

Applicability and Legal Enforceability of Sales-Purchase Contract in International Trade Operations in Banks

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Applicability and Legal Enforceability of Sales-Purchase Contract in International Trade Operations in Banks

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Forewords

The findings of the research workshop titled “Applicability and Legal Enforceability of Sales-Purchase Contract in International Trade Operations in Banks ” are presented as part of the ongoing dissemination of BIBM research outputs. The research was presented in an online session held on the Zoom platform on 06 October August, 2021. The applicability and legal enforceability of sales-purchase contracts are critical issue for cross border trade transactions for a developing country like Bangladesh. However, the relevance and applicability of contracts vary in different trade payment methods used in international trade transactions. The objective of the paper is to identify the applicability and legal enforceability of the sales-purchase contract in international trade operations in the context of Bangladesh. This study aims to identify the status, and practice of sales purchase contract for the banks in Bangladesh. The paper attempts to put forward certain proposals for discussion as the policy recommendations for encouraging the use of binding and legally enforceable sales-purchase contracts in Bangladesh.

It brings me great pleasure to offer this valuable resource of academic insights to bank and financial institution practitioners, regulatory agencies, policymakers, academics, and general readers on behalf of BIBM. I think that this research workshop will be a useful resource for policymakers interested in learning more about applicability and legal enforceability of the sales-purchase in banking operations. We welcome feedback from our valued readers on this topic, as it will undoubtedly assist our research team members in improving our research operations in the next years.

Dr. Md. Akhtaruzzaman

Director General

Acknowledgment

The research workshop titled “Applicability and Legal Enforceability of Sales-Purchase Contract in International Trade Operations in Banks” comes to light with the immense support from many persons, especially from the executives of different banks to explore the concepts, status and practices of sales purchase contract of banks in Bangladesh. The study has also identified several challenges associated with different payment methods in cross border transactions and has made some recommendations. We would like to extend our gratitude to Dr. Md. Akhtaruzzaman, Honorable Director General of BIBM, for his valuable advice, observations and thoughts to progress our research work. We are also thankful to Dr. Md. Shahid Ullah, Associate Professor and Associate Editor for his Valuable Comments.

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Executive Summary

A written sales-purchase contract is the primary document for originating international trade transactions for all developed and developing countries including Bangladesh. This founding document of international trade is frequently used as synonymous with Proforma-Invoice (PI) in Bangladesh. *The applicability of sales-purchase contracts does not seem to be distinctly understood by all bankers, and the importance of legal enforceability is hardly recognized* Necessity of these agreements between exporters and importers is considered simply as an information source in the process of issuance of documentary credit to a big section of stakeholders which has been the most widely used trade payment method in the country. Contract is also commonly pronounced with a method of payment-‘documentary collection’ in Bangladesh. Covid-19 devastation resulted in disruption in the business relations at global level, leading to important consequences caused by the nonperformance of international commercial contracts. *The contractual traders-exporters or importers often attempted to exempt their non-performance, either as force majeure or using other legal instruments. Many traders experienced termination or cancellation of contracts that caused huge financial damages and erosion of trusts between the traders.* The paper is based on both primary and secondary information. Published reports and legal interpretations were important sources of secondary information. A questionnaire survey was conducted for the trade service-providing banks. A total number of 32 banks (4 SCBs, 26 PCBs, and 2 FCBs) responded to the questionnaire survey (appendix table-). Two Focus Group Discussions were conducted for bankers, traders, and representatives of the buying houses (list of participants is given in appendix table 2 and appendix table-3). Cases were gathered from banks’ and traders’ sources. The paper is organized into four sections. Following a background, objective and methodological issues in section-1, section 2 reviewed literature on the applicability of sales-purchase contracts, the legal framework, and legal enforceability of contracts in the global context. Applicability of the sales-purchase contracts, the association of contracts with the trade payment methods, and challenges associated with sales-purchase contracts are examined in the context of Bangladesh in section 3. Section-4 puts forward a few policy propositions and recommendations. Based on the primary survey and FGD, the study proposes some policy suggestions for policymakers and practitioners

First, *Standardization of sales contract in international trade with the provision of the insertion of certain clauses is an immediate necessity. In the country’s*

practices, presence of arbitration clause, compensation clause, or legal coverage is hardly observed. Popularizing specialized commercial court/tribunal; making arbitration more popular in terms of resolving commercial disputes, and bringing more effective changes in the ADR and arbitration laws of Bangladesh is the need of the time. Traders may also be suggested to resort to ‘International Arbitration Center’ as dispute settlement body to resolve their disputes considering suitability of the traders of the country. The central bank of the country may issue a guideline on model contract to support exporters-importers and bankers in standardizing the Sales-purchase contract and thus help to minimize commercial, performance, country risk, and TBML risks in international trade.

Second, in most instances, ‘Sales-Purchase contract’ in International Trade is not binding (mostly) agreement and is not legally enforceable. It is well-known that the central bank allowed issuance of back-to-back LC against purchase/sale contract to support RMG traders. The mode is getting popular and is having proven benefits. However, the risks cannot be ignored. In the context of Covid-19, several instances of so-called order cancellation, and the occurrences of shifting from DP to DA without consulting exporters exposed the country’s unbinding sales contracts and weaknesses in terms of legal enforceability. *Open account might also get popularity in the near future when binding contract is particularly essential. In such a situation, ratifications of CISG and signing UNIDROIT Principles became necessary.* Traders should be guided in incorporating specific conditionality and clauses till the ratification of these conventions or principles is accomplished. For this, the concerned ministries, the central bank, and the trade associations of the country have critical roles to play.

Third, the domestic relevant regulation i.e. Contract Act 1872 was equipped mainly targeting the country’s domestic trade and commercial transactions. Alignment of domestic and international regulations might offer useful comfort to the traders. In several instances, domestic regulations have been prepared to incorporate the key provisions of CISG and/or based on the UNIDROIT principles. Such uniformity and connections are mean for matters of comfort for traders and other stakeholders both in domestic and international trade. In the context of growing international trade transactions and linkages of domestic and cross-border trade, aligning Contract Act 1872 with CISG and UNIDROIT provisions might be contributory.

Finally, there is apparent lack of awareness of the benefits of the legal enforceability of purchase/sale contracts among traders and bankers of the country.

The terms ‘Firm Contracts’, ‘Confirmed Contracts’, ‘Binding Contracts’ are hardly interpreted rightly by the traders. ‘Purchase/Sale contract’ and ‘proforma invoice’ are used synonymously by the traders and bankers. It is crucial to disseminate information on the benefits of legal enforceability, and risks associated with the trade transactions based on a proforma invoice or contracts without the required clauses. The central bank, trade associations, and banks have roles to play in this context.

Applicability and Legal Enforceability of Sales-Purchase Contract in International Trade Operations in Banks

1. Background Note

A ‘Sale-Purchase Contract’ or sometimes simply termed as ‘contract’ is the founding document agreed between the exporters and importers in a cross-boarder trade transactions. Typically a purchase/sale contract is formed through a process that may include an offer or requirements, acceptance or rejection, and counteroffer, however, not all contracts have standard terms and conditionality. The applicability and legal enforceability of sales-purchase contracts depend upon specific terms and sets of elements on the face of the document. The relevance and applicability of contracts however vary in different trade payment methods used in international trade transactions. Ratifications of certain globally recognized conventions and soft laws by the trading countries have critical roles for the legal enforceability of the contract documents agreed upon by the traders.

There are examples of accomplishing trade transactions without having protection clauses or international trade may also take place even without the existence of a written contract. However, there are practical reasons and logical basis for having a written and legally enforceable contract that can assist and protect the traders both during and after their negotiations especially when two jurisdictions under differential legislation are engaged in this process. A written contract document offers legal defense, clarifying all particulars of the agreed-upon performances to a judge or arbitrator. Additional complications associated with international trade, as compared to domestic trade, necessitate additional regulatory provisions and formalities to handle key uncertainty or risks i.e. country risk, trade based money laundering (TBML) risk, etc. So it is not only about managing commercial risks of the two parties, it is also about handling the interests of the trading countries. Moreover, “differences in exporters’ and importers’ traditions and backgrounds, as well as laws and regulations governing international sales, can cause complications one may not have thought about, and that is why sound and written contracts are crucial” (Noah, 2020).

