

FORMS AND LEGALITY OF CONTRACTS: ASPECT BANGLADESH

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1 Introduction:

Generally the law of contract provides, inter alia, the procedure for the formation of contracts; in particular, the elements of a contract and the process for them to be combined so as to culminate into a contract.¹ As a general rule, no particular form is prescribed to conclude contracts by the law of contract. So, in this modern economic era a large number of contracts are lawfully being made without following any stringent form. However, exceptions are generally being constituted by other laws. Modern legal systems increasingly require certain contracts to be executed² or made in specific form. The laws may require that the contract shall be concluded in writing. Some contracts may be required to be executed on proper stamp. Some other contracts may be required to be made by registered deeds and in the presence of witnesses. Such legal prescriptions as to form of contracts may some time be mandatory to comply with, in addition to the procedural requirements, and hence be essential for the legitimacy of contracts.

Apart from legitimacy the commercial utility of making contracts in specific form is also well appreciated. In particular, E.G., where a contract is made by registered deed, the parties thereto may rely with confidence

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¹ For example, the Contract Act, 1872 in force in Bangladesh lists up the elements and prescribes the process as to how these elements shall collectively constitute a contract: see section 2 (a), (b), (d), (e) and 10 of the Contract Act.

² "executed" and "execution", used with reference to instruments, mean "signed" and "signature": (section 2 (12) of the Stamp Act, 1899).

upon the statements contained in the register as a full and complete account of all terms of the contract.³ On the contrary, as Professor Tritely puts it,⁴ form has the disadvantage as well. Requirement of particular form is time-consuming and clumsy and that it is a source of technical pitfalls. Even the relatively simple requirement of writing is subject to criticism from commercial point of view. Thus Professor Tritely observes,⁵ ". . . the general rule is that contracts can be made quite informally." This view is well subscribed by the legal regime relating to contracts as generated by the Contract Act, 1872 (hereinafter referred as "Contract Act") in force in Bangladesh. It seems that the Contract Act does not prescribe any precise form to be followed mandatory to make a contract. Hence a contract may be made in a simple process either by written communications, or by spoken words or even by conducts. However, section 10 of the Contract Act, prescribing criteria for a contract, seems to recognize some exceptions to this general rule. According to section 10, the provisions of the Contract Act shall not nullify any provision of any law requiring particular contracts to be made in specific form.

In this article, having section 10 of the Contract Act in constant view, attempts have been made to find out the forms of contract prescribed by statutes and to have a sweeping look over a few legal instruments, in particular, the contracts that are to be executed in any of such prescribed forms. This work further strives to weigh the legal weight of the instruments executed in accordance with, or in contravention of, the statutory prescription as to form. As this article progresses, it realizes that the laws prescribing forms for contracts to be concluded do not limit the application of the Contract Act, rather they complement each other and collectively define methods to enter into contracts that are commercially as well as legally sensible.

³ See sections 54 and 59 of the Transfer of Properties Act, 1882, section 49 of the Registration Act, 1908

⁴ G.H. Treitel: *The Law of Contract* Eleventh Edition (2003), publisher Sweet & Maxwell Limited., P. 177.

⁵ Treitel supra nnote 4 above, P. 177.

2 Forms of Contract in General:

“Form of contract” refers to the process in which terms of a particular class of contracts are to be recorded.⁶ For example, statute may require certain contracts to be concluded in writing. Some time terms of contract may be required to be written on proper stem. Further, written contracts May, as well, be required to be authenticated by notary or registered and/or be executed in presence of witnesses etc. So usually forms have got nothing to do with the contents/elements of a contract.

This may not be irrelevant to note here that as per section 2 (h) of the Contract Act a contract stems out of an agreement; provided that the agreement is fit to be enforced by law. Section 10 of the Contract Act allows those agreements to become contracts that are made (i) between competent parties, (ii) with free consent of the parties thereto, (iii) with lawful considerations and for lawful objects and (iv) are not barred by law. These are four mandatory elements/requirements, which all agreements have to comply with to be enforced by law, i.e., to become contracts. In other words, the Contract Act, apart from these four elements, does not prescribe any positive rule requiring an agreement to be executed in one or other form. Competent parties may exercise their discretion to choose the form of contract ranging from written to oral forms of contracts; even contracts may be made tacitly by conducts.⁷

In legal parlance no difference is made between oral and written contracts; rather oral contracts are as valid as written contracts. But in the matter of an oral contract, once it is denied by one of the parties, a very heavy onus of proof lies on the other party in establishing its truth.⁸ Hence this general rule is now subject to some exceptions. These depend on the legislations dealing with special contracts. Second paragraph of section 10 of the Contract Act recognizes such legal arrangements to the following effect:

⁶ Treitel supra note 4, p. 176.

⁷ See section 9 of the Contract Act. For a good survey on section 9 see Pollock and Mulla: “*Indian Contract and Specific Relief Act*”, India (1994), eleventh edition, pp. 150-156.

⁸ Rezaur Rahman & others vs. Al-Hajj Ahmed Hossain Khan (1986) 14 BLD 14.

“Nothing herein contained shall affect any law in force in Bangladesh, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”

Second paragraph of the section 10 of the Contract act, it is submitted, is designed in such a fashion so as to avoid any probable conflict between the Contract Act and any special legislation to regulate a particular type of contract. For instance, the Negotiable Instruments Act, 1881, Transfer of Property Act, 1882, Registration Act, 1908, Sale of Goods Act, 1930, Companies Act, 1994, Arbitration Act, 2001, Bangladesh Labor Act, 2006, Procurement Act, 2006, amongst other statutes entail the parties to conclude certain contracts in specific forms/manner. Such statutory prescription regarding forms of contract has been held to be legitimate: If the statutory requirement is that the contract needs to be executed in a particular manner and that requirement is also mandatory, a contract executed in contravention of the statutory prescription will be a nullity.⁹

Therefore, section 10 of the Contract Act seems to suggest that an agreement shall fulfill four conditions to be a contract. However, if any statute requires the contract to be executed in a particular form, such as, in writing or with registered deed, the contract needs to satisfy this condition either. But this fifth condition (regarding form) unlike first four conditions is not by nature compulsory unless so prescribed by relevant statute. This article in the subsequent pages focuses on this fifth but subsidiary element for the legitimacy of a contract.

