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# JUDICIAL INTERPRETATION OF "FOREIGN JURISDICTION CLAUSE" IN A CONTRACT—CALLS FOR REVIEW: A STUDY IN THE CONTEXT OF BANGLADESH

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## 1. INTRODUCTION:[1]

One of the cardinal principles of law of procedure is that a legal proceeding shall be instituted in the court having jurisdiction to entertain the same and the court will administer justice according to the laws it is subject to. Adjudication of a matter not in congruent with the said fundamental principle is a nullity and no legal consequence shall flow from such proceeding. However, skepticism is prevailing as to whether the said principle relating to the jurisdiction of court is applicable in terms of adjudication of civil matters in its full vigor without any derogation.

In the backdrop of above legal prescription this long been practiced that when entering into international contracts[2] parties thereto may agree as to what would be the legal regime to govern the contract, i.e., provisions of the contract would be construed and all disputes between the parties stems out of the contract would be resolved as per the agreed legal regime.[3] Again, parties may agree that any dispute arising out of, or in relation to, the contract would exclusively be adjudicated by the courts of a specific country. By such

[1] I am thankful to Dr. Shirin Sharmin Chowdhury for her thoughtful suggestion. Whatever value the article may have is due in large part to her contributions. Errors or other deficiencies are my responsibility alone.
[2] International contracts are those that are having an international element in them or these involve international movement of goods/services: Roy Goode: "Commercial Law" Second Edition (1995) Butterworths p. 877.
[3] Such a clause is called "proper law clause" Dicey and Morris "conflict of laws" (Ed. Eleventh, P. 1162. See also 49 DLR AD 187, para 15.

a clause commonly known as "foreign jurisdiction clause" the parties express their intention to institute all proceedings for the settlement of disputes before the agreed courts of a particular country although the cause of action may have arisen within the local limits of the courts located in a different country where the contract in question has been performed either wholly or in part.

When a dispute arises out of such a contract, chances are there for a suit being instituted by one of the parties in a court other than those as agreed in the contract and this may lead to a legal battle over the assumption of jurisdiction by the court. The issue of assumption of jurisdiction is further aggravated if, in the first place, the court agreed in the contract and the court assuming jurisdiction over the dispute are not located in the same country and, in the second place, the cause of action of the suit, either wholly or in part, has arisen within the territorial limit of the latter court. If, at all, the other party of the contract, being defendant enters appearance before the court assuming jurisdiction over the dispute, in majority of the cases, he by filing an interlocutory application raises a question as to the legality of assumption of jurisdiction by the court (within whose jurisdiction the cause of action has arisen). This is the time when the legal status of "foreign jurisdiction clause" comes under scrutiny.

One opinion adheres to the strict application of the notion of "national sovereignty". Courts subscribing this view appear to be reluctant to dismiss the suit of the plaintiff having taken the view that statute confers upon the court authority to assume jurisdiction over the dispute; private stipulation in the form of "foreign jurisdiction clause" in a contract shall not have overriding effect towards the complete ouster of the jurisdiction of the local courts. Another stream of opinion is ready to circumvent the application of legal principle reflecting radical notion of "national sovereignty" on the plea of national interest in the backdrop of globalization. It is argued in this paper that the last mentioned opinion seems to be more rational as this would help creating environment conducive to better trade and commerce in the country.

The paper in sections 1 and 2 gives a brief account of jurisprudence as to the legal status of "foreign jurisdiction clause" prevailing respectively in Bangladesh and in some leading legal system, such as United Kingdom, European Union, India and Pakistan and in the final section this paper attempts to put forward some suggestions that will make the laws of Bangladesh regarding "foreign jurisdiction clause" in an international contract congruent with the modern trend.

## SECTION 1
## 2. STATUS OF "FOREIGN JURISDICTION CLAUSE": BANGLADESH PERSPECTIVE:

As far as matter of jurisdiction is concerned, a number of statutes are there prescribing rules to determine jurisdiction of Civil Courts. Although Civil Courts Act, 1887 establishes Civil Courts and defines their pecuniary jurisdiction, however, the Code of

Civil Procedure, 1908 prescribes basic rules for fixing jurisdiction of Civil Courts.[4] One of the cardinal principles regarding jurisdiction of Civil Courts as encapsulated in section 9 of the Code of Civil Procedure, is that Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred under the provisions of laws. The implication of this rule is that a Civil Court shall entertain all suits of civil nature the cause of action of which has arisen within the territorial limit of the Court; provided that suit value falls within the pecuniary limit of the Court.[5] Provided further that assumption of jurisdiction over the suit by a Civil Court is not barred by any statute.[6]

It is stated elsewhere that international contracts for sale/purchase of commodities/goods often contain a clause stating the forum and applicable law for settlement of disputes arising out, or in relation to, the international sale contract between the parties thereto. Seemingly, such "foreign jurisdiction clause" by nature puts restrictions on the jurisdiction of local Civil Courts and such clauses, as it appears, are in conflict with the principle as enunciated in section 9 of the Code of Civil Procedure. As far as laws of Bangladesh is concerned, it appears that section 28 of the Contract Act, 1872 is having some rules regarding the "foreign jurisdiction clause" in a contract and, Therefore, in an effort to evaluate the jurisprudence so far developed on the clauses concerning "foreign jurisdiction" by the Courts of Bangladesh, legal decisions on section 28 of the Contract Act would mainly be examined.