A written sales-purchase contract is the primary document for originating international trade transactions for all developed and developing countries including Bangladesh. This founding document of international trade is frequently used as synonymous with Proforma-Invoice (PI) in Bangladesh. The applicability of sales-purchase contracts does not seem to be distinctly understood, and the importance of legal enforceability is hardly recognized. Necessity of these agreements between exporters and importers is considered simply an information source in the process of issuance of documentary credit to a big section of stakeholders which has been the most widely used trade payment method in the country. Contract is also commonly pronounced with a method of payment-‘documentary collection’ in Bangladesh.

Covid-19 devastation resulted in disruption in the business relations at global level, leading to important consequences caused by the nonperformance of international commercial contracts. The contractual traders-exporters or importers often attempted to exempt their non-performance, either as force majeure or using other legal instruments. Many traders experienced termination or cancellation of contracts that caused huge financial damages and erosion of trusts between the traders. A big section of contractual partners failed to protect themselves against hasty and irresponsible decisions of the counterparties mainly due to the unbinding nature of their contracts. Necessity of having a sound and legally enforceable sales-purchase contract was strongly felt in the context of the first wave of the Covid-19 crisis. Traders in Bangladesh also faced many instances of the termination and non-performance of contracts, and vulnerability and unbinding nature of the sales-purchase contracts were heavily exposed. Contract partners of the ratifying countries of the recognized legal instruments like the United Nations Convention on Contract for the International Sale of Goods (CISG) and the UNIDROIT Principles on International Commercial Contracts (UNIDROIT Principles) were better equipped to protect themselves. Though the major trading partners of Bangladesh are among the signatory countries of these conventions/principles, Bangladesh is yet to ratify these instruments.

On the above background, the objective of the paper is to identify the applicability and legal enforceability of the sales-purchase contract in international trade operations in the context of Bangladesh. The paper attempts to put forward certain proposals for discussion as the policy recommendations for encouraging the use of binding and legally enforceable sales-purchase contracts in Bangladesh.

The paper is based on both primary and secondary information. Published reports and legal interpretations were important sources of secondary information. A questionnaire survey was conducted for the trade service-providing banks. A total number of 32 banks (4 SCBs, 26 PCBs, and 2 FCBs) responded to the questionnaire survey (appendix table-). Two Focus Group Discussions were conducted for bankers, traders, and representatives of the buying houses (list of participants is given in appendix table 2 and appendix table-3). Cases were gathered from banks' and traders' sources.

A draft paper was presented in a Research Workshop and was finalized based on the inputs of the experts/participants of the Research Workshop.

The paper is organized into four sections. Following a background, objective and methodological issues in section-1, section 2 reviewed literature on the applicability of sales-purchase contracts, the legal framework, and legal enforceability of contracts in the global context. Applicability of the sales-purchase contracts, the association of contracts with the trade payment methods, and challenges associated with sales-purchase contracts are examined in the context of Bangladesh in section 3. Section-4 puts forward a few policy propositions and recommendations.

2. Applicability of the Sales-purchase Contract in International Trade and the Relevant Regulatory Framework

2.1: International Contract of Sale- A Founding Document of International Trade

An international contract of sales or sales-purchase contract is an agreement under which goods or services shall be delivered from the territory of one country to the territory of another country.¹ For sound and hassle-free trading operation and payment, a purchase/sale contract should be drafted carefully and comprehensively. The contract could be either oral or written. It may be possible to enforce the contract that was made orally between parties depending on the national law, governing the contract. However, to avoid disputes, it is better to have an agreed written contract, not conflict with some other relevant contracts.²

¹ <https://chyrkinlaw.com/en/what-you-should-know-about-international-sales-contracts/>

² Like contract of carriage, payment mechanism and insurance contract etc.

A sound contract must be a legally binding agreement, which means when prepared correctly is enforceable in a court of law; parties may collect recompensation for any damages if one of the parties fails to meet the requirements in the contract (Termsfeed, 2020). Generally, a legally binding contract or agreement requires notation of obligations or the parties, performance issues and payment terms; and insertion of the circumstances of handling breach of contract.

The rights of exporters and importers in international transactions are governed either by the national laws or by the UN Convention on the International Sale of Goods [CISG] popularly known as Vienna Convention. Principles of International Commercial Contracts [UNIDROIT Contract Principles or UPICC] is another popular soft law for the legal enforceability of contract. A few regional and national regulations or Acts are also being used. In most cases, there are large degrees of similarities between the regional/national laws governing purchase/sale contracts and the Vienna Convention, and UNIDROIT Principles. Other than the courts of the trading partners, commercial arbitration center could be selected by the traders for arbitration.

Use of standard format for international trade contracts has recognized benefits for the trading parties and trade finance providing banks and financial institutions. A standard format for purchase/sale agreement helps to minimize commercial and performance risks and protect the interests of the key stakeholders in a better manner. Though certain commodity and raw material markets use highly specific/customized forms of contracts with some obligatory terms, standard contracts, in general, have extensive similarities. Some of the standard contract formats can be found from sources like ORGALIME [liaison group of the European mechanical, electrical, and metalworking industries], The United Nations Economic Commission for Europe [UNECE], or ICC Model Contracts. However, generally, a standard contract should have at least the following elements (Table 2.1):

Table 2.1: Elements of a Standard Purchase/Sale Contract
<ul style="list-style-type: none"> • Names and addresses of importer/applicant, the importer's bank/ presenting/ buyer's bank • Names and addresses of the exporter, exporter's bank /nominated/ remitting/ seller's bank • Total value and full description of goods [specification, quantity, unit price, etc.] • Last date of shipment, date of expiry, and documents required • Payment Method • Payment terms: tenor, Incoterms; warranty/ guarantee/ undertaking • Arbitration or Damage Clause • Damage Clause • Force Majeure Clause <p><i>Note: Based on the standard format of ICC, ORGALIME, and UNECE.</i></p>

It is always suggested to conduct primary due diligence on counterparty (especially when it is new), by checking updated information on the entity, financial strength, powers of the representative of the company to sign the document, etc. before going for a contract. Transfer of risks and responsibility from the seller to the buyer is crucial and Incoterms³ serves as guidelines and rules for that for the exporters, importers, lawyers, and others involved in international trade. In the cross-border trade transactions, it is very important to define the ways of dispute resolution that can be both a court and arbitration. Conditions regarding the governing law are closely related to conditions on the dispute resolution clause. It is obvious that a party might be interested to have its own governing law to cover any contract, however, identifying and resorting to a globally accepted set of rules offer better outcome. Presence of such a clause is crucial to handle any performance-related dispute that may arise in the process of the execution of the contract (Kawsar, 2018). With dispute settlement or ADR clauses, the parties can agree on whether the arbitration will be binding or non-binding; the place of arbitration; governing law of arbitration proceedings; and the selection of the arbitrators; and modern contracts also contain a force majeure clause to handle any unforeseen developments (Huq, 2020). It might appear that drafting a contract is quite simple,

³ Current version of incoterms, Incoterms 2020, having 11 terms became effective in January 2020 that broadly cover: the responsible parties of *export and import clearance, transportation cost/freight cost, loading and unloading responsibilities, insurance, and point of risk transfer* (ICC Incoterms, 2020).

however, misunderstanding/wrong drafting/absence of conditionality may result in unexpected outcome, and following standard format help to minimize risks in trade transactions and sustaining damages as a result of any misunderstanding and non-performances.⁴ Model forms help draft the contract, however, one must choose the correct form and add product or transaction-specific items to the contract.

2.2: Applicability of Purchase/sale Contract in International Trade Payment Methods

Cash in advance, open account, documentary collection, and documentary credit are the trade payment methods to facilitate export-import transactions. Though purchase/sale contract is the starting point of international trade transactions, applicability of purchase/sale contract varies in different trade payment methods. Well-drafted and legally enforceable purchase/sale contract have differential implications for diverse extent of country risk, commercial risk, and money laundering risk associated with different trade payment methods (Table 2.2).

Table 2.2: Applicability of Purchase/sale Contract and Risk Elements in Trade Payment Methods		
Methods	Associated Risks	Applicability of Contract
Open Account	Risky for exporter; involvement of banks are insignificant; relatively cheap for the traders; limited regulatory control; high country risk; high ML/TF risk.	Purchase/Sale Contract is the guiding document; Legal enforceability of purchase/sale contract is particularly important to protect the interest of exporter, banks, and other associated risks.
Cash in Advance	Risky for importer; involvement of banks is insignificant; limited regulatory control; high country risk; high ML/TF risk.	Purchase/Sale Contract is the guiding document; Legal enforceability of purchase/sale contract is particularly important to protect the interest of importer, banks, and other associated risks.