At the very outset this ought to be confessed to the readers that this work does not, as a whole, consider all legal instruments while examining the topic. Its research area would be only contracts. Again, the host of contracts this work considers may not give comprehensive account of the contracts to be made in specific form. This work, by citing different contracts, rather proposes to reinforce the fact that many of the contracts that we come across are required to be made in one or other form

⁹ PLD 1976 Lahore 1192.

prescribed by law. Any deviation from the legal prescription may deprive such contracts of any legal force.

3 Contracts to be made in Writing:

General rule is that all contracts that are required to be registered shall be reduced in writing and be stamped properly. There are few other contracts that are required to be stamped properly and hence be in writing although these may not be registered. Yet there are few contracts prescribed to be in writing but these are neither to be stamped nor to be registered. Some contracts falling under the last mentioned category are stated below:

- (A) cherub;¹⁰
- (b) Banker's pay order;¹¹
- (c) An instrument to appoint proxy for the purpose of voting in the meeting of a company;¹²
- (d) a contract between the company and the prospective director agreeing to take qualification share from the company;¹³
- (e) Contracts to appoint shareholder director, the managing director, auditor etc. In a company;¹⁴
- (f) Procurement contracts by the Government;¹⁵

¹⁰ Section 6 of the Negotiable Instruments Act, 1881.

¹¹ This is evident from section 11A of the Stamp Act, 1899 that a pay order shall be in writing.

¹² Section 85 (f) and regulations 66 and 68 of Schedule I to the Companies Act, 1994.

¹³ Section 92 read with section 97 of the Companies Act.

¹⁴ Sections 91, 2 (1) (M), 211 etc. read with section 88 of the Companies Act, 1994.

¹⁵ Section 21 of the Procurement Act, 2006; [In the modern time governments allocate a considerable portion of their annual budget to procure work/services/goods to run their affairs as well as to ensure welfare of the citizens. For example, government money is spent on purchasing items ranging from paper-clips required for government servants for their official works to equipments, arms and ammunitions to strengthen security in and around the

- (g) Contracts to appoint workers as defined in the Bangladesh Labor Act, 2006;¹⁶
- (h) Contracts entered into between the collective bargaining agent and the employer for the settlement of any industrial disputes etc.¹⁷
- (i) Air waybill or Air consignment note;¹⁸
- (j) Consignment note or forwarding note;¹⁹
- (k) Rail receipt;²⁰
- (l) Road or Inland Waterway Transport Documents however named;²¹
- (m) Contracts for arbitration for the settlement of any dispute.²²

country. To bring discipline in government expenditure and to ensure value for money a legal regime has gradually been developed. This is known as “law of public procurement”: for good survey on this matter see Susan L. Arrow smith, John Linearly and Don Wallace; *Regulating Public Procurement National and International Perspectives* Ed. 2000, pp.1-20; Professor Sue Arrow smith: *Government Procurement in the Two* First edition (2003) publisher Lower Law Intl, section 1.2.1; Leo D’Arcy, Carole Murray and Barbara Cleave: *Clive Schmitt Hoff’s Export Trade* tenth edition, publisher sweet & Maxwell limited. pp. 511-512].

¹⁶ Section 5 of Bangladesh Labor Act, 2006.

¹⁷ Section 210 of the Bangladesh Labour Act, 2006.

¹⁸ Carriage by Air Act (XX of 1934) read with Carriage by Air (International Convention) Act (IX of 1966); see also *Uniform Customs and Practice for Documentary Credit* (ICC publication no. 600) (UCP 600) publish by International Chamber of Commerce, Article 23; M Kuchchal: *Mercantile Law* (2002 p. 554.

¹⁹ “Forwarding note” or “consignment note” contains the description of goods, number of packages, weight, the names and addresses of the consignor and consignee, the extent of the liability of the railway authority for loss or damage and is marked either 'Freight Paid' or 'Freight to pay'. It constitutes a contract between railway authority and the consignor/consignee and “rail receipt” is produced on the basis thereof: Kuchchal note 20 above, p. 511.

²⁰ Section 2 (4) of the Sale of Goods Act, 1930.

²¹ UCP 600 note 20 above, Article 24.

²² Section 9 (2) of the Arbitration Act, 2001; section 210 (12) of Bangladesh Labor Act, 2006.

3.1 Effect of non-compliance:

If any one of the above contracts is being made in a form other than in writing, the question may be raised as to the legal status of such contracts. This is more or less obvious that if the statutory requirement is that the contract should be executed in a particular manner and that requirement is also mandatory, there cannot be the slightest doubt that either the document should be executed in that manner or not at all. If the contract is executed in violation of such requirement it is invalid.²³

Given the cardinal rule this may be noted that in some cases the contract may remain valid although the contract, in breach of statute, is not in writing. In such a case, if one party denies the existence of the contract, heavy onus would lie on the other party to establish the fact of execution of the contract²⁴ and thereafter any particular term alleged to have been violated.²⁵

4 Contracts which must be stamped:

There are many contracts that are not only required to be in writing but also to be executed duly stamped²⁶ (although many of such instruments are absolved from being registered compulsorily). The general rules prescribing stamp requirement for legal instruments (excluding pleadings)

²³ Rezaur Rahman & others vs. Al-Hajj Ahmed Hossain Khan (1986) BLD 14 p. 14.

