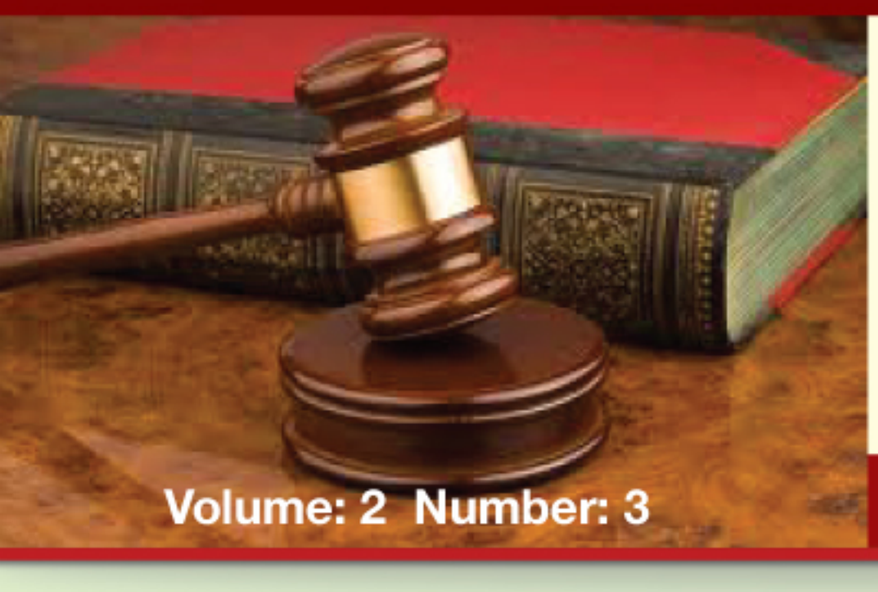

BIAC

Bangladesh International Arbitration Centre (BIAC)

The Institution for Alternative Dispute Resolution

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Meeting with DGDP

BIAC officials visited the Directorate General of Defence Purchase (DGDP) on August 11, 2014. BIAC Chief Executive made a presentation on BIAC and its role in promoting ADR. Referring to the relevance for the DGDP, Dr. Ali highlighted that in all business transactions, the procuring agency should carefully consider the dispute resolution clause of the contract. It is vital that this dispute resolution clause be negotiated at the time the contract is finalized. Once a dispute has arisen, it may be difficult for the two parties to agree as each tries to take advantage of the situation. Due to delay in disposal of cases in courts as well as some other disadvantages of litigation, the interests of parties in ADR are growing rapidly, around the world. BIAC was created to provide ADR services relating to arbitration and mediation in Bangladesh. The main objective of an ADR institution like BIAC is to bring down cost and time of dispute resolution, while ensuring transparency and fairness in the process. This should generate a more business-friendly environment, which also attracts FDI. Maj. Gen. Kazi Fakhruddin Ahmed, psc, Director General, DGDP, expressed keen interest in ADR methods, particularly arbitration, and services provided by BIAC in this respect. All officers of DGDP attended the briefing, and several of them asked questions after the presentation. The Director General hoped that DGDP's association with BIAC will benefit his organization.

Seminar on ADR at Dhaka International University

At a seminar on ADR in Bangladesh, organized jointly by the Dhaka International University (DIU) and Bangladesh International Arbitration Centre (BIAC), on September 4, 2014 the speakers emphasized the need for wide implementation of ADR methods to decrease the backlog of cases in our country .

BIAC Chief Executive presented the keynote paper at the seminar at Dhaka International University. Barrister Jennifer Ashraf and Advocate Khalid Yahyea were the discussants in the program. Vice-Chancellor of DIU Dr. K. M. Mohsin and Chairman, Board of Trustees Dr. S. Quadir Patwari also spoke at the event. Among others, chairpersons of different Departments along with faculty members of Law Department and around 200 students of the Department of Law of DIU were present at this event.