One of the early decisions on the status of clauses regarding "foreign jurisdiction" pronounced by a Court in Bangladesh was in the case of Abdul Razzak V The East Asiatic Co. Ltd. reported in 5DLR 224. In that suit certain merchandise was sent to Pakistan under a bill of lading. Paragraph 2 of the bill of lading governed the right of the parties as regards the forum of the suit; and it was to the following effect:

> "2. Jurisdiction. Any dispute arising under this Bill of Lading to be decided in Denmark according to Danish Law"

Dispute arose between the consignee and the carrier over the non-delivery of goods represented by the bill of lading and consequently a suit was instituted by the consignee in a Court of Munsiff (now called "Court of Assistant Judge") Chittagong. The carrier being defendant made appearance before the Court and filed an interlocutory application seeking an order for returning of the plaint for being filed in the proper court in Denmark. Learned Munsiff allowed the application of defendant against which an appeal was preferred before the then Dhaka High Court. The cardinal question in the said appeal before the Dhaka High Court was whether under the contract, the Danish Court, which was a foreign court, would be the proper forum for decision of the present dispute regarding non-delivery of the goods or whether the Chittagong Court would have jurisdiction to try the dispute inspite of the covenant in paragraph 2 of the bill of lading.

[4] Section 9 as well as sections 15 to 20 of Code of Civil Procedure, 1908 contain rules relating to jurisdiction of Civil Courts.
[5] Civil Courts Act, 1887 fixes the pecuniary limit of the Civil Courts.
[6] The Companies Act, 1994; the Labour Act, 2006; the Arbitration Act, 2003 are some of the statutes imposing restrictions over the power of Civil Courts as prescribed in section 9 of the Code of Civil Procedure.

Making reference to a number of leading decisions pronounced by Courts of Pakistan and India and also English Courts the Court observed: ". . .when two parties living under different systems of law enter into a personal contract covenant to submit disputes to the decision of a foreign court and the question arises which of those systems must be applied to its construction depends upon their mutual intention either as expressed in their contract or as derivable by fair implication from its terms. In other words, in case of a covenant to submit disputes to the decision of a foreign court, the intention of the parties gathered from the whole contract may be that such covenant would be governed by the foreign law and in such a case the essential validity and effect of such a covenant shall be determined by the foreign law. The instant case, in my opinion, falls within the principle enunciated above. . ."[7] and on this basis the appeal was dismissed and judgment of the learned Munsiff was up held.

In the said appeal it was argued before the Dhaka High Court that clauses conferring jurisdiction to a foreign court are void under section 28 of the Contract Act and hence local Court should seize of the matter. To address this point Court observed: "Section 28 of the Contract Act makes void only that agreement which absolutely restricts a party to a contract from enforcing his right under the contract in the ordinary tribunals but has no application when a party agrees not to restrict his rights in the ordinary tribunal but only agrees to the selection of a particular tribunal in which the suit is to be tried."[8] And "In agreeing to bring a suit in one out of the two courts belonging to two foreign countries, both of which would be competent to try the suit, parties cannot be said to have contracted out of the jurisdiction vested in that court or to be depriving that court of its jurisdiction, which it otherwise possessed."[9]

It should be noted here that while delivering the said judgment the Dhaka High Court did not loss sight of the cardinal principle that no one by private stipulation can confer jurisdiction upon the court which it otherwise does not possess; nor its jurisdiction can be taken away by private covenant.[10] To surmount this formidable hurdle Court adopted a broader interpretation of the expression "court of competent jurisdiction". Court observed[11]: "according to the rules of Private International Law, 'a court of competent jurisdiction' 'means a court which has the right to adjudicate upon a given matter. . . . the 'court of competent jurisdiction' refers to extra-territorial competence of a court or rather to the extent to which the competence of a Court is admitted in any country other than the country to which to settle dispute, the court belongs."

In short Dhaka High Court took the view that in case of international contract if the parties by clear stipulations in the contract express their intention as to the proper law and forum, the intention of the parties shall be decisive and Courts ought to give effect to such covenant. Where the such intention of the parties cannot be gathered from the document, Court should decide the question as to jurisdiction by making reference to the

[7] 5 DLR 224.
[8] 5 DLR 224.
[9] 5 DLR 224.
[10] 5 DLR 224 para 10.
[11] 5 DLR 224 para 13.

principles based upon ". . . common senses, upon business convenience, and upon the comity of nations. . . ."[12]