²⁴ The basic rule is that he who asserts any fact must prove it: see sections 101-110 of the Evidence Act, 1872.

²⁵ In particular, consider the contracts for services such as carriage of goods, employment, procurement of goods/works/services etc. But it seems, this rule is not a bar for proving the existence of such transactions by adducing oral evidence: See sections 16, 59 and 91 of the Evidence Act, 1872. See also some analogous judgments reported in *4 DLR 457*; *10 DLR 474*.

²⁶ The expression "duly stamped", as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount, and that such stamp has been affixed or used in accordance with the law for the time being in force in Bangladesh: Section 2 (11) of the Stamp Act, 1899.

are fixed by the Stamp Act, 1899²⁷. The stamp Act, inter alia, provides for various types of stamps²⁸ for different instruments, process of affixing stamps,²⁹ and effect of non-compliance with stamp requirement. Followings are the examples of some of the instruments required to be executed with appropriate stamp.

SI. No.	Description of instrument	Rate of stamp duty (In Taka)
(a)	A deed of apprenticeship	Tk. 70.00 ³⁰
(b)	Agreement or memorandum of an agreement if relating to the sale of a bill of exchange	Tk. 20.00 ³¹
(c)	Agreement or memorandum of an agreement if relating to the sale of	Subject to a minimum of 100 Taka one Taka for every

²⁷ although the Stamp Act is subject to amendments as time to time made by the Finance Act every year.

²⁸ "The Stamp Act recognizes three types of stamps, such as, impressed stamp, adhesive stamp and paper stamp. Impressed stamp" includes (a) labels affixed and impressed by the proper officer, and (b) stamps embossed or engraved on stamped paper; see sections 2 (13) and 11-13 of the Stamp Act, 1899.

²⁹ All instruments chargeable with duty and executed by any person in Bangladesh shall be stamped before or at the time of execution. Every instrument chargeable with duty executed only out of Bangladesh, and not being a bill of exchange, or promissory note, may be stamped within three months after it has been first received in Bangladesh. Where any such foreign instrument cannot be duly stamped by a private person, it may be taken within the said period of three months to the Collector, who shall stamp the same with a stamp of such value as the person so taking such instrument may require and pay for: see sections 17 and 18 of the Stamp Act and see Chapter 2 of the said Act for detail on process of affixing stamp.

³⁰ SI. No. 9, Schedule I to the Stamp Act, 1899.

³¹ SI. No. 5, Schedule I to the Stamp Act, 1899

	Government Security	Taka 5000 or part thereof or the value of the security. ³²
(d)	Agreement or memorandum of an agreement if relating to the sale of a share in an incorporated company or other body corporate	One Taka for every Taka 1000 or part thereof, of the value of the share. ³³
(e)	Debenture, whether a mortgagee debenture or not, being a marketable security and transferable	Stamp duty varies according to its nature. ³⁴
(f)	Articles of association of a company	Stamp duty varies according to the nominal share capital etc. ³⁵
(g)	Memorandum of association of a company	Stamp duty varies according to the nominal capital. ³⁶

³² SI. No. 5, Schedule I to the Stamp Act, 1899

³³ Section 38 of the Companies Act, 1994 read with SI. No. 5, Schedule I to the Stamp Act, 1899

³⁴ (a) If transferable by endorsement or by a separate instrument of transfer: 2% of the value of the consideration and (b) if transferable by delivery: 05% of the value of the consideration: SI. No. 27, Schedule I to the Stamp Act, 1899.

³⁵ (a) where the nominal share capital does not exceed ten lakh taka: Tk. 1500.00 (b) where the nominal share capital exceeds ten lakh taka but not exceeding three core taka: Tk. 4000.00; (c) where the nominal share capital exceeds 3 core taka: Tk. 10,000.00; and (d) Articles of any Association not formed for profit and registered under section 28 of the Companies Act, 1994: 1000.00: SI. No. 10, Schedule I to the Stamp Act, 1899.

³⁶ (a) If accompanied by articles of association under section 17 of the Companies Act, 1994: Tk. 500.00; (b) if not as accompanied - (i) where the nominal share capital does not exceed Taka one lakh: Tk. 1000.00 and (ii) where the nominal share capital exceeds Taka one lakh: Tk. 1500.00: SI. No. 39, Schedule I to the Stamp Act, 1899.

(h)	Promissory note	Stamp duty varies according to the terms of the note. ³⁷
(i)	Bill of exchange:	Stamp duty varies according to its nature. ³⁸
(j)	Letter of credit	Tk. 20.00 ³⁹
(k)	Letter of guarantee	Tk. 20.00 ⁴⁰
(l)	Letter of license, i.e., any agreement between a debtor and his creditors that the latter shall, for a specified time, suspend their claims and allow the debtor to carry on business at his own discretion..	Tk. 150.00 ⁴¹
(m)	Charter party;	Tk. 300.00 ⁴²

³⁷ (a) when payable on demand-(i) when the amount or value does not exceed Taka 1,000: Tk. 05.00; (ii) when the amount or value exceeds Taka 1,000 but does not exceed taka 5,000: Tk. 10.00; (iii) in any other case: Tk. 20.00 and (b) when payable otherwise than on demand: 0.2% of the value of the consideration: Section 4 of the Negotiable Instruments Act, 1881 read with SI. No. 49, Schedule I to the Stamp Act, 1899.

³⁸ (a) where the bill of exchange is payable otherwise than on demand but not more than one year after date or sight: 0.2% of the value of the consideration and (b) where payable at more than one year after date or sight: 0.1% of the value of the consideration: Section 5 of the Negotiable Instruments Act, 1881 read with SI. No. 13, Schedule I to the Stamp Act, 1899.

