

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)**

Arbitration Application No. 37 of 2025.

with

Arbitration Application No. 06 of 2018.

IN THE MATTER OF:

An application under Section 12, read with Section 7A of the Arbitration Act, 2001.

With

An application under Section 7(ka) of the Arbitration Act, 2001.

IN THE MATTER OF:

Transcom Beverage Limited, represented by its Managing Director.

----- Petitioner.

-Versus-

TFG International S.r.l., represented by its President Mr. Daniele Pezzani, of Via Cavallotti, 21- 31015 Conegliano (TV) - Italy and others.

----- Respondents.

Mr. Sajed Ahammad Sami, Advocate

----- For the Petitioner.

None appears.

----- For the Respondents.

The 18th day of May, 2026.

Present:

Mr. Justice Md. Toufiq Inam.

These two applications under Sections 7A and 12(7)(a) of the Arbitration Act, 2001 (“the Act”) have been taken up for disposal analogously, as both the applications arise out of the same transaction,

involve identical parties and relate to the same arbitration agreement embodied in the Contract dated 07.08.2016.

The facts, in brief, are that the petitioner is a reputed public limited company incorporated in Bangladesh and engaged in the business of manufacturing, bottling and marketing carbonated soft drinks and beverages throughout the country. The respondent No. 1 is a company incorporated under the laws of Italy and is engaged in designing, manufacturing and supplying equipment for the beverage industry. The proforma respondent No. 2 is the issuing bank through which the petitioner opened the Letter of Credit and the proforma respondent No. 3 is the beneficiary bank of respondent No. 1.

It appears from the materials on record that the petitioner, with a view to modernizing and increasing the production capacity of its PET bottling line, entered into a Contract dated 07.08.2016 with respondent No. 1 for supply, installation, commissioning and operationalization of a PET bottling machinery line. The agreement was executed on behalf of respondent No. 1 by its President, Mr. Daniele Pezzani.

From the terms of the agreement, particularly Clauses 6 and 7 under the heading “Special Conditions”, it transpires that the contract was not merely for sale and installation of machinery. Rather, achievement of specified line efficiency constituted the fundamental and inseparable obligation of the contract. Under the agreement, respondent No. 1 expressly undertook to achieve 60% line efficiency by 01.03.2017 and 90% line efficiency by 31.03.2017 in relation to a production capacity of 24,000 bottles per hour. The agreement further stipulated that release of final payment under the L/C was conditional upon issuance of certification jointly signed by both parties confirming achievement of the agreed line efficiency.

Pursuant to the said agreement, the petitioner opened an irrevocable Letter of Credit dated 21.08.2016 bearing Ref. No. DPCDAK613330 corresponding to the contractual payment structure. It further appears that part shipment was made and certain payments were released. However, according to the petitioner, respondent No. 1 failed to ship and install the filler machinery, which constituted the core component of the production line.

The documents annexed to the application reveal extensive correspondence exchanged between the parties over a prolonged

period. The petitioner repeatedly requested respondent No. 1 to complete the shipment and installation process, whereas respondent No. 1 repeatedly sought extension of time and amendment of the L/C conditions. Acting in good faith and in expectation of performance of the contract, the petitioner accommodated such requests and extended the validity of the L/C on several occasions, lastly on 09.05.2017 pursuant to a revised proforma invoice dated 08.05.2017.

Despite such indulgence, respondent No. 1 admittedly failed to deliver the filler machinery and failed to achieve the agreed operational efficiency. The petitioner contends that because of such failure it had to continue operating its old machinery line to mitigate further commercial losses. It has further been asserted that the machinery line presently operates only at approximately 40% efficiency.

Significantly, the materials on record include a written communication dated 22.11.2017 issued on behalf of respondent No. 1 whereby respondent No. 1 assured the petitioner that shipment would be completed and 90% line efficiency would be achieved by 31.03.2018. In the same communication respondent No. 1 further undertook that in the event of failure to achieve such performance, it would waive the balance payment amounting to €146,231.