The principle established by Dhaka High Court in Abdur Razzak vs. East Asiatic Co. as to the status of clause in contracts stipulating forum for settling dispute arising out, or, in relation to the contract, had been followed in a series of subsequent legal decisions[13] pronounced by Dhaka High Court and a liberal and commercially responsive regime of rules relating to foreign jurisdiction clauses started to be formed. However, the efforts of Dhaka High Court had a set back when the principles settled by Dhaka High Court regarding "foreign jurisdiction" clauses were placed before the Supreme Court of Pakistan for reexamination. Pakistan Supreme Court disposed of a number of matters by a single judgment reported in 22 DLR (SC) (1965) 334. In all the said matters a common question of law: "What is the status of a clause in a contract conferring jurisdiction to a foreign court to try any matter stems out of the contract" came up for consideration. Hamoodur Rahman, C.J. while speaking for the Pakistan Supreme Court said referring to the decision of Dhaka High Court in Abdur Razzak vs. East Asiatic Co. and all subsequent decisions based thereon,: "In this view of the matter, in spite of the consistent decisions of the High Court of East Pakistan, I have, with utmost respect, to hold that these decisions have diverted the law of the country into a wrong channel and must, therefore, be over-ruled." [14] To justify his position Hamoodur Rahman, C.J, inter alia, stated that exclusive jurisdiction clause in a contract like a bill of lading, whereby the jurisdiction of local court in the country is ousted in respect of any dispute referred to in the same being opposed to public policy and derogatory to country's sovereignty is void.[15]

This decision of Pakistan Supreme Court has been followed by the Courts of Bangladesh after independence. However, in a recent decision[16] involving a question regarding the validity of an "arbitration clause" whereby the parties thereto agreed to refer any dispute arose between them to an arbitrator for settlement according to English Law the Appellate Division of the Supreme Court made some observations which cast shadow on the vigor of the said judgment of the Pakistan Supreme Court on "proper law" and "foreign jurisdiction" clauses in contracts.

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[1212] 5 DLR 224 para 25.

[13] Tar Md. & Co. vs. Federation of Pakistan (1957) 9 DLR 197; Narayanganj Iron Works Ltd. vs. Pakistan (1963) 15 DLR 434 Osaka Shosen Kaisha vs. Prov. of E. Pakistan (1965) 17 DLR 659; British India Steam Navigation Co. Ltd. vs. A.R.Choudhury (1967) 19 DLR 54; Swedish East Asia Co. Ltd. vs. Md. Masud Raza (1969) 21 DLR 343.

[14] 22 DLR (SC) (1965) 334 para 56.

[15] 22 DLR (SC) (1965) 334 paras 54, 55. Hon'ble Chief Justice further argued: (I) The language of section 28 of the Contract Act is clear by itself, and can only, mean that a contract which absolutely restricts any party to it from enforcing his rights under or in respect of such a contract by the "usual legal proceedings" in the "ordinary tribunals" of the country, will, to that extent, be void unless protected by the exceptions to the said section (22 DLR (SC) (1965) 334 para 46.). (II) The "legal proceedings" and "tribunals" referred to in section 28 of the Contract Act can only mean legal proceedings and tribunals known to the legislature as ordinary tribunals in the country and the usual proceedings available in these Courts. These expressions never contemplate any foreign court or any proceeding therein. (22 DLR (SC) (1965) 334.). (III) However, such foreign jurisdiction clauses, even when they purport to give jurisdiction to a Court in a foreign country, are really in the nature of arbitration clauses which come within the exceptions to section 28 of the Contract Act and, therefore, should be dealt with in the same manner as other arbitration clauses. (22 DLR (SC) (1965) 334 para 57.)

[16] Bangladesh Air Service (Pvt. Ltd. vs. British Airways PLC reported in 49DLR(AD) (1997) 187.

It was argued[17] before the Appellate Division of the Supreme Court of Bangladesh that "foreign jurisdiction" clauses in a contract are not to be upheld because these are derogatory to the national sovereignty of the country and hence oppose to public policy. Mr. Mustafa Kamal J while speaking for the Appellate Division observed in forthright terms ". . . The plea of sovereignty and interest of the country and its citizens, if accepted, will render foreign arbitral jurisdiction absolutely nugatory, we venture to say that such a consequence will itself be opposed to public policy, for no country lives in an island these days. Foreign arbitration clause is an integral part of international trade and commerce today."[18]

Further the view put forward by Mr. Mustafa Kamal J was also endorsed by Mr. Latifur Rahman J. While addressing the question as to the validity of "foreign jurisdiction clauses" he observed: "In this regard, I may also refer to a passage from Cheshire and North's Private International Law (11th Edition, 495), while discussing about the interpretation of contracts the authors say: "There is, speaking generally, no reason in principle why the parties should not be free to select the governing law. The express choice of law made by parties alleviates need for interpretation. In the absence of an express choice, the question of the proper law of contract would arise; the parties to a contract should be bound by the jurisdiction clause to which they were agreed unless there is some strong reason to the contrary". The parties having chosen the law, the question of deciding the proper law of contract does not arise. The parties to a contract should be bound by the jurisdiction clause to which they have agreed unless there is some strong reason to the contrary."[19]