³⁹ SI. No. 37, Schedule I to the Stamp Act, 1899; see UCP 600 note 18 above for detail provisions on "letter of credit"; Mohammad Abdur Razzak: "Documentary Credit: A Creation of International Trade Transaction" *Journal of International Affairs* Vol. 7 No. 1 (January to June) 2003 publisher Bangladesh Institute of Law and International Affairs (BILIA) Pp. 58-79.

⁴⁰ SI. No. 37, Schedule I to the Stamp Act, 1899.

⁴¹ SI. No. 38, Schedule I to the Stamp Act, 1899.

(n)	Bill of lading, including through bill of lading	Stamp duty varies according to the value of the consideration (freight). ⁴³
(o)	Power of attorney;	Stamp duty varies according to the terms of the instrument. ⁴⁴
(p)	Appointment in execution of a power, whether of trustees or of property, movable or immovable, not being a Will	Tk. 100.00 ⁴⁵

⁴² Carriage of Goods by Sea Act, 1925 read with SI. 20, Schedule I to the Stamp Act, 1899; For a good survey on charter party see Leo D'Arcy note 17 above, Chapter 15 pp. 251-313; John F. Wilson: *Carriage of Goods by Sea* 4th Edition, (Long man 2001) chapters 3-4 pp. 52-116.

⁴³ (a) When the value of the consideration does not exceed Taka 5,000: Tk. 20.00; (b) When it exceeds Taka 5,000 but not exceeding 50,000 Taka: Tk. 50.00 and (c) When It exceeds 50,000 Taka: Tk. 200.00: Schedule to the Carriage of Goods by Sea Act, 1925 read with SI. No. 14, Schedule I to the Stamp Act, 1899; For more on bill of lading see Leo D'Arcy note 15 above, Chapter 15 pp. 251-313; Wilson note 43 above, chapter 5 pp. 117-175; Mohammad Abdur Razzak: "Bill of Lading: A Pivotal Document in International Sale Transactions" Bangladesh Legal Decision (BLD) (2005) Pp 29-44.

⁴⁴ (a) when executed for the sole purpose of procuring the registration of one or more document in relation to a single transaction or for admitting execution of one or more such documents: Tk. 50.00; (b) when authorizing one person or more to act in a single transaction other than the case mentioned in clause (a): Tk. 100.00; (c) when authorizing not more than five persons to act jointly and severally in more than one transaction or generally: 200.00; (d) when authorizing more than five but not more than ten persons, to act jointly and severally in more than one transaction or generally; (e) when given for consideration and authorizing the attorney to sell any immovable property: Tk. 400.00 and in any other case: 05% of the value of the consideration: SI. No. 48, Schedule I to the Stamp Act, 1899.

⁴⁵ SI. No. 7, Schedule I to the Stamp Act, 1899.

(q)	Bond as defined by section 2(5) of the Stamp Act, 1899	Tk. 20.00 ⁴⁶
(r)	Bottom Bond ⁴⁷	Tk. 2% of the value of the consideration
(s)	Customs Bond	Stamp duty varies according to its value. ⁴⁸
(t)	Adoption deed, i.e., any instrument (other than a WILL), recording an adoption, or conferring or purporting to confer an authority to adopt.	Tk. 5000.00 ⁴⁹
(u)	An instrument canceling any previously executed instrument	Tk. 150.00 ⁵⁰
(v)	Conveyance as defined by section 2(10) of the Stamp Act, 1899 ⁵¹	05% of the value of the consideration. ⁵²
(w)	Composition Deed ⁵³	Tk. 150.00 ⁵⁴

⁴⁶ SI. No. 15, Schedule I to the Stamp Act, 1899.

⁴⁷ An instrument whereby the master of a seagoing ship borrows money on the security of the ship to enable him to preserve the ship or prosecute her voyage: SI. No. 16, Schedule I to the Stamp Act, 1899.

⁴⁸ (a) where the amount does not exceed taka ten lakh: Tk. 500.00 and (b) in any other case exceeding ten lakh taka : Tk. 1000.00: SI. No. 26, Schedule I to the Stamp Act, 1899.

⁴⁹ SI. No. 3, Schedule I to the Stamp Act, 1899.

⁵⁰ SI. No. 17, Schedule I to the Stamp Act, 1899.

⁵¹ The definition runs thus: "conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred *inter vivo* and which is not otherwise specifically provided for by Schedule I to the Stamp Act, 1899.

⁵² SI. No. 23, Schedule I to the Stamp Act, 1899.

⁵³ It refers to any instrument executed by a debtor, where by he conveys his property for the benefit of his creditors, or whereby payment of a composition

(y)	An agreement relating to deposit of title deed or pawn or pledge of any moveable property as collateral for any loan	Stamp duty varies according to the value of the consideration and tenure of loan. ⁵⁵
(z)	Mortgage deed	Stamp duty varies according to the terms of contract. ⁵⁶
(aa)	A deed of exchange of property	05% of the value of the consideration. ⁵⁷
(bb)	Lease;	Stamp duty varies according to the duration or terms of the lease. ⁵⁸
(cc)	Instruments of gift:	05% of the value of the consideration. ⁵⁹
(dd)	Partition deed ⁶⁰	Tk. 20.00 for each separated

or dividend on their debts is secured to the creditors, or thereby provision is made for the continuance of the debtor's business under the supervision of Inspectors or under letters of license, for the benefit of his creditors: SI. No. 22, Schedule I to the Stamp Act, 1889.

⁵⁴ See SI. No. 22, Schedule I, the Stamp Act, 1899.

⁵⁵ See SI. No. 6 of Schedule I to the Stamp Act, 1899.

