



BIAC

Bangladesh International Arbitration Centre (BIAC)

The Institution for Alternative Dispute Resolution

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Seminar on The Rise of International Arbitration in Asia



business chambers, eminent lawyers and representatives of prominent corporate houses attended the seminar and participated in the deliberations.

BIAC and Rajah & Tann Singapore LLP jointly organized a seminar on "The rise of International Arbitration in Asia" on 4 April 2015 at Pan Pacific Sonargaon Hotel. The keynote speakers from Rajah & Tann Singapore LLP were Francis Xavier, S.C., & V. Bala while Barrister Sameer Sattar provided a Bangladesh perspective. Minister for Law, Justice & Parliamentary Affairs Hon'ble Anisul Huq, MP was present at the seminar as Chief Guest. Distinguished jurists, Presidents of leading busi-

Seminar on Mediation for Settlement of Commercial Disputes & Recovery of Overdue Bank Loans



Minister for Law, Justice & Parliamentary Affairs, S.K. Sur Chowdhury, Deputy Governor of Bangladesh Bank, Mediators of BIAC Panel, Managing Directors of banks and financial institutions as well as prominent businessmen and distinguished lawyers attended the seminar and participated in the discussion. Former Adviser and Former Secretary Abdul Mueyed Chowdhury and Managing Director of Midland Bank Md. Ahsan-uz Zaman, both of whom happened to be Accredited Mediators, presented the key note papers in the seminar.

To encourage settlement of money loan disputes outside Court through effective use of mediation techniques a seminar entitled "Mediation for Settlement of Commercial Disputes and Recovery of Overdue Bank Loans" was jointly organized by BIAC and Metropolitan Chamber of Commerce & Industry (MCCI) on 6 May 2015 at MCCI Conference Hall. Minister for Commerce, Hon'ble Tofail Ahmed, MP was present at the seminar as chief guest. Mohammad Shahidul Haque, Secretary, Legislative & Parliamentary Affairs Division of Ministry of Law, Justice & Parliamentary

Seminar on Out-of-Court Settlement of Overdue Bank Loan Disputes



At the invitation of the Managing Director of Mercantile Bank, a seminar on Out-of-Court Settlement of Overdue Bank Loan Disputes was held on 6 June 2015 at the Mercantile Bank Training Institute. Sixty senior officers of Mercantile Bank attended the seminar. The Chairman of the Bank Al-Haj Akram Hossain (Humayun) inaugurated the seminar, while the Managing Director, the Additional Managing Director, Deputy Managing Directors, and other senior officers of the

Bank actively participated throughout the half-day event. Dr. Toufiq Ali, Chief Executive, A.H.M. Nurul Islam, Director and Barrister Fahmida Islam, Assistant Counsel, BIAC made presentations on ADR methods with special emphasis on mediation and Artha Rin Adalat Ain at the interactive seminar.

Meetings with Former Chief Justices, Justices, Eminent and Mid-Career Lawyers



On 30 May 2015, BIAC organized a meeting with Former Chief Justices, Justices and eminent lawyers who are involved in arbitration practices. Another such meeting was organized on 16 June 2015 with mid career practicing lawyers. The objective of these meetings was to reach out to ADR clients of BIAC and meet their requirements. It has been observed that parties generally rely on advice of their counsels and arbitrators on selection of procedure, seat and venue of arbitration.

BIAC signed Memorandum of Understanding with Anwar Group of Industries and Apex Group of Companies

BIAC signed Memorandum of Understanding (MoU) with Anwar Group of Industries and Apex Group of Companies for resolving commercial disputes through using BIAC's specialized ADR services. Both the signing ceremonies were held on 30 June 2015 at the respective companies' head offices in Dhaka. Mr. Mahbubur Rahman, Chairman, BIAC signed on behalf of Bangladesh International Arbitration Centre while Mr. Manwar Hossain, Group Managing Director, Anwar Group of Industries and Syed Manzur Elahi, Chairman, Apex Group of Companies signed on behalf of their respective organisations.



Accumulated bad loans of 56 banks in Bangladesh over Tk 546.57 billion

The total amount of default loans of 56 banks operating in Bangladesh is over Tk 546.57 billion.