⁴ <https://chyarkinlaw.com/en/what-you-should-know-about-international-sales-contracts/>

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Table 2.2: Applicability of Purchase/sale Contract and Risk Elements in Trade Payment Methods		
Documentary Collection	Exporters have lower risks than open account; banks are engaged in remitting payments and documents; greater regulatory control than open account; relatively less country and ML risk as compared to the open account.	Purchase/sale Contract is one of the guiding documents; the method is collectively guided by URC 522 and purchase/sale contract; Legal enforceability of purchase/sale contract is important to protect the interest of exporter, banks, and other associated risks.
Documentary Credit (LC)	Banks' involvement is significant and bank itself is a party in LC; very structured and formal method guided by UCP 600 (supported by ISBP 745 and URR 725); considerable regulatory control; most reliable trade payment method from country risk and ML/TF risk perspectives.	Purchase/sale contract is useful in the process of LC issuance; contract is not part of regulation for LC, however, legally enforceable and binding contract becomes essential when LC does not perform.

2.3: Principles and Regulatory Guidelines for Uniformity and Legal Enforceability of Contract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) and the International Institute for the Unification of Private Law or Principles of International Commercial Contracts (UNIDROIT Contract Principles or UPICC) are the key pillars for harmonizing international contracts in export-import transactions (Dennis, 2014). The UNCITRAL CISG was adopted in April 1980 by the UN General Assembly (Flechtner, 2009). The Convention⁵ provides a uniform framework for contracts of sale of goods between parties from different jurisdictions. The text of the convention contains 101 substantive articles of the CISG, which are organized into four Parts. Part I encompass articles 1-13 of the

⁵ Uniform Law on the International Sale of Goods (ULIS) and Uniform Rules on the Formation of Contract of Sale (ULF) also called as Hague Conventions, 1964 are the underlying documents of CISG.

Convention and covers sphere of application and general provisions. Part II of the Convention deals with the formation of contract. The largest part of the Convention is Part III that mainly consists of obligations of the seller regarding delivery of goods, handing over of documents, conformity of goods, third party claims, remedies for breach of contract by the seller, remedies for breach of contract by the buyer, obligations of the buyer, taking delivery, etc. Part IV includes final provisions in articles 89-101 of the convention. CISG enjoys a significant amount of recognition and success. According to the WTO (2015), the world's top six merchandise trader countries are all signatories to the CISG. A total number was 97 at this moment which collectively control around four-fifth of the global trade transactions (www.cisgac.com). CISG is believed to be the most successful convention in the history of cross-border commercial trade transactions.

Complexities and conflicts in contract rules may be avoided by using CISG (Teacher, 2019). It is the document that offers a reliable platform and rules on which traders, legal systems and arbitrators may rely (UNCITRAL, 2014). Unification of rules was necessary for efficient cross-border trade and this goal was significantly served by CISG (Bonell, Liguori 1997; Enderlin, 1992). CISG became crucial for international trade that attempts to unify global rules on commercial sales and tries to mitigate links between international sales laws (Andre Janssen 2009).

The CISG provisions are automatically applied to the contracting traders when both are from the ratifying countries. Parties can modify or exclude⁶ the terms of the CISG by explicitly mentioning the provisions in the contract. 'Automatic' application may also be eliminated if the ratifying country has made a reservation under article 95 of the CISG.⁷ The convention is applied to goods only, and the transactions must be between two different states (UNCITRAL Digest 2008). The CISG covers⁸ a wide range of contracts, however excludes agreements for the purchase/sale for personal or household use. Moreover, agreements or contracts for

⁶ The CISG Advisory Council has issued an opinion about exclusion of the CISG (CISG- AC Opinion No. 16), according to which any exclusion provision should bear a clear intent and exclusions made after the execution of a sales contract will still be governed by the formation of contract provisions of the CISG (Beck, 2011).

⁷ An article 95 reservation is when a country makes a declaration at the time of ratification, approval or accession to the CISG that it will not be bound by the CISG when the private international law rules lead to the application of its laws (Fatma, 2016).

⁸ <https://www.corrs.com.au/insights/the-un-cisg-and-its-implications-for-australian-businesses-during-the-covid-19-pandemic>.

the sale/purchase of shares/securities, for the sale/purchase of ships or vessels, or contracts/agreements for the sale/purchase of electricity are out of the scope of CISG.

Application of CISG is very common in the international arbitral tribunals however application of the CISG by courts varies across globe (Enderson, Mazotta, Zeller, 2010). Use of CISG is common in European civil law courts which is not true for USA. Though the CISG has been ratified and acknowledged by the USA, the federal district courts only recently explicitly recognized its application.⁹ Singapore explicitly declared the application of CISG for contracts in the country; enforcement of the CISG was ensured by China through the introduction of the New Contract Law 1999; German courts recognized the application of the CISG in resolving disputes (Bruno Zeller 2007). CISG has been implemented as not only the cross border sales law but as well as domestic law of sales by a number of economies. Domestic contract regulations/acts of Sweden and Finland have been formulated and enforced on the concept of the CISG. Norway endorsed CISG as their law for sales both in domestic and international transactions (Peter Schlechtriem, 2005). There is common space for the co-existence of national laws on contracts and the CISG, and CISG is not forcibly applied to the international transactions (Anderson, 2015).

Regarding the nature of application of the available rules, the CISG is a binding instrument when applied, whereas the UNIDROIT Principles are a soft-law instrument aimed at harmonizing the international commercial contract law as the supplement of CISG and even domestic laws.¹⁰ UNIDROIT Principles, prepared by the independent legal and geo-political experts, have been translated into more than 20 languages. Part of the methods in which the UNIDROIT Principles can be implemented into a contract is to choose them as the rules of law governing the contract or to incorporate them as terms of the contract (Cristofor and Casiana, 2020). UNIDROIT Principles are helpful in interpreting CISG and thus it might be a very good gap-fillers (Gilberto, 2021). CISG and UNIDROIT Principles are articulated simply to be understood easily by the foreign actors, and applying

⁹ According to a ruling by the federal district court of USA (August 2019), the CISG will be applied for the sale of goods if the parties are incorporated in ratifying countries; and the sale/purchase contract does not explicitly opt out of the CISG (2019 WL 3755499). In another instance (Ningbo Yang Voyage Textiles Co. v. Sault Trading, September 2019) the CISG was applied by the NY District Court as both China and USA were the ratifying countries (2019 U.S. Dist. LEXIS 155405.)

¹⁰ <https://www.unidroit.org/unidroit-covid-19/#1456405893720-a55ec26a-b30a>

these for harmonizing international contract law can contribute to trade and economic growth in countries with underdeveloped legal system (Whited, 2011).

The current version of UNIDROIT, the fourth edition, was approved in 2016. The first edition was approved in 1994, then second one received recognition in 2004, and third version was approved in the year 2021. Bonell (2007) noted, the UNIDROIT Principles, prepared as a soft-law, have been acknowledge favourably in practice. As of September 2021, a total number of 63 major trading countries ratified the document of which USA, UK, Japan, China, India and a good number of European countries. Collectively CISG and UNIDROIT Principles offered a comprehensive and modern legal framework for international sales/purchase transactions (unidroit.org, 2020).

Several regional and domestic regulations are in use in handling international arbitration and disputes in the courts of law like European law, English Law, USA Law, Chinese Law, Indian Law, etc. Inspired by CISG and taking into account the requirements of European domestic trade, the Principles of European Contract Law (PECL) is a set of model rules drawn up by leading contract law academics in Europe. In the context of the commercial transactions in USA, the Uniform Commercial Code (UCC) is a comprehensive laws. The CISG and UCC provide the similar remedies in the event of breach. UK Uniform Laws on International Sales Act 1967, and Indian Contract Act 1972 are relatively old documents. Current Contract Law of the People's Republic of China is a law came into force in 1999, a relatively recent one.

Global Arbitration Centers are essential element in handling purchase/sale contract and several other international trade related disputes. Regarding recognized dispute settlement centers, Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), International Arbitration Centers located in India and are prominent. SIAC, for example, reached a new high in 2020 with 1,080 new case filings, with SIAC administering 98 percent of the cases. SIAC was chosen by parties from 60 countries to arbitrate in 2020. The overseas user ranks were topped by India, the United States, and China. Other major international users include Switzerland, Thailand, Indonesia, Vietnam, and Japan, as well as a wide range of civil and common law countries (LJC & LCLS, 2021).