The Daily Star

DHAKA TUESDAY SEPTEMBER 9, 2014

LAW EVENT

Seminar on ADR held at DIU

RAISUL ISLAM SOURAV

BOTH lower and upper judiciary in Bangladesh are overstrained with more than 2.5 million civil and criminal cases demanding effective operation of Alternative Dispute Resolution (ADR) to reduce the pressure on all tiers of the courts. Key problems like cost, complexity and delay of adversarial litigation procedure can effectively be reduced by mere introduction of arbitration, mediation, negotiation, conciliation and other forms of ADR in our laws and court systems.

In addition, mind set up and culture of litigation should be changed to bring an effective solution for easy access to justice for dispute affected poor and marginal people. Speakers at a seminar on ADR in Bangladesh jointly organised by Dhaka International University (DIU) and Bangladesh International Arbitration Centre (BIAC) on September 04, 2014 emphasised the need for wide implementation of ADR mechanisms to decrease the backlog of cases of our country.

Dr. Taufiq Ali, Chief Executive of BIAC, presented the keynote paper at the seminar. Barrister Jennifer Ashraf and Advocate Khalid Yhayea were the discussants in the program while the seminar was emcee'd by Raisul Islam Sourav, senior lecturer and coordinator of the department of law of DIU.

The spokesmen mentioned the loopholes of the existing provisions of ADR in our legal system, specially the provision of the Artha Rin Adalat Ain and the Civil Procedure Code to go to the court for ADR. According to their views apart from our court system lawyers are not less liable for the delay in civil litigation like land related matters.

They also criticised its non practices and gave some recommendations to change the scenario of litigation. They told that arbitration and mediation are easier process in comparison with formal court proceedings and it is much time effective also. They said it could be a new door for the young lawyers to boost up their careers. Further, they urged, to introduce the ADR course into our legal studies.

Among others chairpersons of different departments along with faculty members of law department and around 200 students of the department of law were present.

THE WRITER IS A SENIOR LECTURER OF LAW, DHAKA INTERNATIONAL UNIVERSITY (DIU).

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Department of Justice team of US Embassy visited BIAC

A team of officers of Department of Justice working at the US Embassy, Dhaka visited BIAC on September 10, 2014 and met with BIAC officials. The team comprised of Thomas Dougherty, Legal Advisor, Karyn Kenny, Legal Advisor, Shahedul Haque, Assistant Legal Advisor, and Zahid Islam, Administrative Assistant.

BIAC Chief Executive Dr. Toufiq Ali delivered a brief speech on Arbitration and Mediation in Bangladesh. A Presentation on BIAC and ADR was made by Director Nurul Islam under three broad segments: firstly, why ADR is important for businesses in Bangladesh; secondly, emergence of BIAC, its activities and how BIAC facilitates ADR and thirdly, Opportunities & Challenges of ADR in Bangladesh. Thomas Dougherty wanted to know if BIAC's Rules and facilities can be used to resolve disputes in RMG sector. Dr. Ali explained that if BGMEA chooses, they can use BIAC's services and facilities as a neutral and independent intermediary. Dr. Ali expressed his optimism about the Bangladesh RMG sector.

BIAC Mediation Rules 2014 launched

BIAC Mediation Rules and Mediator's Code of Conduct were launched in May 2014. The Rules conform to Bangladesh laws and follow global best practices. It ensures self determination by the parties, fairness of the process and confidentiality. A neutral Mediator may settle a dispute even in one day following BIAC Mediation Rules. These Rules were framed with inputs from local and foreign experts. Mediators of BIAC are to follow Mediator's Code of Conduct which ensures ethical handling of disputes in Mediation. This Code of Conduct should provide comfort to clients who opt for mediation. BIAC's Panel, comprised of trained and accredited Mediators, has already been announced.