⁵⁶ See for detail SI. No. 40, Schedule I to the Stamp Act, 1899.

⁵⁷ SI. No. 31, Schedule I to the Stamp Act, 1899.

⁵⁸ See for detail SI. No. 35, Schedule I to the Stamp Act, 1899.

⁵⁹ SI. No. 33, Schedule I to the Stamp Act, 1899.

⁶⁰ "Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any Revenue-authority or any Civil Court and an award by an arbitrator directing a partition: Section 2 (15) of the Stamp Act, 1899.

		share. ⁶¹
(ee)	Contract for hiring or for service;	05% of the value of the consideration. ⁶²
(ff)	Policy of insurance	Stamp duty varies according to the rate of premium and terms of contract. ⁶³

4.1 Effect of non-compliance:

If the instruments otherwise valid are duly stamped according to law, these are treated to be valid and hence are impoundable by a person exercising authority in pursuant to any public office.⁶⁴ On the contrary, any instrument executed in contravention of the Stamp Act or any statute prescribing stamp duty to be levied on an instrument will not be valid and will enjoy limited legal recognition. In the first place, these instruments are not admissible in evidence in any judicial proceeding.⁶⁵ Secondly, these

⁶¹ This duty is subject to the following rules: (a) when an instrument of partition containing an agreement to divided property in severally is executed and partition is effected in pursuance of such agreement the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than one taka fifty polish; (b) where land is held on Revenue settlement for a period not exceeding thirty years and paying the full assessment, the value for the purpose of duty shall be calculated at not more than five times the annual revenue and (c) where a final order for effecting a partition passed by any revenue Authority or any Civil Court or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument of partition and an instrument of partitioning pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed one Taka fifty polish: SI. No. 45, Schedule I to the Stamp Act, 1899.

⁶² SI. No. 33, Schedule I to the Stamp Act, 1899.

⁶³ SI. No. 47, Schedule I to the Stamp Act, 1899.

⁶⁴ Section 33 of the Stamp Act, 1899.

⁶⁵ Section 35 of the Stamp Act, 1899.

instruments are not entitled to be registered or even otherwise be recognized by law.⁶⁶

This should be noted that the legal defects that an instrument sustains through non-compliance of the provisions of Stamp Act or other like statutes may well be corrected by paying penalty imposed or duty levied⁶⁷ and such rectified instruments shall have all attributes of a valid instrument.⁶⁸

5 Contract which must be made by Registered Deed:

This has been stated elsewhere in this article that although the Contract Act does not prescribe any form for the validity of contract, it expressly states that provisions of the Contract Act will be effective subject to the provisions of other laws in force in Bangladesh requiring different contracts to be made in different forms.⁶⁹ The Registration Act, 1908, the Transfer of Property Act, 1882, amongst other statutes, give guidelines as to what contracts are to be made by registered deed. These guidelines not being self-explanatory on some aspects have been the cause of controversies on various occasions inviting judiciary to intervene. Hence review of relevant provisions of the aforesaid statutes and legal decisions thereon may be an appropriate way to figure out as to what contracts are required to be

⁶⁶ Section 35 of the Stamp Act, 1899. Further, any receipt not duly stamped may be refused to be impoundable in any public audit: Section 34 of the Stamp Act, 1899.

⁶⁷ Section 35, 37 and 40 of the Stamp Act, 1899. If one party to the transaction supplies the deficit stamp duty, he is permitted to recover stipulated contribution from the other party of the transaction through the process of law.

⁶⁸ Section 42 of the Stamp Act, 1899. Note that it is very important from financial as well as legal point of view that stipulated instruments are stamped duly. In order for that to happen law operates in two ways: in the first place, if an instrument is executed without proper stamp duty, relevant authority may require the concern persons to deposit deficit charges. In addition, if any person(s) found to have committed an offence against Stamp Act may, as well, be prosecuted for such offences.

⁶⁹ See second paragraph of section 10 of the Contract Act, 1872.

registered.⁷⁰ Some of the contracts falling under this category are recorded below:

5.1 Non-testamentary instruments effecting interest in immoveable property:

Section 17(1) (b) of the Registration Act, 1908 states that any non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immovable property must be registered. The scope of this section has much broadened by omitting the words "of the value of one hundred taka and upwards,". The effect of the said amendment is that any instruments falling under section 17 (1) (b) shall have to be registered irrespective of their pecuniary value.⁷¹ Another aspect of this rule is that it is wide enough to encompass not only instruments which create any right, title, etc., but also any instrument that purport to create any right, title or interest. Following instruments are held to come within the purview of the above rule:

- (a) Contracts for the sale of immoveable property;⁷²
- (b) A document which gives a right to a creditor to have an immovable property brought to sale and to recover out of the proceeds the money lent by him;⁷³
- (c) A deed of compromise affecting immovable property;⁷⁴

⁷⁰ The real purpose of registration is to secure that every person dealing with property, where such dealings require registration, may rely with confidence upon the statements contained in the register as a full and complete account of all transactions by which his title may be affected unless he has actual notice of some unregistered transaction which may be valid apart from registration. In some cases the unregistered document is inoperative and inadmissible as evidence of the transaction. See sections 54 and 59 of the Transfer of Property Act, 1882, and section 49 of the Registration Act.

⁷¹ See Act No. XXV of 2004, section 2, (with effect from 1st July, 2004).

⁷² Section 54 of the Transfer of Property Act, 1882; Md Golam Ali Molla vs. Khondakar Abdul Mazid and others, 1984 BLD 157.

⁷³ Kala Chand vs. Gopal (1869) 12 WR 163.