2.4: Purchase/sale Contract in the Context of Covid-19

Covid-19 disrupted international trade transactions, and it has notable implications for the purchase/sale contracts. Especially, the outbreak has undoubtedly impacted the business relations at global level, leading to important consequences caused by the nonperformance of international commercial contracts (Squire, 2020).

Despite notable success in handling the impact of Covid-19, business and trade uncertainty remains and the traders are required to be careful concerning the exiting and upcoming trade contracts. In this critical time, terms or clauses associated with the risk of financial insolvency worsening trade performance on the part of customers and suppliers, covering termination rights, rights to amend payment terms have received newer motivation. Force majeure provisions are no longer simple statements, and one size no longer fits all businesses and/ or circumstances. The complex situation demands careful thoughts on the scope and impact of unforeseen events like suspension, alteration, termination, etc.

Protecting legitimate rights of both exporters and importer became a key focus in the wake of the first wave of the Covid-19 devastation, and concerned parties were working hard to ensure protection under various regulatory framework. In the context of CISG, the basic principle of the CISG is party autonomy, and the parties' special agreement on obstacles to the performance of contracts caused by the covid-19 pandemic is respected. In the absence of such an arrangement, the contracting parties are required to invoke article 79 of the CISG to seek an exemption. For exempting themselves from the liability of non-performance of the contract by invoking article 79 of the CISG, there must be proof of the following obstacles or impediments: "one, beyond control of the party; two, unable to be foreseen; three, unable to be avoided or overcome; and four, there is a causal relationship between the impediment and the party's non-performance" (uncitral.un.org).

In several instances, the application of CISG and UNIDROIT Principles supported handling disputes and offering remedies and exemptions from liabilities. In the context of the ongoing Covid-19 devastation and trade disruption, UNIDROIT instruments might be useful to the exporters-importers, policymakers, legal professionals, and development practitioners, etc.¹¹ CISG and UNIDROIT Principles became even more relevant and contributory in the context of Covid-19 devastation (Gilberto, 2021). In this critical and complex situation, traders must

¹¹ <https://www.unidroit.org/unidroit-covid-19/#1456405893720-a55ec26a-b30a>

have continuous communication with the counterparties, oversee operations, preserve evidence, use appropriate policy instruments, and use legal instruments like CISG (Zhuang, 2021).

3. Contract of Sale in International Trade and Existing Regulatory Framework and Legal Enforceability of Contract in Bangladesh

3.1: Use of Purchase/Sale Contract in Bangladesh and Its Applicability in Different Trade Payment Methods in the Country

‘Firm Contract’ appears to be a requirement for trade services by banks in Bangladesh. There is specific mention of the term ‘firm contract’ in Bangladesh Bank Guidelines on Foreign Exchange Transactions (GFET) and Export Policy of Bangladesh. For example, “LC to be opened only against ‘Firm Contract’”, “.....AD should, before opening an LC, see documentary evidence that a firm order for the goods to be imported has been placed and accepted” according to the Chapter-7, GFET, 2018; and “commercial banks will consider, on a priority basis, providing credit to the exporters of 90 percent of LC or contract value against irrevocable letter of credit or confirmed contract”, noted in the Export Policy 2018-2021. Despite differential interpretations, the term ‘Firm Contract’ might indicate the binding nature of the agreement that cannot be amended or cancelled unilaterally. The term ‘Confirmed Contract’ may be associated with the credibility and genuineness of the counterparty. GFET and Trade Policy documents of the country do not specifically mention using or verifying any special clause to make a contract a binding agreement or legally enforceable, however, there are cautions or suggestions on the trade service facilitation or financing facilities against contract alone. For example, “..... ADs should make discreet inquiries in this regard through their correspondents abroad etc., greater care should be taken particularly in cases of shipments against contract alone and shipments on CAD/DA basis” (GFET, BB). *Guideline on Prevention of Trade Based Money Laundering (issued in 2019 by BFIU)* also puts forward cautionary note regarding the potential vulnerability of the contract documents “...while making remittance of royalty and other technical fees, banks may expose them to money laundering by not conducting due diligence under the following conditions.....ambiguous agreement/contract between local company and technical service provider; even where goods are publicly traded, the current prices may not reflect the agreed price used in any contract of sale or purchase and these details will not usually be available to the banks involved due

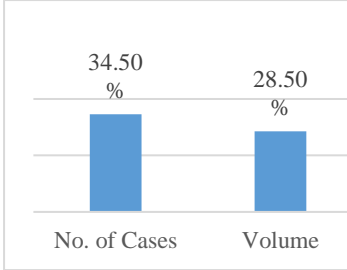
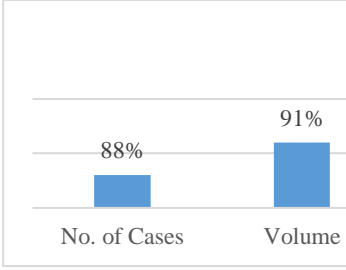
to competitive sensitivity of such information;Guarantee/ Standby LC fails to reference underlying project or contract.”

At the user level (exporters and importers), Proforma Invoice (PI) is the starting point of cross-border trade both in case of export and import in Bangladesh. There are also use of Purchase Order and Indent. In 90% of cases however it is the singed PI that is submitted to the banks for trade services/financing by the clients, and contracts are not significantly different in different economic areas and sectors (Survey data). In many instances, traders and bankers hardly make distinction between ‘Proforma Invoice’ and ‘Contract’ and thus cannot perceive the necessity of the legal applicability and binding nature of the agreement ‘sales-purchase contract’. Use of some necessary contract clauses associated with the legal enforceability and protection concerns is not at all common in Bangladesh (3.1).

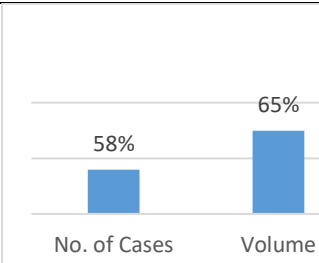
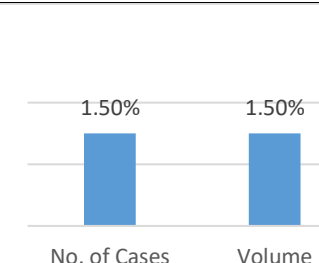
Table 3.1: Presence of Key Relevant Contract Clauses for Legal Enforceability in Bangladesh	
Sales-Purchase Contract Clauses	Availability
Resolution of Disputes Clause	15%; available for contract of mainly scrap vessel import, and reputed buyers.
Arbitration Clause	13%; available for contract of scrap vessel import, and reputed buyers.
Force majeure Clause	Very Insignificant
Limitation of Liability Clause	Very Insignificant
Applicable Law and Guiding Principles	Very Insignificant
<i>Note: Based on Collected Contract Documents (Appendix Table 1)</i>	

Applicability of sales-purchase contracts has implications for the trade payment methods used in any country. Of the different trade payment methods, LC has been widely in use in Bangladesh. Importation of the country is mostly taking place using documentary credit. Legally enforceable purchase/sale contracts are essential for handling several key risks in case of all forms of trade payment methods including LC. Clauses and terms of the contracts are useful in the process of issuing a

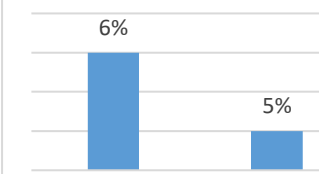
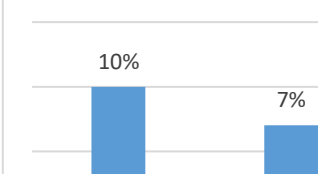
documentary credit; however legally enforceable contract is particularly useful in case the LC does not work (Table 3.2).