It is, therefore, plausible that the decision as pronounced by Pakistan Supreme Court reported in 22 DLR (SC) (1965) 334 came under a severe criticism. Appellate Division of the Supreme Court of Bangladesh has questioned the propriety of the said judgment of Hamoodur Rahman, C.J and disagreed with the observations he made to substantiate his judgment. However, the appellate division did not overrule the said judgment of Pakistan Supreme Court. One explanation may be that in the case of Bangladesh Air Service (Pvt. Ltd. vs. British Airways PLC[20] Appellate Division was to adjudicate whether the "foreign jurisdiction clause" whereby the parties thereto agreed to refer the dispute between them to an arbitral tribunal to be governed by English Law; but the case as dealt with by Hamoodur Rahman C.J involved a "foreign jurisdiction clause" as included in the bill of lading whereby the parties thereto agreed to refer their dispute to a foreign court to be governed by Danish law. It seems, the Supreme Court of Bangladesh left the matter to deal with on some future event if and when opportunity arises to address the question more directly. In the result, because of said two conflicting judgmentts as to the validity of "foreign jurisdiction" and "proper law" clauses, the legal status of such clauses in a contract to be enforced in Bangladesh remains questionable. This grey area needs to be addressed by the judiciary with specificity to bring clarity and certainty in trade transactions of traders of Bangladesh while trading with foreign merchants.

[17] This argument was put forward before the Appellate Division by Mr. Khandker Mahbubuddin Ahmed, Senior Advocate, in a case reported in 49 DLR AD 187, see para 26.
[18] 49 DLR AD 187 para 26.
[19] 49 DLR AD 187 para 56.
[20] 49 DLR AD 187

This paper proposes to put forward some suggestions that may be useful for those who are striving to find a way out in the present matter and to have a rational interpretation of a clause in a contract conferring jurisdiction to a foreign court which will be suitable for the traders working in the era of globalisation. Before doing that, it may be apposite for us to revisit the principles adhered to by some legal systems to address question of legality of "foreign jurisdiction clause" in a contract.

## SECTION 2

## 3. COMPARATIVE ANALYSIS OF LEGAL POSITION OF "FOREIGN JURISDICTION CLAUSE"IN VARIOUS JURISDICTIONS

### 3.1 INDIAN LAW:

It is amazing to note here that a similar question which we are dealing with today was addressed by Indian Court in the middle of last century. Reference may be made to one of such series of cases[21] decided in 1962 in which status of clauses defining "proper law" and conferring jurisdiction to foreign courts was extensively being discussed. In the case of Swedish East Asia Company Ltd. VS Herman and Mohatta (India) Private Ltd.[22] where the respondent being an Indian party commenced a suit in Calcutta against the appellant—a Swedish shipping company, for short delivery of 14 bundles of M.S. Flats shipped on a vessel for carriage to India under a bill of lading which, inter alia, provided that any dispute arising on the said bill of lading would be decided in Sweden according to Swedish law. In an action brought by the Appellant seeking stay of the said proceeding Calcutta High Court observed: ". . . Generally speaking, the Courts try to hold contracting parties to their bargain. In this case, we have found nothing wrong in the contract contained in the bill of lading and when parties with their eyes wide open entered in to an agreement to have their dispute settled in Sweden according to Swedish law, it would, we think, be improper, is in the absence of any circumstance of an overriding nature to supersede that agreement." Thus having found the "foreign jurisdiction" and "proper law" clauses to be lawful the Court stayed the proceedings of the suit in India and allowed fresh proceedings to commence in Sweden according to Swedish law.[23]

It was argued before the Calcutta High Court that "foreign jurisdiction" and "proper law" clauses are oppose to public policy and are negated by section 23[24] of the Contract Act,

[21] AIR 1960 Cal 155, Messrs. Lakhinarayan Ramniwas V. Lloyd Triestino Societa Per Azinnl De Navigaziene Sede in Triesta: It was held that although a contract between the parties cannot be pleaded to bar the jurisdiction of the court which it possesses, the court can always act on the principle that it will compel the parties to abide by their contract. There was an agreement between the parties that disputes, if any, between them would be referred to the Judicial Authority in Italy. That agreement was upheld. The question of convenience of parties and witnesses was also taken into account and it was held that in the absence of anything overwhelmingly in favour of a trial being held in this country, the action ought to be tried in the forum the venue of which had already been determined by agreement between the parties.

[22] AIR 1962 Calcutta 601 (V 49 C 128 para 12;

[23] AIR 1962 Calcutta 601 (V 49 C 128 para 23;

[24] Section 23 of the Contract Act states that if a contract is held by a Court to be oppose to public policy, the consideration and object of the contract is said to be unlawful and Every agreement of which the object or consideration is unlawful is void.

1872. Rejecting the submission the Court observed: ". . .we are clearly of the opinion that there is nothing in the contract contained in the bill of lading which militates against public policy or suggests bad faith on the part of the contracting parties which would justify super session of the chosen forum."[25]

The aforesaid decision was subsequently endorsed by the same High Court in the case of Union of India and another V Navigation Maritime Bulgare.[26] To maintain objectivity it should be noted here that on the same question there are some differing opinions put forward by some High Courts of India. This Courts seem to base their decision on two grounds, namely, "proper law" and "foreign jurisdiction" clauses are oppose to statutory postulation as well as public policy.[27]

## 3.2 PAKISTAN LAW:

As far as the existing laws as in force in Pakistan as to the legality of "foreign jurisdiction" clauses is concerned, these have well been reflected in the judgment of Pakistan Supreme Court reported in 22 DLR (SC) (1965) 334 as elaborated above (See section 1 above).