- (d) A "power of attorney" which creates a charge in favor of the donee on the immovable property referred to therein;⁷⁵
- (e) Any transfer of immoveable property by a Muslim husband to his wife in lieu of dower;⁷⁶
- (f) Deed of waif;⁷⁷
- (g) Deed of exchange in relation to immoveable properties;
- (h) An instrument creating charge⁷⁸ on property;⁷⁹
- (i) An amalgam or era containing a contract for the sale of straw growing on land;⁸⁰
- (j) A deed conferring on a Hindu wife, in consideration of marriage, a right of residence and maintenance out of the rents of a house;⁸¹

⁷⁴ The nature of a compromise being that it is an acknowledgment of the existing rights of the parties, it is treated as a sale within the meaning of section 54 of the Transfer of Property Act: *Krishina vs. Aha* (1910) 34 Born 139.

⁷⁵ *Indri Bibi vs. Jain Sirdar* (1908) 35 Ca 1845, 848, 849.

⁷⁶ Transaction of this kind is treated as sale and hence shall be covered by section 17 (1) (b) of the Registration Act, 1908: *Sahiba Begum vs. Atcham* (1868) 4 Mad HE 115, 116; *Abbas Ali vs. Karim Baksh* (1908) 13 Cal WN 160.

⁷⁷ Generally by a waqf-namah the owner of an immovable property dedicates the property to God and constitutes himself the first mutual (superintendent), and reserves to himself the power of appointing mutualism jointly with him. the waqf-namah requires registration as it extinguishes the ownership of the waif though it does not purport to transfer the ownership to the mutualism: *Muhammad Rostra Ali vs. Mushtaq Hussain* (1920) 47 IA 224, 227, 42 All 609, 57 IC 329, ('21) APC 105.

⁷⁸ Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property: see section 100 of the Transfer of Property Act, 1882.

⁷⁹ 12 DLR 395; AIR 1937 All. 282.

⁸⁰ an amalgam being not a contract for sale of goods but one creating interest in land falls within the purview of section 17(1)(b) of the Registration Act, 1908: 62 CLJ 534 : 1936 Cal 770.

⁸¹ *Bay Parson vs. Lallubhai* (1932) 34 Born LR 457. 138 IC 274, ('32) AB 217.

- (k) A "power of attorney"⁸² which authorizes the donee to recover the rents of an immovable property owned by the donor for the benefit of donee;
- (l) The document itself creating an interest in immovable property although it contemplates execution of another document;⁸³
- (m) Deed to transfer the interest of a partner in a partnership firm having ownership over immovable properties;⁸⁴
- (n) A release or receipt in writing in order to forgo any claim to or interest in immovable property;⁸⁵
- (o) Instruments varying the terms of the registered documents⁸⁶ etc.

5.2 Instruments of gift of immovable property:

The instrument of gift of immovable property as defined by section 122 of Transfer of Property Act shall have to be registered.⁸⁷ Again, an instrument whereby to make a declaration of heritable (gift) relating to

⁸² This instrument was held to have effectuated an assignment of title over immovable property within the meaning of clause (b) of sub-section (1) of section 17 of the Registration Act: *Ganpat vs. Atari* (1879) 3 Born 312, 326.

⁸³ 1952 SC 153.

⁸⁴ Share in a partnership being of the nature of a beneficial interest in the assets of the firm the transaction came under section 17(1)(b) of the Registration Act, 1908 as the transfer operates to create an interest in immovable property: 20 DLR 1056

⁸⁵ *Imam Ali vs. Bain Nat* (2906) 33 Cal 613, 621-622; *Safari vs. Lachlan* (1879) 2 All 554; *Bazaar vs. Kakapo* (1878) 2 Born 489; *Rangy vs. Kameswara* (1897) 20 Mad 367.

⁸⁶ 8 Pat 585, 40 CWN 638:1936 Cal.

⁸⁷ Section 17(1)(a) of the Registration Act, 1908. See also *Kala Miah vs. Gopal Chandra Paul and others* 51 DLR 77

immoveable property under the Muslim Personal Law must also be reduced in writing and be registered.⁸⁸

5.3 Authority for adoption:

An instrument conferring Authorities to adopt a son, executed after the first day of January, 1872, and not conferred by a will, shall also be registered.⁸⁹

5.4 Mortgage:⁹⁰

By general rule, an instrument constituting a mortgage,⁹¹ other than a mortgage by deposit of title-deeds,⁹² must be registered according to section 17(1)(c) of the Registration Act read with section 59 of the Transfer of Property Act. In addition, certain other instruments relating to mortgage are, as well, needed to be registered. A few of such instruments are listed below:⁹³

⁸⁸ Section 17 (1) (a) of the Registration Act, 1908. Under Muslim law gift either written or oral is not required to be registered. This position of law has been changed bringing an amendment to the Registration Act, 1908 See Act No. XXV of 2004, section 2, (with effect from 1st July, 2004).

1872.

⁸⁹ Section 17 of the Registration Act.

⁹⁰ See section 58 of the Transfer of Property Act, 1882 for different classes of mortgage.

⁹¹ A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability: section 58 (a) of the Transfer of Property Act, 1882.

⁹² Although section 17(1) (c) of the Registration Act requires all instruments creating mortgage to be registered, however, section 59 of the Transfer of Property Act seems to exonerate "mortgage by deposit of title-deeds" from being registered compulsorily: *Kincaid vs. Shine Rio* (1905) 28 Mad 54)

⁹³ *Begum vs. Fatema Bhai* PLD 1961(WP) Karachi 537

- (a) Memorandum of deposit of title deeds, in case of equitable mortgage, purporting to create interest in property in favor of mortgagee;⁹⁴
- (b) A debenture issued by a Limited company, the loan under it being stated to be on the security of specified immovable property;⁹⁵
- (c) An agreement between mortgagor and mortgagee varying the term of the mortgage deed⁹⁶ such as to alter the term of the contract effecting interest payable by mortgagor⁹⁷ etc.