Table 3.2: Use of Documentary Credit in Bangladesh and Applicability of Sales Contract														
Export 2020	Import 2020	Applicability												
 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>34.50%</td></tr><tr><td>Volume</td><td>28.50%</td></tr></table>	Category	Percentage	No. of Cases	34.50%	Volume	28.50%	 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>88%</td></tr><tr><td>Volume</td><td>91%</td></tr></table>	Category	Percentage	No. of Cases	88%	Volume	91%	Legally enforceable contracts offer protection in case of the failure of the performance under Documentary Credit Agreement
Category	Percentage													
No. of Cases	34.50%													
Volume	28.50%													
Category	Percentage													
No. of Cases	88%													
Volume	91%													
Source: Payment data sourced from BIBM Review, 2021														

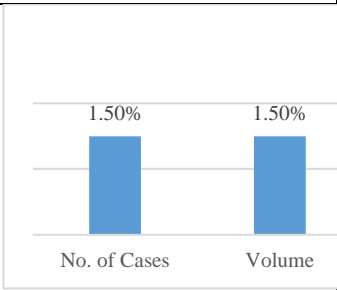
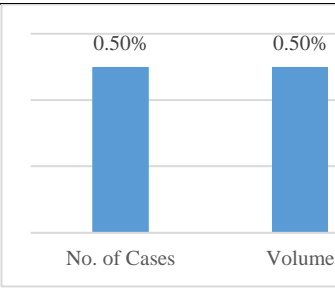
‘Sales-purchase contract’ is part of guiding or legal document in the cases of documentary collection, cash in advance, and open account. Documentary collection is the second most prominent trade payment method in Bangladesh, and in many instances ‘contract’ is used to indicate trade facilitation using documentary collection only. The popularity of documentary collection is increasing steadily mainly in exports. Between 2019 and 2020, the use of documentary collection increased from 35% to 65% in exports (BIBM Trade Review, 2021). Documentary collection is collectively guided by the URC 522 and Purchase/Sale Contract (Table 3.3). Thus a binding and legally enforceable sales-purchase contract is very important to ensure for safety and security of the banks, traders, and also contributory to the ‘country risk’ management.

Table 3.3: Use of Documentary Collection in Bangladesh and Applicability of Contract														
Export 2020	Import 2020	Applicability												
 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>58%</td></tr><tr><td>Volume</td><td>65%</td></tr></table>	Category	Percentage	No. of Cases	58%	Volume	65%	 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>1.50%</td></tr><tr><td>Volume</td><td>1.50%</td></tr></table>	Category	Percentage	No. of Cases	1.50%	Volume	1.50%	Alongside URC 522, Purchase/Sale Contract is the Guiding Document and Should be a binding document for Safety and Security
Category	Percentage													
No. of Cases	58%													
Volume	65%													
Category	Percentage													
No. of Cases	1.50%													
Volume	1.50%													
<i>Source: Payment data sourced from BIBM Review, 2021.</i>														

Cash in Advance has been unpopular throughout the globe. Bangladesh is not different. However the volume and number of ‘cash in advance’ increased in recent time mainly in the context of Covid-19 when a sizeable volume of health and essential equipment/goods were imported against cash in advance. Legally enforceable contract is very essential in case of Cash in Advance which is the sole guiding document for safety and security of the key stakeholders (Table 3.4).

Table 3.4: Use of Cash in Advance in Bangladesh and Applicability of Contract														
Export 2020	Import 2020	Applicability												
 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>6%</td></tr><tr><td>Volume</td><td>5%</td></tr></table>	Category	Percentage	No. of Cases	6%	Volume	5%	 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>10%</td></tr><tr><td>Volume</td><td>7%</td></tr></table>	Category	Percentage	No. of Cases	10%	Volume	7%	Purchase/Sale Contract is the Guiding Document and Should be a binding document and legally Enforceable for Safety and Security
Category	Percentage													
No. of Cases	6%													
Volume	5%													
Category	Percentage													
No. of Cases	10%													
Volume	7%													
Note: Payment data sourced from BIBM Review, 2021														

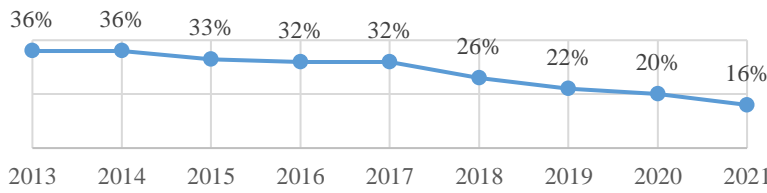
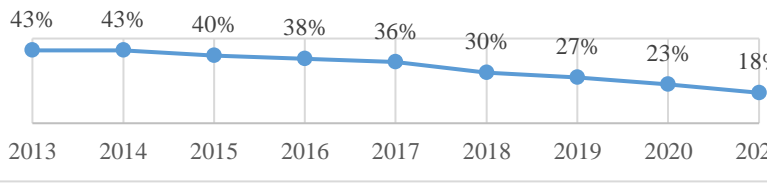
In contrast to the global practices, use of open account has been very limited in facilitating trade transactions in the country due to some explicit and implicit restrictions. This is however not true in case of trade transactions within EPZ. Since mid-2020, the central bank of Bangladesh permitted conditional open account 2020¹². Like Cash in Advance, legally enforceable contract is the guiding document for ensuring safety and security of the traders especially exporters (Table-3.5).

Table 3.5: Use of Open Account in Bangladesh and Applicability of Contract														
Export 2020	Import 2020	Applicability												
 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>1.50%</td></tr><tr><td>Volume</td><td>1.50%</td></tr></table>	Category	Percentage	No. of Cases	1.50%	Volume	1.50%	 <table><tr><th>Category</th><th>Percentage</th></tr><tr><td>No. of Cases</td><td>0.50%</td></tr><tr><td>Volume</td><td>0.50%</td></tr></table>	Category	Percentage	No. of Cases	0.50%	Volume	0.50%	Purchase/Sale Contract is the Guiding Document and Should be a binding document and legally Enforceable for Safety and Security
Category	Percentage													
No. of Cases	1.50%													
Volume	1.50%													
Category	Percentage													
No. of Cases	0.50%													
Volume	0.50%													
Source: Payment data sourced from BIBM Review, 2021														

RMG trade, the key export of Bangladesh, has huge reliance on back-to-back LC. This has important implications for the applicability and legal enforceability of ‘sales-purchase contract’. Back-to-back LC against master LC is relatively better in terms of risks, and binding sales-purchase contracts are mainly useful in case of the performance failure when a sound contract may work as a pressure factor and take legal actions. The use of back-to-back LC against export LC decreased sharply in recent years (Table 3.6).

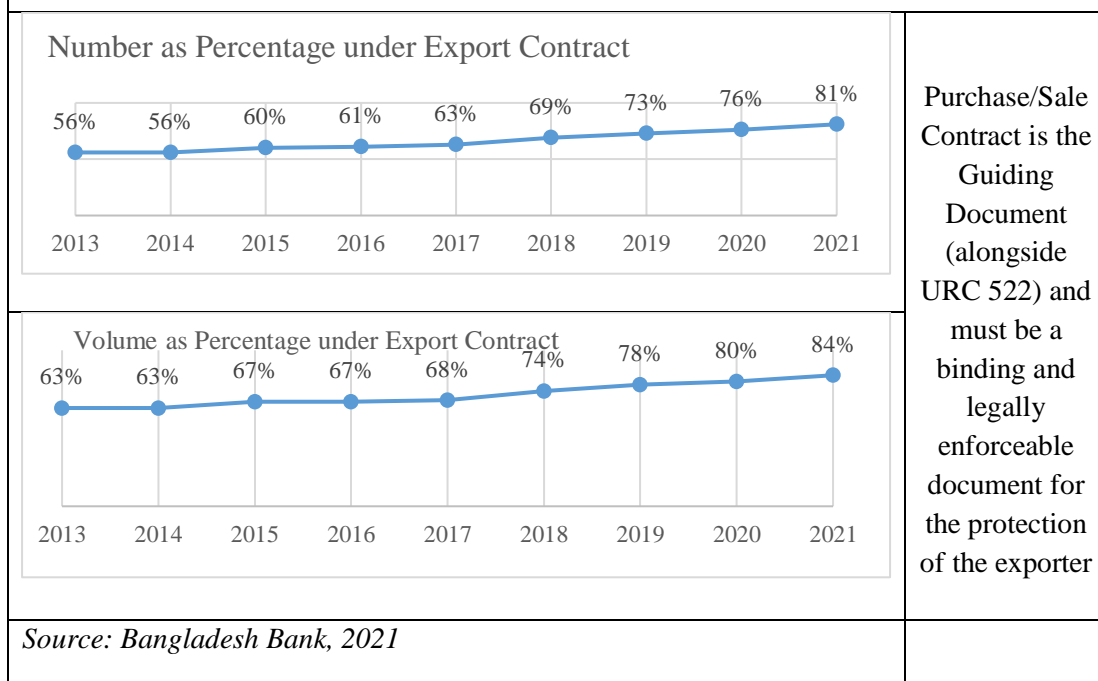
¹² BB FE-25: June 30, 2020.