## 3.3 ENGLISH LAW:

The general rule in English legal system is that the parties to a contract may expressly select the law by which it is to be governed. As pointed out by Dicey and Morris[28] in determining the obligations under a contract, English courts apply the proper law. If the parties have given expression to the intention that the law of a given country shall govern the contract, or if such an intention can be clearly inferred from the contract itself or from the surrounding circumstances, that intention will determine the proper law. They further comment that where a common intention of the parties can be ascertained, it normally fixes the proper law of the contract. This view has well been reflected in a decision of the English Court[29] where Lord Wright, speaking for the Privy Council, observed, "where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention

[25] AIR 1962 Calcutta 601 (V 49 C 128 para 18;

[26] AIR 1973 Calcutta 526 (V 60 C 122); see para 3:". . . . In general the Court would compel the parties to abide by their contracts. But in such a case when the attention of the Court was drawn to the contractual stipulation of this kind the Court might in the exercise of its discretion stay its hand and refuse to try the suit until the competent judicial authority to whose decision the parties had agreed to submit their disputes had pronounced its decision. In those circumstances the Court acted upon the principle that the Court would compel the parties to abide by their contracts and if on a consideration of the circumstances of the case the Court came to the conclusion that it would be unjust or unfair to stay the suit, it might refuse to grant the stay asked for but not otherwise. Therefore, the principle seems to be that the parties are bound by the contract. . . ."

[27] AIR 1991 Delhi 285: para 16: In the first place, under S. 28 of the Indian Contract Act every agreement by which any party thereto is-restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may, thus, enforce his rights is void to that extent. When S.28 talks of "usual legal proceedings, in the ordinary tribunals" it refers to proceedings in India. Any agreement that parties will not have recourse to Indian Courts would be void. In this connection, it could not be said that an aggrieved party could file proceedings in England or in any other foreign country under agreement between the parties. Further any agreement between the parties which provides that provisions of a statute shall not be applicable unless the statute itself gives such a right; would be opposed to public, policy and void under S. 23 of the Indian Contract Act as well.

[28] " Conflict of laws", above (Ed. Eleventh, P. 1162.

[29] Vita Food Products Inc. v. Unus Shipping Co. Ltd. 1939 (A.C. 277

expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.". In a relatively recent decision[30] Lord Reid endorsing the decision of the Privy Council observed: "Parties are entitled to agree what is to be the proper law of their contract .... There have been from time to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled.

Hence this has been concluded by Dicey and Morris[31] stating that the expressed intention of the parties to an agreement must in general be decisive, because it is a fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply.

Another aspect of conflict of laws is the concern whether a clause in an agreement conferring jurisdiction to one of many courts having competence and jurisdiction to seize of the matter is valid and be binding upon the parties so agreeing. The position of English law is that as regards the forum of the suit for a dispute arising out of the contract between the parties it is to be governed by the agreement and the chosen court only shall determine that dispute. While explaining the jurisprudence so far developed in the domain of private international law by the English Judges on the legal status of the clauses of the contract conferring jurisdiction to a foreign forum for the adjudication of any dispute, Dicey and Morris[32] remark that where parties to a contract in international trade or commerce agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them, they may choose a court in the country of one or both of the parties, or it may be a neutral forum; or jurisdiction clause may provide for a submission to the courts of a particular country, or to a court identified by a formula in a printed standard form, such as a bill of lading referring disputes to the courts of the carrier's principal place of business. As a general rule, but subject to important exceptions, English courts (in common with the courts of other countries) will give effect to a choice of jurisdiction. If the English court is the chosen forum, the jurisdiction clause will be effective to confer jurisdiction on the English court; in certain circumstances, the court will have discretion not to exercise it. If a foreign court is the chosen forum, then the English court will give effect to the choice by staying proceedings brought before it in breach of the jurisdiction clause or refusing to give leave to serve process outside the jurisdiction.

In exercising its discretion to stay its preceding the English Court should take into account all the circumstances of the particular case, in particular, the following matters:[33]

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.

[30] Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [1970] A.C. 583, 603, as referred to in "Conflict of Laws", by Dicey and Morris, (Ed. Eleventh, P. 1169).
[31] " Conflict of laws", above (Ed. Eleventh, P. 1162.
[32] "conflict of laws": above (Ed. Eleventh) PP. 403-404
[33] Cheshire and North's Private International Law, Ed. 13, pp. 351-352

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.
(c) With what country either party is connected, and how closely.
(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages,
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trials

Further the inconvenience to the claimant of having to bring two sets of proceedings in different venues if the English proceedings were stayed has been taken into account as a decisive factor in refusing a stay.[34] Again, it is suggested that the necessary strong cause to rebut the prima facie case for a stay is easier to find where the jurisdiction clause is a standard one incorporated into a contract (without any previous course of dealing between the parties) than where it has been specifically negotiated.[35]

It is pertinent to note here that the modern position of English law is that if the question as to the validity of a clause in a contract defining :"proper law" and "forum of adjudication" is raised between an English and a foreign national not being a citizen of the EU member States, the principles explained above shall have application. But if the same question is raised with a national of EU member State, a different regime of law shall have application to resolve the dispute.[36]

## 3.4 EUROPEAN ECONOMIC COMMUNITY LAW:

The member states to the European Economic Community have adopted a number of conventions in order to unify the laws regarding the jurisdiction of courts and enforcement of judgments, in particular, among the member states over, amongst others, civil and commercial matters. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 and Rome Convention, 1980 are the major conventions of this category and underlying purpose of these conventions is to give effect to the terms of contracts whereby the parties thereto select the forum for adjudication of their disputes and the legal regime which the chosen forum shall apply during adjudication.