5.5 Lease:

As Section 17 (d) of the Registration Act puts it, leases⁹⁸ of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent shall compulsorily be registered.⁹⁹ Even if the lease is created pursuant to a compromise decree, then again, registration is mandatory.¹⁰⁰ Further, a subsequent deed, which purports to extinguish the rights created by a registered lease, must be registered.¹⁰¹

5.6 Judicial pronouncement:

Generally, judicial decrees or orders need not to be registered for their validity. But every non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or

⁹⁴ M/s Eagle Star Insurance Co. Ltd. 21 PLD Karachi 133.

⁹⁵ See section 100 read with section 59 of the Transfer of Property Act, 1882.

⁹⁶ 17 CWN 233 PC.

⁹⁷ 1952 SC 153 : 1952 SCJ 150 : 1952 SCR 491.

⁹⁸ A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms: section 105 of Transfer of Property Act, 1882.

⁹⁹ See section 107 of Transfer of Property Act, 1882. See also Abdul Majid Mia vs. Mvi Nabiruddin Pramanik 22 DLR (SC) 360; Bangladesh vs. Md. Aslam 44 DLR 69; 194 IC 31-1941 R 117.

¹⁰⁰ Haft Md Mostafa & others vs. Md Mumtazul Haque & others. 3 BSCD 111.

¹⁰¹ 28 Born LR 1152 : 1926 Born 573.

award purports or operates to effect any right, title or interest to or in immovable property shall have to be registered.¹⁰² For the registration the pecuniary value of the instrument is no longer to be taken into account.¹⁰³

Followings are some of the documents compulsorily to be registered:

- (a) a private award affecting immovable property;¹⁰⁴
- (b) A compromise decree increasing the annual rent of a land passed on a compromise petition filed by the parties¹⁰⁵ etc.

5.7 Family arrangements:

Any arrangement whereby to divide the family property, in particular, immoveable property, shall come within the scope of section 17 (1) of the Registration Act, 1908:

- (a) Instrument of partition of immovable property affected by persons upon inheritance according to their respective personal laws is to be registered;¹⁰⁶
- (b) A family arrangement whereby each party takes a share of or interest in family property by virtue of an independent title which is to that extent admitted by the other parties by way of declarations of right under section 17 (1) (b) of the Registration Act, 1908 ought to be registered etc.¹⁰⁷

5.8 instrument of sale in pursuance of an order of the Court

If not exempted by Government, instrument of sale in pursuant to an order of the Court under section 96 of the State Acquisition and Tenancy Act, 1950 shall have to be registered.¹⁰⁸

¹⁰² Section 17(1) (e) of the Registration Act, 1908.

¹⁰³ See Act No. XXV of 2004, section 2, (with effect from 1st July, 200).

¹⁰⁴ An award need not ordinarily be registered but if the parties put their signatures to that by way of acceptance and it amounts to partition, it is to be registered 39 CWN 54.

¹⁰⁵ Azizur Rahman vs. Satyendra Kumar Saha PLR 1958 Dacca 394.

¹⁰⁶ Section 17 (1) (f) of the Registration Act, 1908.

¹⁰⁷ Section 17 (f) of the Registration Act, 1908.

¹⁰⁸ Section 17 (g) of the Registration Act, 1908.

5.9 Instruments in relation to companies:

Generally, the corporate charter of a company, such as memorandum of association and articles of association are to be registered for their legality.¹⁰⁹

5.10 Non-remittable instruments:

It is quite relevant here to note that the Registration Act has exempted certain instruments from being registered although these are related or purporting to relate to immoveable property. By analogy judiciary has also held certain other somewhat similar instruments not to be remittable. These instruments¹¹⁰ are quite valid without registration provided that

¹⁰⁹ These instruments constitute contracts between the company itself and the shareholders signing them. sections 22 and 23 of the Companies Act, 1994.

¹¹⁰ Some of these instruments are listed below:

- (a) Instruments mentioned in sub-section (2) of section 17 of the Registration Act, 1908; (b) an instrument in writing evidencing a deposit of title-deeds on collateral security for a loan [United Bank of India Ltd. vs. Azirannessa 17 DLR (SC) 169]; (c) a memorandum in writing evidencing the creation an equitable mortgage [48 LW 292-- 1938 Mad. 865--(1938) 2 MLJ 534]; (d) An agreement to execute an usufructuary mortgage deed [45 A 388--1923 A 433(2)]; (e) a negotiable instrument, the payment of which is secured by a mortgage by deposit of title-deeds (1937 Rang. LR 303--1937 Rang. 154); (f) A license given by Government for exploration of mineral etc. in the land (Rang swami vs. Vishnu Namable AIR 1946 Mad. 180); (g) a release of part of the mortgaged property on part payment of the mortgage debt by endorsement on the bond (27A 305. 72 IC 454 (C) 61 C 894; 59 CL1473 : 1934 Cal 775, 37 CWN 424, 1933 Cal 588); (h) a deed of appointment creating interest of an executor in the testator's immoveable property (2 DLR 265); (i) an instrument creating tenancy for a year or less although governed by the Transfer of Property Act, 1882 (Province of East Pakistan vs. Abdul Jail Molla 20 DLR 1223); (j) A rent note signed only by the intending lessee[A rent deed does not fall within the purview of section 107 of the Transfer of Property Act, 1882 (42 PLR 75) and hence is not required to be registered as per section 17 of the Registration Act, 1908 (1940 NLJ 110--1940 N 143)]; (k) an agreement creating a right of pre-emption (47 B 283); (l) an agreement by a reversionary not to challenge alienation by the limited owner (1949 EP 207: 4 DLR Smile 18); (m) an agreement for financing a partition suit for half share of property (1940 Born 143 : 188 IC 217); (n) an agreement to execute deed (9

these are in conformity with other forms, if so prescribed by statutes.