Table 3.6: Proportion of Back to Back LC against Export LC during CY2013 to CY2021

<p>Number as Percentage under Export LC</p>  <table><tr><th>Year</th><th>Proportion (%)</th></tr><tr><td>2013</td><td>36%</td></tr><tr><td>2014</td><td>36%</td></tr><tr><td>2015</td><td>33%</td></tr><tr><td>2016</td><td>32%</td></tr><tr><td>2017</td><td>32%</td></tr><tr><td>2018</td><td>26%</td></tr><tr><td>2019</td><td>22%</td></tr><tr><td>2020</td><td>20%</td></tr><tr><td>2021</td><td>16%</td></tr></table>	Year	Proportion (%)	2013	36%	2014	36%	2015	33%	2016	32%	2017	32%	2018	26%	2019	22%	2020	20%	2021	16%	<p>Sound Contract Agreement and legal enforceability are useful in case of the failure of the performance under LC arrangement</p>
Year	Proportion (%)																				
2013	36%																				
2014	36%																				
2015	33%																				
2016	32%																				
2017	32%																				
2018	26%																				
2019	22%																				
2020	20%																				
2021	16%																				
<p>Volume as Percentage under Export LC</p>  <table><tr><th>Year</th><th>Proportion (%)</th></tr><tr><td>2013</td><td>43%</td></tr><tr><td>2014</td><td>43%</td></tr><tr><td>2015</td><td>40%</td></tr><tr><td>2016</td><td>38%</td></tr><tr><td>2017</td><td>36%</td></tr><tr><td>2018</td><td>30%</td></tr><tr><td>2019</td><td>27%</td></tr><tr><td>2020</td><td>23%</td></tr><tr><td>2021</td><td>18%</td></tr></table>	Year	Proportion (%)	2013	43%	2014	43%	2015	40%	2016	38%	2017	36%	2018	30%	2019	27%	2020	23%	2021	18%	
Year	Proportion (%)																				
2013	43%																				
2014	43%																				
2015	40%																				
2016	38%																				
2017	36%																				
2018	30%																				
2019	27%																				
2020	23%																				
2021	18%																				
<p>Source: Bangladesh Bank, 2021</p>																					

Back-to-back LC against ‘Confirmed Contract’ was first referred by the Bangladesh Bank in the year 2001, and export and import policies also specifically referred to back-to-back LC against LC/contract as an important tool to the exporters of the country. The growing tendency of issuing back-to-back LC against contract shifted risk profile of this trade finance product comprehensively (Table-3.7). In such an arrangement, a legally enforceable and binding contract with arbitration, damage clause, and applicable law is a necessity to ensure safe and secured transactions. However, no extra-ordinary feature/concern was observed with sales-purchase contract to open back-to-back on the part of traders or bankers (a finding came from FGDs with banks and traders).

Table 3.7: Proportion of Back to Back LC against Export Contracts during CY2013 to CY2021



Bangladesh's international trade transactions, logistics, documentation, and associated financing were extensively affected by the Covid-19 devastation. The necessity of binding agreements was strongly felt especially when a number of exporters of the country confronted cancellation of orders following the first wave of the Covid-19 devastation. European and USA brands and retailers cancelled import orders worth 1.40 billion as of March 2020 when 347 apparel exporters and 220 knitwear exporters faced cancellation of orders¹³. These sound unusual as the country's trade is allowed only against 'Firm Contract'!

In recent time, the back-to-back LC against purchase/sale contract is growing, and it is concerning that the non-payment, non-performance and fraud cases appear to be higher in case of back-to-back LC opened against contract (FGD with banks).

¹³ <https://www.dhakatribune.com/business/2020/03/22/1-4bn-apparel-export-orders-cancelled>.

3.2: Existing Regulatory Framework and Legal Enforceability of Contract in Bangladesh

Bangladesh is not a signatory or ratifying country of the CISG or UNIDROIT Principles. The country's major trading partners like USA, members of the EU, China, India, and UK are among the signatory or ratifying countries of CISG and/or UNIDROIT Principles. Bangladesh has a domestic act to handle purchase/sale contract mainly targeting domestic concerns titled Contract Act, 1872. Following the independence of the country, Contract Act 1872 has been adopted by the Parliament of Bangladesh. With the passage of time and with the growth of the volume of trade and the rise of mercantile activities certain changes were made. However, to be adopted by the international trade partners, and to support international trade related disputes and cases, unification of Contract Act 1972 with the globally recognized conventions like CISG and UNIDROIT Principles might serve better.

Arbitration Act 2001 is another legal machinery relevant for handling disputes related to purchase-sale contract. In Bangladesh, the Arbitration Act 2001 is largely based on UNCITRAL Model Law that attempted to overcome a limitation of the earlier Arbitration Act 1940 that did not mention about foreign arbitral award.

The first international arbitration institution in the country, BIAC, was created in 2011 and is similar to SIAC, HKIAC, and others. In April 2012, BIAC released its Arbitration Rules, and in 2014, it released its Mediation Rules, both of which were amended in 2019. While adhering to the Bangladesh Arbitration Act 2001, these Rules encompass some of the most recent advancements in domestic and international arbitration. Since 2011, BIAC has handled 54 arbitration matters, with only two being international commercial arbitration cases. Challenges and required measures for streamlining arbitration practices were discussed by the legal experts in two events organized by The Lawyers & Jurists in Collaboration with the LCLS in 2019; and in 2021 in the context of Bangladesh (Table 3.1).

Table 3.1: Challenges and Suggestions for Efficient Arbitration Practices in Bangladesh [Law Professionals' Perspective]	
Challenges	Suggestions
<p>-Arbitration is not managed centrally in the country</p> <p>-Current Arbitration Act does not require time frame to accomplish arbitration. Consequently, more powerful businesses influence the process of arbitration.</p> <p>-According to the Arbitration Act 2001, an award may not be enforced which is contrary to the public policy of Bangladesh.</p> <p>-Arbitration has become an expensive affair due to high legal fees, witness fees, venue fees, etc. Unlike the model law, the arbitration act does not allocate cost of arbitration between parties.</p> <p>-Due to absence of arbitral institution, awareness among traders and related stakeholders is a key concern for set rules related to arbitration.</p>	<p>-To handle international commercial dispute, government may establish a separate High Court Bench or a group of judges.</p> <p>-To build up awareness among stakeholders and to promote ADR, universities in the country in their academic syllabus might include necessity, types and techniques to resolve international commercial contracts.</p> <p>-Traders and related stakeholders can technology based dispute resolution in cross border trades which will minimize costs.</p> <p>-Government might form Institutional Arbitration Council to develop set of rules for institutional arbitration and adhoc arbitration.</p>
<i>Note: based on LJC & LCLS, 2019; and LJC & LCLS, 2021¹⁴</i>	

A joint symposium by LJC & LCLS (2019) finds, in the exiting global competitive environment, no nation is in a position to ignore the economic consequences of the lack of enforceability of purchase-sale contracts. Bangladesh was placed 168th out of 190 countries in the 2019 Ease of Doing Business Index. The long duration of the enforceability of commercial disputes in sales-purchase contracts was one of

¹⁴ Specches by Barrister Ajmalul Hossain QC/ Dr. Khaled Hamid Chowdhury/ Barrister A.M. Masum /Justice Naima Haider/ Anil Changarothe.

the important issues. For example, it takes roughly 4 years to resolve a commercial dispute in the country, but it takes 1.5 years in developed countries. In terms of the cost of dispute resolution for commercial contracts, it requires 66 percent of the contract price in the country, but only 23 percent in developed countries. Foreign investors may be hesitant to invest in the country because of the lengthy and costly dispute resolution process in commercial contracts (Barrister Masum in LCLS, 2019, 2019).

3.3: Challenges Associated with Sales-Purchase Contract: Cases and Opinions

Following cases [mini cases 3.1-3.7] reflect the necessity of having a binding and legally enforceable contract for the protection of the traders, trade finance banks, and also to protect country risk and MTBL risks in the context of Bangladesh. FGDs help validating information collected through questionnaire and identify contract related challenges from traders/buying houses' and bankers' perspective [box 3.1 and 3.2] .

Mini Case-3.1: Exporter unable to take legal support due to absence of binding contract with legal coverage

A Bangladeshi exporter got a purchase order worth USD 392000 from Turkey for jute yarn. The payment term was 'document against acceptance' under documentary collection in the order. The credit report of the foreign buyer was good. The exporter had timely shipped the yarn and send the documents to the importer. The documents were directly consigned to the name of foreign importer. The goods were collected by the importer on time. But after maturity, the Bangladeshi exporter was not getting payment. For the EXP overdue, the exporter was unable to avail of the cash incentives. The exporter's bank urged help from central bank. BB promptly acted and tried to negotiate. But the importer was unable to capture in the negotiation loop as there was no clause regarding dispute settlement in the purchase order. After that, BB advised the exporter to file a case in Turkey court and the exporter did so. But the foreign court couldn't help the exporter till now. It is not easy to put pressure on the Turkey regulatory body due to the absence of binding contract with legal coverage.