Article 17 of the Brussels Convention states, "If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. . . ." The Brussels Convention[37] further provides that where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State,

[34] The Rewia [1991] 1 Lloyd's Rep 69 at 75
[35] The Bergen (No 2) [1997] 2 Lloyd's Rep 710 at 715.
[36] Cheshire and North's Private International Law, Ed. 13, p. 535
[37] Article 17

the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction."

However, such an agreement conferring jurisdiction, as Convention requires it[38], shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

Again, Article 3 of the Rome Convention, 1980 provides that a contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

# SECTION 3
# 4. WAY FORWARD:

## 4.1 NOTION OF NATIONAL SOVEREIGNTY AND FOREIGN JURISDICTION CLAUSE:

It is stated elsewhere in this paper that statutes of the country do not squarely and with specificity address the issue of legal status of the "foreign jurisdiction" clause in a contract. Further the views of our judiciary on the same question are not consistent as well. One authoritarian judicial interpretation[39] is still prevailing which favours the strict application of the rules based on notion of "national sovereignty" while dealing with "foreign jurisdiction" clause. Although the Appellate Division of Bangladesh Supreme Court is a critic[40] of the said interpretation, however, it did not overrule the decision leaving rooms for the judges to act upon the nationalist approach as adhered to by the Pakistan Supreme Court.

A point seems to be quite appropriate to be made here. The inherent nature of law is that it is ever changing. Law changes with the passage of time to tailor itself to respond to the need and demand of the age.[41] So a rule which may have justification to have the force of law in a particular time may be quite inappropriate for the people of other age or ages. Because the rationality behind having a law may be guided by a number of factors such as values, thoughts, behavioural pattern, social and economic conditions etc. Therefore, the notion of "national sovereignty" might have provided impetus in the early part or in the middle of twentieth century to the policy makers to take the policy decision; but this notion may not aptly be used in the era of globalization of twenty-first century when the interdependency of the nations has ruthlessly been demonstrated and the prosperity of the countries largely depends on the management of inter state relationship in terms of

[38] See Article 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968
[39] 22 DLR(SC) (1965) 334.
[40] 49 DLR AD 187, see para 26.
[41] Niharendu Dutta Mazumdar V Emperor AIR 1942 FC 22.

trade and commerce, information technology, diplomatic relations etc. As rightly pointed out by Cheshire and North,[42] "Courts in one country must frequently take account of some rule of law that exists in another. A sovereign is supreme within his own territory and, according to the universal maxim of jurisprudence, he has exclusive jurisdiction over everybody and everything within that territory and over every transaction that is effected there. He can, if he chooses, refuse to consider any law but his own. Although the adoption of this policy of indifference might have been common enough in other ages, it is impracticable in the modern civilised world. Consequently, nations have long found that they cannot, by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rules of law merely because they happen to be different from their own internal system of law. . . . it is no derogation of sovereignty to take account of foreign law."

The Chief Justice of the US Supreme Court Mr. Burger observed:[43] ". . . that far too little weight and effect was given to the forum clause in resolving controversy. For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. . . .The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our Courts. . . the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the Carbon Black case have little place . . .We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our Courts.

It is noteworthy that the Appellate Division of the Supreme Court of Bangladesh also appreciates that time has come for our policy makers to revisit our earlier position and "foreign jurisdiction clauses" conferring jurisdiction to a foreign court ought no longer to be treated to be derogatory to the national sovereignty and Court should give effect to the "foreign jurisdiction clauses" as agreed by the parties in their contract.[44]

## 4.2 PROCEDURAL SAFEGUARDS FOR ENDS OF JUSTICE:

When the Courts are found to have inclination towards giving recognition to the "foreign jurisdiction" clause, a further question may reasonably arise: whether the Court when its assumption of jurisdiction is challenged[45] (in reference to a "foreign jurisdiction

[42] Cheshire and North's Private International Law, Ed. 13, p. 4. It is one of the most authoritarian books on the subject and the Appellate Division is found to have made reference to the same to justify its findings: See 49 DLR 187, para 56.

[43] Zapata Off-Shore Co. v. The Bremen" and Unterweser Reederei G. M. B. H. (The "Chaparral"), reported in 1972 (2)Lloyd's Law Reports at page 315: per Mr. Burger C.J, p. 318.

[44] 49 DLR 187, paras 26 and 56. Reference can also be made to a decision reported in AIR 1973 Calcutta 526 (V 60 C 122) para 3Union of India and another V Navigation Maritime Bulgare where Court observed that while dealing with a clause in a contract conferring jurisdiction to a foreign court, court should also consider the present trend of international trade and commerce.

