পর্ক নাই। মূল চুক্তির কোন শর্ত ভঙ্গের কারণে এসকল চুক্তি বাতিল কিংবা স্থগিত করা যাবে না। স্বাধীন, ভিন্ন এবং চূড়ান্ত প্রকৃতির হেতু মূল চুক্তিপত্রের পক্ষদ্বয়ের মধ্যে বিবাধমান বিরোধের কারণে ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)** বাস্তবায়নে বাধা প্রদান করা যাবে না। এটি এমন একটি দলিল যা কোনভাবেই মূল চুক্তি দ্বারা প্রভাবিত না হয়ে চুক্তি পালনের নিশ্চয়তা স্বাধীনভাবে প্রদান করে।

ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance**

Guarantee) যেহেতু স্বাধীন চুক্তিপত্র, সেহেতু এসকল চুক্তিসমূহকে সম্মান করতে, বাস্তবায়ন করতে এবং এর শর্ত প্রতিপালন করতে ব্যাংক বাধ্য থাকবে। কারণ এটি একটি নিঃশর্ত এবং অলঙ্ঘনীয় দলিল।

ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)** নিশ্চয়তা চুক্তি তথা ***"Contract of guarantee"*** এর অন্তর্ভূক্ত একটি স্বাধীন ও স্বতন্ত্র চুক্তি **(Independent Contract)**। যার একপক্ষ ব্যাংক বা জামিনদার (***surety***) এবং অপর পক্ষ তথা যার বরাবরে এটি প্রদত্ত হল তিনি দ্বিতীয় পক্ষ।

বর্তমান বিশ্বে বাণিজ্যিক তথা ব্যবসায়িক কার্যক্রম গতিশীল ও কার্যকারী করার ক্ষেত্রে ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)** এর মতো সকল স্বাধীন চুক্তিসমূহ গুরুত্বপূর্ণ ভূমিকা পালন করে। কারণ এসব স্বাধীন চুক্তি ছাড়া ব্যবসা-বাণিজ্য বর্তমানে অচল। ব্যবসা বাণিজ্যকে সহজ ও নিরাপদ করার জন্যই ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)** এর মতো স্বাধীন চুক্তিসমূহ সম্পাদন করা হয়ে থাকে।

ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)** দলিলসমূহকে ব্যাখ্যা প্রদান করতে হবে উক্ত দলিলসমূহের মধ্যে বর্ণিত শর্ত অনুযায়ী।

ব্যাংক গ্যারান্টি **(Bank Guarantee)** তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র **(Letter of Credit)** এবং প্রতিপালনের নিশ্চয়তা **(Performance Guarantee)** দলিলসমূহ ব্যাংকের দায়। ব্যাংক এটি প্রতিপালনে বাধ্য। এ সকল দলিলের সুবিধাভোগীকে ব্যাংক তার পাওনা প্রদান করতে বাধ্য।

শুধুমাত্র প্রমাণিত প্রতারণার ক্ষেত্র ব্যতিত আদালত কখনই ব্যাংক গ্যারান্টি (Bank Guarantee) তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র (Letter of Credit) এবং প্রতিপালনের নিশ্চয়তা (Performance Guarantee) দলিলসমূহ সংশ্লিষ্টতায় কোন আদেশ নির্দেশ প্রদান করবে না।

ব্যাংক গ্যারান্টি (Bank Guarantee) তথা ব্যাংক নিশ্চয়তা, ঋণ পত্র (Letter of Credit) এবং প্রতিপালনের নিশ্চয়তা (Performance Guarantee) দলিলসমূহের শর্তে কোন কিছু বলা না থাকলে ICC Uniform Rules for Demand Guarantees (URDG) ICC Publication No. 758 (2010) এবং The International Chamber of Commerce (the "ICC") এর *Documentary Instruments Dispute Resolution Expertise ("DOCDEX") "Rules"* অনুসরণ করতে হবে।

স্বীকৃত মতেই অত্র মোকদ্দমার দরখাস্তকারী বাদী ব্রান্ড উইন ট্রেডিং কর্পোরেশন লিঃ তর্কিত পারফরমেন্স গ্যারান্টির (Performance Guarantee) তথা প্রতিপালনের নিশ্চয়তায় কোন পক্ষ নন। যেহেতু ব্রান্ড উইন ট্রেডিং কর্পোরেশন লিঃ তর্কিত পারফরমেন্স গ্যারান্টিসমূহের কোন পক্ষ নন, সেহেতু ব্রান্ড উইন ট্রেডিং কর্পোরেশন লিঃ অত্র মোকদ্দম তথা সালিশী আইন, ২০০১ এর ৭(ক) ধারায় মোকদ্দমা দায়ের করার হকদার নয়। বাদীপক্ষ অপরিচ্ছন্ন হাতে আদালতে এসেছেন। অত্র রুলটি খারিজ যোগ্য।

অতএব, আদেশ হয় যে, অত্র রুলটি ২,০০,০০০/- (দুই লক্ষ) টাকা জরিমানাসহ খারিজ করা হলো।

বাংলাদেশের কৃষকের জন্য "সার" সবচেয়ে গুরুত্বপূর্ণ এবং প্রয়োজনীয়। সেই সার আমদানীর দায়িত্ব নিয়ে তা পালন না করে দরখাস্তকারী ভয়ানক অপরাধ করেছেন তথা দেশের কৃষকের এবং অর্থনীতির ব্যাপক ক্ষতি করেছেন। উপরিল্লিখিত কারণে সার আমদানিসহ জনগুরুত্বপূর্ণ কোন পণ্য সরকারীভাবে আমদানির ক্ষেত্রে ব্রান্ড উইন ট্রেডিং কর্পোরেশন লিমিটেডকে কালো তালিকাভুক্ত করা হলো।

বিজ্ঞ জেলা-জজ, ঢাকা কর্তৃক আরবিট্রেশন বিবিধ মোকদ্দমা নং- ৫৯৭/২০১৫-এ প্রদত্ত বিগত ইংরেজী ১৪.১১.২০১৯ তারিখের প্রদত্ত রায় আদেশ এতদ্বারা বহাল রাখা হলো।

অত্র রায় ও আদেশের অনুলিপিসহ অধঃস্তন আদালতের নথি সংশ্লিষ্ট আদালতে দ্রুত প্রেরণ করা হোক।