5.11 Effect of non-registration:

Section 17 of the Registration Act makes it mandatory for all contracts coming within its scope to be registered. Non-fulfillment of this mandatory requirement shall have fatal consequences. Legal ramification may be of different types: in the first place, these instruments, which ought to be registered, shall, on account of non-registration, become void although they are in conformity with other formal conditions set out for the validity of contracts and, as a result, these instruments being void¹¹¹ cannot create, extinguish or assign any interest in the property in question¹¹² and, in the second place, these non-registered instruments are inadmissible¹¹³ in any proceeding before any Court of law as evidence.¹¹⁴

DLR 464); (o) a power of attorney not affecting any interest of the donor in any immovable property so as to attract the provision of section 17(1)(b) of the Registration Act, 1908 [Chandpur Mills Ltd vs. Dad Ltd. PLD 1959 Dacca 636 ((B)); (p) Agricultural lease (Shamsuddin Sarder vs. Amjan Bewa 19 DLR 192); (q) an instrument involves Recital of past/existing state of affairs which does not affect any interest in immovable property [Ghulam Mohiuddin vs. Haft Muhammad PLD 1957 (WP) Karachi 643 (DB) Ref : AIR 1942 PC 55, AIR 1923 PC 50, 5 Born. 232]; (r) an amalgam or dastaknama (It is an order to go and take possession for consideration of some staff. It does not create any tenancy; nor it creates any lease: 33C, 502, 13 CWN 267: 8 CLJ 538); (s) a security bond filed in court for the purpose of staying execution of a decree (52 B 72 : 1928 Born 42, 1934 Lahr 138, 149 IC 300 FB); (t) a family arrangement which does not effect any transfer of immovable property (150."1941 Ouch 191: IC 402); (u) a document appointing a person as guardian of the property of a minor (1903) 13 Mad LJ 303) etc.

¹¹¹ A landlord, for example, cannot recover rent under an unregistered lease if the lease is one requiring registration: See section 23 of the Contract Act.

¹¹² Javed Ali Bepari vs. Abdul Bari Bepari 19 DLR 192; 2 DLR 265; 12 DLR 395 : 9 DLR 464.

¹¹³ However, An unregistered document which requires registration under section 17 of the Registration Act can be admitted in evidence for a collateral purpose. The fact whether a lease of immovable property is made for a certain term express or implied, or in perpetuity, or for a certain consideration is not covered by the term "collateral purpose". They are the essential terms of the lease and cannot be proved by a document which is not by the law governing

If a document is not registered although statute requires it to be registered, Court shall, this transaction being contrary to law,¹¹⁵ decline to enforce the covenant. So any proceeding for specific performance of terms of such unregistered instrument shall not be maintainable although innocent party may opt to bring an action on the ground of breach of contract.¹¹⁶ On the contrary, registered documents shall, as regards the property they comprise, take effect against every unregistered document relating to the same property although last mentioned documents have been executed first in point of time.¹¹⁷

6. Conclusion:

It is evident from the foregoing run down that a large number of contracts are compulsorily being made in one or other form. These contracts are filtered at least twice. In the first place, they have to comply with the primary requirements as enunciated in section 10 of the Contract Act and, in the second place, they have to be in congruent with the requirements as to the form prescribed by relevant statutes. The process of making such contracts on the face of it seems to be an intricate one. For example, a contract required to be registered entails the parties to it to exert a great deal of their time, energy and money to bring it about as per law.

such document admissible in evidence. *Nur Khartum vs. Sheikh Ahmed* 9 DLR (WP) 8; PLD 1957 (WP) Posh. 50 : PLR 1957 (I) WP 1089 (DB); *Dagwood & Co* PLD 1962 (WP) Karachi 368. But Where the agreement of sale of immovable property was not registered, and subsequently on the non-performance of the agreement by the vender a suit was brought for the refund of earnest money. It was held that the agreement was admissible in evidence because it was required to be looked at only for a collateral matter. *Moosa vs. Mohd. Yaqub* PLD 1966 Karachi 376.

¹¹⁴ See section 49 read with section 17A of the Registration Act. See also *Azizur Rahman vs. Satyendra Kumar Saha* PLR 1958 Dacca 394; *Md Golam Ali Molla vs. Khondakar Abdul Mazid and others*, 1984 BLD 157.

¹¹⁵ See section 23 of the Contract Act read with the Specific Relief Act, 1877.

¹¹⁶ See section 39 of the Contract Act.

¹¹⁷ Section 50 of the Registration Act.

It is, however, plausible that almost all the contracts required to be in specific form are subtle in nature and hence requires a degree of care. Prescription regarding making contracts in particular form is precipitated by some underlying purposes. Requirement of forms bring certainty in transaction. Written contracts having recorded all the terms of bargain hardly allow contracting parties to deny the existence of written stipulations by proving extraneous matters.¹¹⁸ Further, written contracts provide a degree of protection to the relatively weaker party in the contract. E.G., an employee who has a written contract with the employer may enjoy sense of security as to the terms of employment agreed.¹¹⁹ Last but not least, at the time of dispute written contracts are adduced to prove the terms of bargain. Oral contracts, on the contrary, imposes a heavy onus on the party complaining to prove the fact of the making of the contract and its terms agreed and hence affords little protection to the party placing reliance.

¹¹⁸ Section 91 of the Evidence Act, 1872.

¹¹⁹ Section 5 of Bangladesh Labour Act, 2006 makes it mandatory for the employers to provide written appointment letters to the workers.