Note : Bank source

Mini Case 3.2: Exporters are Facing Challenges due to Bankruptcy of Renowned Buyer and Weak Contract Clauses

In this Covid-19, Bangladeshi suppliers are facing difficulties due to the bankruptcy of Western retailers Debenhams and JC Penney as they have no idea when they would be getting the payments of USD 57 million for the goods they have already shipped or manufactured. A total of 964 export bills are already shipped to these two largest and most historic department store chains in the

world. Around 28 banks are involved in trade financing in this. Now the Bangladeshi exporters need strong negotiation platform for their loss in this bankruptcy. But the major challenges according to BGMEA in negotiation are mainly the exporter worked under a weak sales/purchase contract and Bangladesh is not a signatory of any international convention for contract. Now suppliers are worried about non-availability of different facilities like cash incentives, EDF facilities etc.

Note : Bank source

Mini Case-3.3: Importer could not claim against its damage

Bangladeshi importers got a pro-forma invoice to import raw materials from India. Bangladeshi bank opened LC in favor of Indian exporter. On the other hand, the plastic manufacturing company got a large order and so it already invested in the factory availing loan from banks. But the Indian company was unable to send raw materials on time which caused a serious difficulties for the Bangladeshi manufacturer. Ultimately manufacturer was unable to complete its order on time. And so it could not make payment of its loan on time. But the client could not claim against its damage from the Indian exporter due to the absence of a binding and legally enforceable contract.

Note : Bank source

Mini Case 3.4: Fraud in Back-t-back LC against Overpriced Contract

An exporter came to bank to open a back-to-back LC in favor of a buyer nominated supplier to import raw materials from China. The exporter was having a sales contract with a UK counterpart. The price offered for the contract seems to be higher, and in support of that the exporter was required to import raw materials from a nominated supplier in China. After the shipment of several consignments, it was found that the importer was not receiving the RMG. Practically, through back-to-back LC the fund was transferred to China whereas export proceed could not be repatriated.

Note: Bank source

Case 3.5: Difficulty in Checking Genuineness of the Contract

An exporter submitted its export order/contract from Europe to a bank in Bangladesh with an interest to open a back-to-back LC. The banker checks the genuineness of the contract through email and contract number. After shipment, the bank also purchased the documents. The payment terms of the contract were document against acceptance. But on maturity, banker was unable to collect payment as the whole transaction was done against a fake contract. The email address and contract number were manipulated.

Note : Bank source

Case 3.6: Bangladeshi Exporter got a portion of its export proceed after Filing a Case in Foreign Jurisdiction

Bangladeshi garments exporter got an export order from an American company. The company sent the contract through an Indian agent. The exporter was doing business with the client for seven years. Banks opened back-to-back LC against the contract as they had a long relationship with the exporter and the buyer was a reputed one. After shipment, exporter sent the documents to the buyer's bank and that bank replied that the document was accepted by buyer under acceptance of bill of exchange. On maturity, the buyer failed to make payment. The buyer's bank returned the bill of exchange to the exporter's bank as the buyer became bankrupt. There was no clause in the contract regarding dispute settlement, arbitration, or legal coverage. Then exporter appointed a lawyer in Bangladesh to handle the issue. The lawyer raised issue to the American embassy officials and submitted all other documents. The American embassy helped the lawyer to file a case in the American High Court. When the regulators liquidating the asset of the company and repaying the liability, the Bangladeshi exporter got a portion of his export proceed back. The lawyer advised the exporter that if the exporter used the noting and protesting option, the case would get more priority in the American court.

Note: Exporter's Source

Case 3.7: Smuggling of currency through over invoicing, manipulated contract and fake documentation by a sole proprietor and his related companies

Various media reports alleged that F Navigation owned by a former director (Mr. A) of T Bank had been smuggling currency abroad through over invoicing while importing scrap vessels. It was found that F Navigation had imported three scrap vessels from three foreign companies (X, Y and Z) amounting to US\$ 20.84 million. Among the three exporting companies, X had no existence in the exporting country as evidenced by the local registry office and Y was an investment & holding company. The manipulated contract was sent by foreign supplier with a bad intension. On the other hand, two of Mr. A's companies (G Enterprise and H Shipping Lines) imported scrap vessels amounting to US\$ 9.50 million and US\$ 7.50 respectively from the same exporter, M Maritime Ltd, an affiliated company of an ex-director of another Bangladeshi bank who had already been convicted of currency smuggling through fake documentation. In all the LC transactions, the importer companies did not meet up the liabilities of the banks while the exporter M Maritime Ltd transferred US\$ 0.79 million to the importer H Shipping Lines through Foreign Telegraphic Transfer (FTT). BFIU suspected that importer companies smuggled currency through over invoicing, manipulated contract and fake documentation while importing scrap vessels from fake companies that had no existence and ship business at all.

Source: BFIU

Box 3.1: Summary of FGD with Buying House and Traders

- Buying houses do not have any format for sales-purchase contract, they just accept the contract of foreign counterpart and do accordingly.
- There is an information gap and lack of awareness about the benefits of having binding contracts amongst traders
- Small manufacturers do face problems in complying some clauses in the contract like charges, discount rate etc.
- Exporters are facing problem in realizing export proceeds under sales-purchase contract.
- Sometimes documents required by banks under LC are unable to ensure the quality of goods and then they need to act according to contract; many of them are unaware of this.
- Both buying house and businessmen are facing problem in settling dispute as they have very little idea about the procedures regarding this.

Box 3.2: Summary of FGD with Trade Finance Banks

- There are serious worries about the import from buyer nominated supplier under contract-based export as inferior quality, higher price etc. are common challenges.
- Banks are facing some problem regarding contract issued from local buying houses, currently, department of textile is their licensing authority and adequate control by the central bank might be an issue to the banks.
- It is very difficult for bankers to verify the authenticity of the contracts.
- Bankers are unable to provide proper direction to the clients due to the absence of proper regulatory guideline on the contract model or clauses.
- When local buying house issue contract, bankers remain unaware about the contractual agreement between foreign buyer and local buying house. This gap ultimately creates obstacles to smooth trade operation.
- During Covid-19, many foreign buyers are changing the payment terms without prior amendment in the contract. And for this, the amount of force loan has been increased.
- Bankers are facing problem with shipment schedule as buyer accept the delivery according to their convenience (not as per the contract). This creates difficulties for bankers in making payment of back-to-back LC.
- Lack of awareness and knowledge gap of Bangladeshi exporters in handling contract generate operational difficulties for the bankers.

4. Policy Propositions and Recommendations

Proposition 1: Standardization of Sales-Purchase Contract

Standardization of sales contract in international trade with the provision of the insertion of certain clauses is an immediate necessity. In the country's practices, presence of arbitration clause, compensation clause, or legal coverage is hardly observed. Popularizing specialized commercial court/tribunal; making arbitration more popular in terms of resolving commercial disputes, and bringing more effective changes in the ADR and arbitration laws of Bangladesh is the need of the time. Traders may also be suggested to 'International Arbitration center' as dispute settlement body considering suitability of the traders of the country. The central bank of the country may issue a guideline on model contract to support exporters-importers and bankers in standardizing the Sales-purchase contract and thus help to minimize commercial, performance, country risk, and TBML risks in international trade.

Proposition 2: Ensuring Legal Enforceability of Sales-Purchase

In most instances, 'Sales-purchase contract' in International Trade is not binding (mostly) agreement and is not legally enforceable. It is well-known that the central bank allowed issuance of back-to-back LC against purchase/sale contract to support RMG traders. The mode is getting popular and is having proven benefits. However, the risks cannot be ignored. In the context of Covid-19, several instances of so-called order cancellation, and the occurrences of shifting from DP to DA without consulting exporters exposed the country's unbinding sales contracts and weaknesses in terms of legal enforceability. Open account might also get popularity in the near future when binding contract is particularly essential. In such a situation, ratifications of CISG and signing UNIDROIT Principles became necessary. Traders should be guided in incorporating specific conditionality and clauses till the ratification of these conventions or principles is accomplished. For this, the concerned ministries, the central bank, and the trade associations of the country have roles.