Legal Updates

Justice Delayed is Justice Denied

The recent case of Adflame Pharmaceuticals ("Adflame Case") illustrates how victims have to wait before the Court provides redress. 'Justice delayed is justice denied'. It is one of the reason why the Bangladesh Judicial system has been failing to ensure justice to the aggrieved.

The Law Commission, in a recent Report to Ministry of Law, commented that it has taken 21 years to deliver justice in a major incident, such as in the Adflame Case, and wondered how long it will take (to conclusively resolve the case) once it goes to the High Court and the Supreme Court.

A case was lodged on Dec 19, 1992, about 21 years ago; accusing eight people of supplying spurious paracetamol syrup causing death of 76 children [Investigation revealed that traces of the highly toxic diethylene glycol had been found in the paracetamol syrup manufactured by Adflame Pharmaceuticals.]. The trial began 14 years later after the Rule in the High Court was resolved. The verdict in the case was pronounced on July 22 this year.

The Court sentenced the Company's Director Dr Helena Pasha, Manager Mizanur Rahman and Quality Control Officer Nrigendra Nath Bala to 10 years in jail. The accused have also been fined Tk 250,000 each.

A copy of the Commission's Report filed to the Law Ministry details the causes of the delay in finalising the Adflame Case. According to the Commission Report, 19 years and two months in the 21-year-long case were simply wasted because the case documents remained locked up in courts. A total of 14 years and three months had been lost after the High Court issued a Rule and sought the case papers from a lower court hearing the case. Following which, another one year and 11 months passed, as the necessary papers were kept locked up instead of being sent back to the lower court after a Criminal Revision. The prosecution let another two years and one month elapse by failing to produce the witnesses. And, finally, the defence added another 11 months to the lost time by seeking repeated adjournments to the hearing.

The Adflame Case depicts the common failure of our litigation system to actively manage cases, causing long delay and frustrating the underlying objective of the Courts to provide remedy justly, expeditiously and at a reasonable cost.

Observing long delays in resolving disputes through litigation, the Law Commission recommended non-stop proceedings, police must make quick arrangements to produce witnesses and file reports, the practice of judges noting depositions must be replaced with alternative ways of doing this to reduce time, hearings should not be adjourned except under emergency conditions, and that adjournments should be a brief period when necessary.

A recommendation of the Commission that has attracted much attention is that Rules issued by the High Court should be automatically dismissed if they are not resolved within six months. The report also recommended that the High Court should practice caution in issuing Rules and stay orders. Steps were sought from the Chief Justice in discouraging unnecessary Rules.

Interim awards are enforceable -decides Singapore Court of Appeal

In the case of PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)[2014] SGHC 146, the Singapore Court of Appeal considered the enforceability of interim awards under the Singapore International Arbitration Act (the IAA). This judgment provides a useful analysis of what constitutes an enforceable award in Singapore and helpfully clarifies that an interim award which may be subject to further determination will still be enforced by the Singapore courts. This is a welcome decision on an issue which remains unsettled on an international level and should provide particular comfort to construction practitioners.

PGN, an Indonesian state-owned company, contracted with CRW, an Indonesian company, to design, procure and pre-commission a pipeline. The contract incorporated the 1999 edition of the FIDIC "red book", a set of standard terms and conditions commonly used in the construction industry.

These rules apply what is known as a "security of payment regime", whereby, in case of a payment dispute, a party can seek a binding interim adjudication from a body known as the Dispute Adjudication Board (DAB).

The purpose of this procedure is to ensure that a contractor can secure a disputed payment in the short term in order to avoid disruption of its cash-flow. The procedure is supported by a contractual obligation on both parties to give prompt effect to a DAB decision. However, despite the binding nature of the adjudication decision in the short-term, nothing precludes both parties from re-opening the underlying merits of the DAB decision in subsequent arbitration proceedings (in this case to be seated in Singapore). For this reason, the driving principle of this framework is often described as "pay now, argue later".