[45] It is pertinent to note here that the foreign defendant who proposes to challenge the assumption of jurisdiction by the local Court in view of "foreign jurisdiction clause" in the contract may face another challenge in choosing the appropriate law under which the interlocutory application is to be filed. He may make the application under Order VII, Rule 10 of the Code of Civil Procedure seeking an order returning the plaint to be filed in the proper court or an application for rejection of plaint under Order VII, Rule 11

clause") shall simply decline jurisdiction on proof of the fact of "foreign jurisdiction clause" in the contract in question or require the parties to satisfy certain procedural criteria before the Court declines jurisdiction over the matter.

The prevailing view, as it seems to be, is that when it is argued before the court that the parties to the contract have already agreed to bring the matter before another forum in a foreign country, the court may at its discretion decline jurisdiction over the matter allowing the same to be adjudicated by the agreed forum if it appears to the court to be just and fair to do so; i.e., the court will consider the availability of evidence, witnesses, procedural safeguard, balance of convenience etc to ensure that the plaintiff/petitioner is not prejudiced in the agreed foreign court and object of defendant is not to frustrate the claim of the plaintiff/petitioner.[46] However, the Appellate Division of the Supreme Court of Bangladesh has taken a robust view on the similar question although raised in terms of a foreign arbitration clause in a contract.[47]

### 4.3 STATUS OF LOCAL PROCEEDING:

The next issue relates to the legal status of the proceedings instituted in the local Court having territorial jurisdiction under whose jurisdiction the cause of action either wholly or in part has arisen. . Two legal trends can be found while examining the principles of private international law as developed by different legal regimes.

In the first place, if any legal proceeding is initiated in a local court in spite of a clause in a contract conferring jurisdiction to a foreign court, the court may, at its discretion, allow the party to institute legal proceedings before the agreed foreign forum. The local court shall, while proceedings before the agreed foreign forum are pending, stay the proceeding before it. The stay on the local proceeding shall automatically stand vacated if the proceedings before the foreign forum is dismissed on the ground of limitation and local court shall adjudicate the matter accordingly.[48]It is plausible that this trend aims at

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(d) of the CP Code. To get the order of rejection the foreign defendant needs to show that the suit cannot be tried by the court as the same is barred by law, i.e., the assumption of jurisdiction by the court is either expressly or impliedly barred by any statute and such argument is not tenable as there is no statutory bar on the Civil Courts to seize of the matter because of the "foreign jurisdiction clause" in the contract in question. Again, the application for returning of the plaint may not be an effective option; for Order VII, Rule 10 presupposes that the suit in question shall be instituted in another Civil Court having jurisdiction by the returned plaint with the court fees already affixed. Hence an order for returning of plaint has got no application if and when the defendant is allowed to commence a fresh proceeding in a foreign court to be governed by a different regime of law. Another option for foreign defendant may be to prefer an application for stay of proceeding under section 10 of the CP Code. However, this section empowers the Courts to stay the subsequent proceeding if a proceeding has already been commenced on the same cause of action between the same parties in a competent Court and hence this option may not, as well, suit him. Finally, the foreign defendant may resort to section 151 of the CP Code which recognizes the inherent power of the Civil Court to administer justice when CP Code is silent as to any procedural matter. Therefore, this matter needs judicial clarification otherwise the litigants after exhausting a number of competent forums may find them to have pursued a wrong proceeding.

[46] AIR 1960 Cal 155; AIR 1962 Calcutta 601 (V 49 C 128) paras 8, 20; AIR 1973 Calcutta 526 (V 60 C 122) para 3; For an excellent survey on the principles guiding judicial discretion for declining jurisdiction by English Court see Chapter 13, Cheshire and North's Private International Law, Ed. 13.

[47] While adjudicating the validity of a clause in a contract conferring jurisdiction to a foreign arbitral tribunal to settle the dispute arising out of the contract according to "Arbitration Act, 1940" (UK), the Appellate Division remarked that the point before it had been a legal one, and it ought to have been decided without reference to extraneous considerations like hardship, availability of the witnesses, expense and the like. The alleged hardship or inconvenience of the appellant as argued by the learned Advocate of the appellant was not a sufficient consideration to allow the appellant to withdraw from the contract which was otherwise lawful: See 49 DLR AD 187, per Latifur Rahman J, para 73.

[48] AIR 1962 Calcutta 601 (V 49 C 128) paras 23 and 25; 22 DLR (SC) (1965) 334 para 57.

striking an appropriate balance between the concept of "national sovereignty"[49] and economic interest of the country. Because, as it is put by US Supreme Court,[50] any strict view whereby the parties to an international contract are required to appear before the local court in the presence of an express clause in the contract agreeing to refer all disputes to a foreign court for settlement arising out of the contract may impede the expansion of trade transaction of the local traders with foreign country. Hence it seems that the legal regimes adhering to this stream of jurisprudence are found to have been inclined to circumvent the jurisdiction of the local courts to a certain extent so as to sustain a modest growth in their economy.