The petitioner alleges that notwithstanding such undertaking and despite non-performance of the contractual obligations, respondent No. 1 thereafter sought encashment of the remaining amount under the L/C by falsely representing to the banks that all obligations under the contract had been duly performed. The petitioner further alleges that respondent No. 1 attempted to disown the authority of its own President who had executed the contract and issued the written undertaking dated 22.11.2017.

Clause 19 of the General Conditions of Contract contains the arbitration agreement between the parties. The said clause provides that disputes arising out of the contract shall first be attempted to be resolved amicably and, failing such settlement within 30 days, shall be referred to arbitration consisting of two arbitrators, one to be appointed by each party, and the arbitration shall proceed in accordance with ICC Guidelines, with the venue of arbitration at Dhaka, Bangladesh and the language being English.

It appears that disputes having arisen between the parties, the petitioner initially invoked the arbitration clause through notice dated 11.03.2018. Simultaneously, the petitioner filed Arbitration Application No. 06 of 2018 under Section 7A of the Arbitration Act,

2001 seeking interim protection restraining release of the balance amount under the L/C.

By order dated 29.03.2018, this Court was pleased to admit the application and grant ad-interim injunction restraining the proforma respondent banks from releasing payment of €146,231 under the L/C in question in order to preserve the subject matter of the arbitration.

The petitioner now contends that although arbitration was invoked in 2018, the arbitral tribunal could not be constituted because of the complete inaction and non-cooperation of respondent No. 1. It has been stated that the petitioner continued attempts at amicable settlement while the respondent remained unresponsive. The petitioner has further stated that subsequent global disruptions caused by the COVID-19 pandemic also contributed to delay in constitution of the tribunal.

Thereafter, with a view to finally commencing the arbitral process, the petitioner issued a fresh notice of arbitration dated 04.09.2025 reaffirming its earlier invocation of arbitration and nominating Mr. Margub Kabir, learned Advocate of the Appellate Division of the Supreme Court of Bangladesh, as arbitrator on behalf of the petitioner.

The respondent was called upon to nominate its arbitrator within the stipulated period. However, despite service of notice, respondent No. 1 neither replied nor nominated any arbitrator.

Mr. Sajid Ahmed Sami, learned Senior Advocate appearing for the petitioner, submits that the conduct of respondent No. 1 clearly demonstrates deliberate avoidance of the arbitral process. He submits that the arbitration agreement admittedly exists, the seat of arbitration is admittedly Dhaka, Bangladesh, and this Court therefore possesses supervisory jurisdiction under the Arbitration Act, 2001. He further submits that unless interim protection continues, the very subject matter of the arbitration shall be frustrated.

No one appears on behalf of respondent No. 1 despite notice.

Having heard the learned Advocate for the petitioner and having considered the materials on record, this Court finds that the following questions arise for determination: A) Whether there exists a valid and subsisting arbitration agreement between the parties; B) Whether this Court has jurisdiction under Section 12(7)(a) of the Arbitration Act, 2001 to appoint an arbitrator on behalf of respondent No. 1; C) Whether the interim order granted under Section 7A of the

Arbitration Act should continue till constitution of the arbitral tribunal; and D) Whether the disputes raised are arbitrable in nature.

On perusal of Clause 19 of the Contract dated 07.08.2016, this Court finds no ambiguity whatsoever regarding the intention of the parties to submit disputes arising out of the contract to arbitration. The clause clearly stipulates the venue of arbitration as Dhaka, Bangladesh and further provides for appointment of one arbitrator by each party. The arbitration agreement therefore squarely satisfies the requirements of Section 9 of the Arbitration Act, 2001. The disputes raised by the petitioner relate to alleged breach of contractual obligations, non-delivery of machinery, non-achievement of line efficiency, wrongful invocation of payment mechanism under the L/C and consequential damages. These are manifestly commercial disputes arising out of contractual obligations and are clearly arbitrable in nature.

This Court further finds that the petitioner validly invoked arbitration initially in 2018 and subsequently reiterated such invocation through fresh notice dated 04.09.2025. The respondent, despite service of notice, failed to nominate its arbitrator within the stipulated period. In such circumstances, Section 12(7)(a) of the Arbitration Act, 2001 empowers this Court to appoint an arbitrator on behalf of the

defaulting party so that the arbitration agreement does not become ineffective merely because of deliberate inaction of one party.