A dispute arose between the parties regarding a number of variation claims under the contract, which the parties referred to the DAB. In a decision of 25 November 2008, the DAB held that PGN owed CRW a sum of approximately USD 17 million (the disputed sum), which PGN failed to pay.

PGN's non-compliance with the DAB decision led CRW to commence arbitration proceedings in 2009. Although the tribunal's award required PGN to pay the disputed sum, ultimately the arbitral award was set aside for reasons which are beyond the scope of this post.

In a second arbitration, CRW obtained an interim arbitral award granted by the majority of the tribunal which again required PGN to promptly pay the disputed sum. The award was expressed to be made "pending the final resolution of the Parties' dispute raised in these proceedings" (the interim award), thereby upholding the principle of "pay now, argue later".

PGN brought an application to set aside the interim award on the basis that it was contrary to the Singapore IAA. PGN argued that the Singapore IAA does not allow a Singapore-seated tribunal to issue a provisional award which is only binding until it is varied by a final award (a concept which PGN referred to as "interim finality"). Further, in light of an express provision in the Singapore IAA which prohibits a tribunal from varying, amending or revoking an award, PGN argued that the interim award would effectively preclude PGN from seeking any future determination on the underlying merits of the dispute, which would be contrary to the rules of natural justice.

Vinodh Coomaraswamy J upheld the interim award on the following basis:

- Every decision which has the status of an "award" carries preclusive effect on its particular subject matter, regardless of the fact that other disputes between the parties remain undetermined. This interim award gave effect to the parties' contractual agreement to promptly comply with a DAB decision, which was an eternal and immutable obligation.

- The judge drew a distinction between a provisional order which is procedural in nature and an interim "award", which gives full effect to a substantive provisional right. Nothing in the IAA prohibited a tribunal from issuing a "provisional" award – by which the judge meant granting relief which was intended to be effective for a limited period.

- Even if the judge was wrong and "provisional" awards were prohibited, the interim award was not provisional as it was final and binding. Nor would the interim award be "varied" "amended" or "revoked' – the obligation to comply promptly with a DAB award would not be displaced when the tribunal disposed of the rest of the dispute, as the interim award would simply cease to have effect when the final award was rendered.

- The words "pending the final resolution of the Parties' dispute raised in these proceedings" simply confirmed that the interim award did not preclude PGN from arguing the primary dispute on the merits. If the tribunal ultimately reversed the DAB decision or reduced the amount payable to CRW by PGN, the tribunal could issue a final award requiring CRW to return the excess, and the interim and final awards would stand together for the purposes of enforcement.

Comment

This judgment provides a useful analysis of what constitutes an enforceable "award" as opposed to an "order" for the purposes of Singapore law. This distinction is an important one given that only an "award" will qualify for recognition and enforcement under the New York Convention, and neither the New York Convention nor the Model Law (as implemented in Singapore) provides a definition of an "award".

This decision makes it clear that a binding award can be granted in relation to a substantive provisional right. The interim award gave effect to the obligation to promptly comply with a DAB decision, which was separate and distinct from the question of whether and how much was owed to CRW by PGN, which would be finally determined later on. It therefore supports the view that an interim ruling can be an "award" and therefore "final" even when it is limited in time. It also helps to dispel any semantic confusion: the question should be framed as whether the subject matter of the decision deals with a substantive right rather than considering whether the decision can be considered "provisional" or "interim".

This is an important outcome for the efficacy of the arbitral process. Had the court set aside the interim award, this would have rendered PGN's contractual obligation to promptly comply with the DAB decision for all practical purposes defunct. Before securing payment, CRW would have had to wait for the tribunal to finally dispose of all issues in dispute, thereby allowing PGN to circumvent its contractual obligations.This also provides welcome judicial support for the "pay now argue later" regime that is the backbone of dispute resolution mechanisms in the construction industry, as it should discourage recalcitrant employers from using the arbitral process as a means of delaying payment of sums which would otherwise be immediately due.

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