The other trend supports the complete ouster of the jurisdiction of the local courts. According to this trend if the parties to a contract agree that any dispute arising out of, or in relation to, the contract shall be referred to a particular forum to settle the same according to a particular legal regime, such clause shall be decisive, i.e., no court/tribunal not named in the contract can assume jurisdiction over the matter unless the chosen forum has declined jurisdiction. Again, if the parties have chosen the applicable law, the agreed forum shall give effect to such "proper law" clause as well and try the matter in accordance therewith. This legal trend is prevailing in the European Union.[51] This was also the position of law which Dhaka High Court started to develop by a leading decision[52] in 1953 and this position of law continued till 1965 before being overruled by Pakistan Supreme Court.[53]

It is submitted that business conveniences, rapid growth in international trade and commerce and overwhelming respond to the concept of free market economy and globalization among the nations in the post Second World War Era may have provided impetus for the policy makers to introduce such a liberal regime of law. Maintenance of minimum standard in the justice system in all EU member States, it seems, may be another reason for introduction of such liberal regime of law in European Union. However, it seems to be questionable how far this trend of interpretation as to "foreign jurisdiction clause" in a contract is workable for the nations not being tied together under an umbrella like EU to adhere to such a liberal regime of law given the diversity in their procedural and substantive law. This concern cannot outright be rejected. But a few points to be noted to address this skepticism

(a) if the statute gives authority to the Civil Courts to decide whether or not to seize of the matter and if the Courts exercise their judicial discretion on sound principles of law, this may, it is submitted, well preserve the national interest; because, in the first place, it is the local Courts which determine whether the jurisdiction of the domestic Courts over the matter is or is not completely ousted and, secondly, before allowing the parties to initiate legal proceedings in their chosen forum, Court shall have an opportunity to look at the national interest as well as the interest of the plaintiff.

[49] Certain principles have emerged from the notion of supremacy of state. It is affirmed by almost all legal systems that no one by private stipulation can take away the jurisdiction of the courts which is assigned to them by statutes; likewise, no one by private stipulation can confer upon the courts jurisdiction which they otherwise do not possess. See above.
[50] See above.
[51] See Above.
[52] See Above.
[53] See 22 DLR SC (1965) 334.

(b) Further, this approach towards "foreign jurisdiction" clauses is in conformity with the cardinal principle of the law of contract which requires the parties to preserve the sanctity of the contract by performing mutual promises unless prevented by overriding cause.

(c) The attention of the reader may be drawn to one aspect of the decision of Pakistan Supreme Court reported in 22 DLR SC 334. While overruling a series of decisions of Dhaka High Court by which a liberal and rational regime of law started to be developed Pakistan Supreme Court adopted a strict interpretation of the expression "ordinary tribunal" as appearing in section 28 of the Contract Act holding the view that the expression includes the tribunals within the country and not any tribunal outside the territory. It is plausible that section 28 of the Contract Act is designed to address the issues where there is a conflict as to which of the competing forums shall assume jurisdiction over the matter and try the same. This is a matter within the regime of private international law and hence the term "tribunal"[54] used in section 28 of the Contract Act ought to be construed in conformity with the jurisprudence of private international law. The vigor of this submission lies in the fact that wherever forum for adjudication is referred in the Contract Act the word "court" has been employed[55] except section 28 where the term "tribunal" has been used. Use of the term "tribunal" in only one place in the Contract Act, i.e. section 28, it is submitted, has a definite purpose to accommodate forums of various categories and should not be confined to local court alone. Therefore, the reasonable interpretation of such statutory postulation seems to be that the term "tribunal" used under section 28 of the Contract Act not only covers the local forum for adjudication but also encompasses similar forums beyond the territory of the country. Any divergent interpretation of the term "tribunal" used in section 28 to mean and include the forum within the country only may likely narrow down the ambit of the section which would be against the words and spirit of this section as contemplated by the framers of the Contract Act.[56]

## 5. CONCLUSION:

To conclude it is to be stated that uncertainty regarding the legal status of "foreign jurisdiction" clause in a contract needs to be settled with specificity. So it may be expected that if and when opportunity arises our judiciary would play its proper role to shape the legal principles to be followed and be enforced in Bangladesh. It may be recalled, as Justice Mustafa Kamal remarked:[57] ". . . no country lives in an island these days." In the backdrop of globalization Interdependency among the nation states is a practical reality.

Judicial approach in deciding the issue of conflict of jurisdiction as well as interpretation of "foreign jurisdiction clause" in a contract which may have a negative impact on

[54] "Tribunal" means the seat of a judge; a court of law; the place where he administers justice: Black's Law Dictionary by Henry Campbell Black, M.A., sixth edition, p. 1506. Although "tribunal" is invested with judicial authority, however, it differs from "court": 11 DLR (SC) 140; 34 DLR (AD) 175.
[55] See sections 19A, 23, 25, 27, 74, 167, 171 and 223.
[56] This interpretation is based on the decision reported in 5 DLR 224 para 13.
[57] 49 DLR AD 187, para 26.

carrying free trade in a free market economy in particular, in terms of trade and commerce, may not be desirable and this may also be regarded as opposed to public policy. In this context, the opinion put forward by the Dhaka High Court in a leading case[58] to the effect that Court should decide the question as to jurisdiction by making reference to the principles based upon ". . . common senses, upon business convenience, and upon the comity of nations. . . ." seems to be very significant.

Reported in 5 DLR 224 para 25.