The law consistently recognizes that courts exercising jurisdiction under arbitration legislation must adopt a pro-arbitration approach and facilitate constitution of arbitral tribunals wherever parties have consciously agreed to resolve disputes through arbitration. A party cannot be permitted to frustrate the arbitration agreement by simply refusing to participate in the constitution of the tribunal.

This Court is also mindful of the fact that the earlier order of injunction dated 29.03.2018 was granted by this Court for preservation of the subject matter of arbitration. The said order has remained operative for a considerable period and there is nothing before this Court suggesting any material change of circumstances warranting its recall. On the contrary, the disputes admittedly remain unresolved and the arbitral tribunal is yet to assume seisin over the matter.

Section 7A of the Arbitration Act confers jurisdiction upon this Court to grant interim measures before or during arbitral proceedings for preservation and protection of the subject matter of the dispute. The

power exercised under Section 7A is intended to ensure that the arbitral proceedings, once commenced, are not rendered nugatory.

In the present case, if the balance amount under the L/C is released before adjudication of the disputes by the arbitral tribunal, the petitioner may suffer irreparable prejudice and the arbitral proceedings themselves may become ineffective. Balance of convenience and inconvenience therefore overwhelmingly lies in favour of maintaining status quo until the arbitral tribunal considers the matter independently upon constitution.

This Court also finds substance in the submission that since the seat of arbitration is Dhaka, Bangladesh, this Court retains supervisory jurisdiction over the arbitral process notwithstanding the fact that respondent No. 1 is a foreign company incorporated in Italy. The juridical seat of arbitration determines the curial law and supervisory jurisdiction of courts. Once parties consciously chose Dhaka as the seat of arbitration, the jurisdiction of this Court under the Arbitration Act, 2001 stands clearly attracted.

Accordingly, the Arbitration application No. 37 of 2025 (under Section 12 of the Arbitration Act, 2001) is allowed.

Hence, it is ordered that:

- i) Mr. Margub Kabir, Attorney-at-Law, Barrister-at-Law, Advocate, Appellate Division, Supreme Court of Bangladesh, is hereby confirmed as Arbitrator nominated on behalf of the petitioner;
- ii) In exercise of power under Section 12(7)(a) of the Arbitration Act, 2001, this Court hereby appoints Mrs. Anita Ghazi Rahman, Barrister-at-Law, Senior Advocate, Supreme Court of Bangladesh, as Arbitrator on behalf of respondent No. 1;
- ii) The learned Arbitrators shall proceed in accordance with law and the arbitration agreement contained in Clause 19 of the Contract dated 07.08.2016;
- iii) The venue and juridical seat of arbitration shall be Dhaka, Bangladesh;
- iv) The arbitration may be administered through Bangladesh International Arbitration Centre (BIAC), if the learned Arbitrators so decide in consultation with the parties;
- v) The interim order dated 29.03.2018 passed in Arbitration Application No. 06 of 2018 restraining the proforma respondent Nos. 2 and 3 from releasing payment of €146,231 under L/C No. DPCDAK613330 dated

21.08.2016 shall continue and remain in force until assumption of jurisdiction by the learned Arbitral Tribunal and for such further period as the Tribunal may determine in accordance with law; and

- vi) The remuneration and incidental expenses of the learned Arbitral Tribunal shall be governed by such directions as may be issued by the learned Tribunal. However, in order to ensure that the arbitral proceedings are not frustrated by non-participation of respondent No. 1, the petitioner is permitted, if so required by the learned Tribunal, to deposit the share of remuneration payable on behalf of respondent No. 1, subject to final determination and allocation of costs by the learned Arbitral Tribunal in accordance with law.

The Arbitration application No. 06 of 2018 (under Sections 7A of the Arbitration Act) stands disposed of accordingly.

There shall, however, be no order as to costs.

(Justice Md. Toufiq Inam)