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Missing Clause: Arbitration in Local-Foreign Joint Ventures

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Large infrastructure contracts in Bangladesh are usually built on standard forms issued by the employer, often adapted from the model documents used by development lenders. These forms carry a General Conditions of Contract and a set of Special Conditions that modify them. The dispute resolution clause almost always sits in the Special Conditions, and it is usually drafted with two boxes in mind.

The first box is the foreign contractor. Where the contractor is a foreign company, the clause typically sends disputes to institutional arbitration abroad, administered by a recognised centre under its own rules, with the place of arbitration being the seat of that institution. The second box is the local contractor. Where the contractor is a national of the employer's country, the clause usually provides for arbitration in Bangladesh under the Arbitration Act 2001, with Dhaka as the place.

The logic is easy enough to follow. A foreign contractor is thought to want a neutral forum. A local contractor is expected to arbitrate at home. The difficulty is that a very large number of infrastructure contracts in Bangladesh are not awarded to either. They are awarded to a joint venture made up of one local company and one foreign company, bidding together precisely because the tender demanded both local presence and foreign technical capacity. That contractor fits neither box. It is not wholly foreign, and it is not wholly a national of the employer's country. The seat clause simply does not say what happens.

Why this matters more than it looks

This is not a quarrel about convenience. The seat decides which arbitration law governs the process and which courts supervise it. Under section 3 of the Arbitration Act 2001, the Act applies to arbitrations held in Bangladesh. Where the seat is abroad, the extent to which local courts can still assist, for example by granting interim protection over local assets, is a separate and less certain question. A party that guesses wrong on the seat may find itself without the interim protection it assumed it had.

The choice also decides cost, timing and the practical enforceability of any award against assets held locally. And, because arbitration is commenced by serving a notice under Section 27 of the Arbitration Act, 2001, an argument about which forum was validly invoked can shade into an argument about whether the claim was brought in time at all.

The competing readings

An employer faced with a joint venture will usually say that the presence of a foreign partner is enough to pull the contract into the foreign arbitration limb. The contractor will usually say that what matters is the identity and control of the joint venture as a whole, pointing to the local partner being the lead partner, holding the majority interest, exercising management and control in Dhaka, and performing the contract entirely within Bangladesh.

Both readings are arguable, and that is the point. Section 2(c) of the Arbitration Act 2001 itself defines international commercial arbitration by looking at the nationality of a party, and it treats central management and control as one of the tests. So the contractor's argument is not a stretch. It picks up a distinction the statute already draws.

Where a clause is genuinely open to both readings, two further points arise. The first is that the ambiguity is not for either party to resolve on its own. The tribunal, once constituted, may rule on its own jurisdiction, and the courts have their role under the Arbitration Act, 2001. The second is that these Special Conditions are prepared and issued by the employer as part of the tender documents. A bidder takes them as it finds them. Ambiguity in a clause drafted and put forward by one party is ordinarily read against that party.

The drafting lesson

None of this needs to happen. If a tender contemplates joint venture bids, and most large ones do, the dispute clause should say clearly what happens when the successful bidder is a mixed joint venture. One sentence naming the seat, the rules and the administering institution for that case would remove the whole argument.

Until that becomes standard practice, contractors bidding as a joint venture should read the dispute clause before signing rather than after the dispute arises, and should be clear about which forum they are agreeing to.