Proposition 3: Unification of Domestic Regulation to Support Exporters-Importers

The domestic relevant regulation i.e. Contract Act 1872 is prepared mainly targeting the country's domestic trade and commercial transactions. Alignment of domestic and international regulations might offer useful comfort to the traders. In several instances, domestic regulations have been prepared to incorporate the key provisions of CISG and/or based on the UNIRDOIT principles. Such uniformity

and connections are matters of comfort for traders and other stakeholders both in domestic and international trade. In the context of growing international trade transactions and linkages of domestic and cross-border trade, aligning Contract Act 1872 with CISG and UNIDROIT provisions might be contributory.

Proposition-4: Awareness Development and Creating Informational Symmetry

There is apparent lack of awareness of the benefits of the legal enforceability of purchase/sale contracts among traders and bankers of the country. The terms ‘Firm Contracts’, ‘Confirmed Contracts’, ‘Binding Contracts’ are hardly interpreted rightly by the traders. ‘Purchase/sale contract’ and ‘proforma invoice’ are used synonymously by the traders and bankers. It is crucial to disseminate information on the benefits of legal enforceability, and risks associated with the trade transactions based on a proforma invoice or contracts without the required clauses. The central bank, trade associations, and banks have roles to play in this context.

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Appendices

Appendix-1: Sales-Purchase Contract Clauses in International Trade in the Context of Bangladesh	
Contract Clauses	Availability
Importers Name and Address	100%
Exporters Name and Address	100%
Goods Description	100%
Amount with unit price	100%
Payment Method and Terms	100%; Sometimes with alternative options
Shipment Details	100%
Delivery Terms/ Incoterms	100% ; updated Incoterms are not used in certain instances
Bank Details	80%
Packing Details	47%
Pre-Shipment Inspection	32%
Inspection of the Goods by buyer	16%; mainly available in government sector, power sector, capital Machinery etc.
Country of Origin	72%
Insurance	35%
Details of Charges	31%
Validity of the Contract	42%
Resolution of Disputes	15%; mainly in contract of scrap vessel import, reputed buyer etc.
Arbitration Clause	13% ; mainly contract of scrap vessel import, reputed buyer etc.
Limitation of Liability	Very insignificant
Applicable law and guiding principles	Very insignificant
Transfer of property	Very insignificant
Force Majeure	Very insignificant
<i>Source: Authors' Compilation based on 150 Contracts covering different major sector and product categories, and within and outside EPZ.</i>	

Appendix-2: List of the Banks Responded to the Questionnaire
State Controlled Banks (SCBs)

1. Sonali Bank Limited
2. Janata Bank Limited
3. Rupali Bank Limited
4. Agrani Bank Limited

Private Commercial Banks (PCBs)

1. AB Bank Limited
2. Trust Bank Limited
3. Community Bank Limited
4. BRAC Bank Limited
5. Dhaka Bank Limited
6. Dutch Bangla Bank Limited
7. Eastern Bank Limited
8. EXIM Bank Limited
9. First Security Islami Bank Limited
10. Islami Bank Bangladesh Limited
11. Mercantile Bank Limited
12. Mutual Trust Bank Limited
13. NRB Commercial Bank Limited
14. ONE Bank Limited
15. Al-Arafah Islami Bank Limited
16. Prime Bank Limited
17. Pubali Bank Limited
18. Shahjalal Islami Bank Limited
19. Social Islami Bank Limited
20. Southeast Bank Limited
21. Standard Bank Limited
22. Jamuna Bank Limited
23. The City Bank Limited
24. The Premier Bank Limited
25. Uttara Bank Limited
26. United Commercial Bank Limited

Foreign Commercial Banks (FCBs)

1. State Bank of India
2. Standard Chartered Bank, Bangladesh

Appendix 3: List of Participants (Bank Officials) participated at Focus Group Discussion

Sl. No.	Name	Bank Name
1.	Faruk Ahmed	The City Bank Limited
2.	Asaduzzaman Bhuiyan	NRB Commercial Bank Ltd
3.	Dhruba Mondal	Standard Chartered Bank
4.	Kazi Yeasin	Dutch Bangla Bank Limited
5.	Mahazaben	Dutch Bangla Bank Limited
6.	Maniruzzaman Mian	BRAC Bank Limited
7.	Md. Abu Moshahed	NRBC Bank Limited
8.	Md. Ibrahim Hossain	National Bank Limited
9.	Md. Mahbub Morshed Khan	NRB Commercial Bank Ltd
10.	Rafiqul Islam	Dhaka Bank Limited
11.	Md. Mohiuddin	Islami Bank Bangladesh Limited
12.	Md. Morshed Anower	The Premier Bank Limited
13.	Md. Nazrul Islam Bhuiyan	ONE Bank Limited
14.	Md. Rashedul Islam	Shahjalal Islami Bank Limited
15.	Md. Shifaul Karim Shaikh	Bank Asia Limited
16.	Zulfiker Ahmed Khan	First Security Islami Bank Limited
17.	Zulfiker Ahmed Khan	Global Islami Bank Limited
18.	S.M. Azharul Islam	First Security Islami Bank Limited
19.	Rafeza Khanom	Pubali Bank Limited
20.	Nishat Maishura Rahman	Pubali Bank Limited
21.	Mosharraf Hossain Chowdhury	First Security Islami Bank Limited
22.	Mohammad Sabir Mia	Global Islami Bank Limited
23.	Md.Aminul Islam	ONE Bank Limited
24.	Arefin	EXIM Bank Ltd
25.	Hasan Murad Choudhury	Southeast Bank Ltd
26.	Upal Dey	State Bank of India, Bangladesh
27.	Md. Nahidul Islam	Shahjalal Islami Bank Limited

Appendix 4: List of Participants (Businessmen and Buying House Officials)/Traders participated at Focus Group Discussion

Sl. No.	Name	Bank Name
1.	Mr. Shihab Chowdhury	Ex Member, BGMEA
2.	Mr. Zillur Rahman	GM, Hosaf Group
3.	Mr. K.I.Hossain	President, Bangladesh Garment Buying House Association
4.	Mr. Aminul Islam	Secretary General, Bangladesh Garment Buying House Association
5.	Mr. Afzalur Rahman	Fashion Comfor Bangladesh Ltd
6.	Mr. Sayed	Pawla Fashion
7.	Mr. Bipul Kanti Saha	Design Ace
8.	Mr. Ashiur Rahman	Zan Design and Sourcing

Appendix -5: FGD Questionnaire for Bankers

- What are the terms and conditions of sales-purchase contracts in export and import in the country?
 - What are the alterations occurred in terms and conditions while handling sales-purchase contracts due to covid crisis?
 - What are the challenges faced by bankers in financing trade under contracts?
 - What are the problems that traders (exporters and importers) are encountering in settling international commercial disputes?
 - What are the changes observed by bankers in contracts in-covid 19 and pre-covid 19?
- *Survey Summary data were been discussed in the FGD for validation.*

Appendix -6: FGD Questionnaire for Buying House Association

- How do the buying houses negotiate with counter parties in setting terms and conditions of sales-purchase contracts?
 - What are the challenges faced by buying houses from counter parties in executing sales-purchase contracts?
 - What are the challenges faced by buying houses from bankers in executing sales-purchase contracts?
 - What are the initiatives taken by the association of buying houses in setting a standard sales-purchase contracts?
 - How do the buying houses resolve disputes related with international commercial contracts?
- *Survey Summary data were been discussed in the FGD for validation.*

Appendix-7: Questionnaire

Questionnaire for the Research Workshop on “Applicability and Legal Enforceability of Sales-Purchase Contract in International Trade Operations in Banks”

Name:	
Designation:	
Department/Division (Foreign Trade/International Banking):	
Bank Address:	
Cell:	Tel:
Email:	

C1: Are the contents of Sale Contract same/different in different methods of Payment [cash in advance, open account, documentary collection, LC]?
C2: Nature of Contract in case of Export and Import in Bangladesh? Is there any special feature of Contract associated with transactions through buying house?
C3: Are contents of contract vary in terms of: a) Products/Services: b) Global Region/Countries: c) Within EPZ/Outside EPZ: d) Clients of FCBs, PCBs, SCBs:
C4: Proportion of PI and Indent in the process of the creation of Contract [in %]; Is it possible to relate this data with any trade sector?
C5: Proportion of back-to-back LC against LC and against Contract [%]. Is it possible to relate this data with any trade sector?
C6: Is there any significant difference between BTB LC against LC & BTB against Contract in terms of fraud Cases or Disputes?
C7: Any Classic Case of Contract [having the standard component]
C8: Any Dispute case associated with Contract

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