Finance Minister AMA Muhith revealed the figure in reply to a query from MP Nurunnabi Chowdhury in Parliament on Saturday, June 27, 2015.

Muhith said the state-owned Agrani Bank, Janata Bank, Rupali Bank and Sonali Bank had accumulated bad loans of Tk 226.54 billion.

The amount of default loans in 39 private banks is over Tk 227.47 billion. Of them, Islami Bank has the highest amount of default loan at Tk 28.02 billion, which is around six percent of its total loan. ICB Islamic Bank has the highest ratio of default loans with 77.49 percent of the total loan it disbursed turned out to be bad loans.

State-owned BASIC Bank's default loan is 56.67 percent of its total loan, Sonali Bank 28.66 percent

and Bangladesh Commerce Bank 32.14 percent.

The nine foreign banks operating in Bangladesh have default loans of over Tk 18.39 billion.

The amount of default loans in three specialised banks.– Bangladesh Development Bank, Bangladesh Krishi Bank and Rajshahi Unnayan Bank – is over Tk 74.17 billion. (Source: bdnews24, 2015-06-27 18:53:15.0 BdST)

In developed and many developing countries such disputes are generally resolved through use of ADR methods, namely mediation. Since its inception, BIAC is trying to popularize ADR for settlement of Commercial and Money Loan Disputes, as these methods are expeditious and cost effective. Further, Mediation is a mandatory first step in resolving money loan disputes as per Artha Rin Adalat Ain 2003. (As amended in 2010)

Bangladesh International Arbitration Centre (BIAC) featured in the US Department of State's Bangladesh Investment Climate Statement 2015

Bangladesh International Arbitration Centre (BIAC) featured in the Bangladesh Investment Climate Statement 2015 released by US Department of State on 29 May 2015. The Statement provides country-specific information and assessments on investment-related laws and other pertinent factors for doing business in Bangladesh, to assist US Companies to make informed decision regarding investment. BIAC has been mentioned in the "Dispute Settlement" chapter of the Statement:

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Duration of Dispute Resolution

The timeframe for dispute resolution is unpredictable. It can be done as quickly as a few months, but often depending on the type of dispute it can take years. In addition, the Bangladesh International Arbitration Center (BIAC) is an independent arbitration center, established by some prominent local business leaders in April 2011. The council committee is headed by the President of International Chamber of Commerce – Bangladesh and includes the Presidents of other prominent chambers such as Dhaka Chamber of Commerce and Industry and Metropolitan Chamber of Commerce and Industry. The center operates under the Bangladesh Arbitration Act 2001. According to the center, if there is a fast track case then it will take around 180 days, if the arbitration is handled by a sole arbitrator it will take around 358 days and if there is a three arbitrators committee, then it will be resolved within 388 days. Bangladesh is a signatory of the New York Convention and does recognize the enforcement of international arbitration awards. Domestic arbitration is under the authority of the district judge court and for foreign arbitration it's under the authority of the relevant high court bench.

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Legal System, Specialized Courts, Judicial Independence, Judgments of Foreign Courts

An important impediment to investment in Bangladesh is a weak and slow legal system in which the enforceability of contracts is uncertain. The judicial system does not provide for interest to be charged in tort judgments, which means there is no penalty for delaying proceedings. In a significant milestone, the government in 2007 separated the country's judiciary from the executive, but the executive retains strong influence over the judiciary through control of judicial appointments. Other pillars of the justice system, including the police, courts, and legal profession are also closely aligned with the executive branch. In lower courts, corruption is widely perceived as a serious problem. Dispute settlement is also hampered by shortcomings in accounting practices and in the registration of real property. With the exception of those conducted by a few internationally affiliated accounting firms, audits of balance sheets and profit and loss statements often follow clients' instructions and fail to conform to international standards. Documents affecting title to real property are often not registered, complicating transfer of ownership and collateral agreements.

Bankruptcy

Many laws affecting investment in Bangladesh are old and outdated. Bankruptcy laws, which apply mainly to individual insolvency, are sometimes not used in business cases because of webs of falsified assets and uncollectible cross-indebtedness supporting insolvent banks and companies. A Bankruptcy Act was enacted in 1997, but has been ineffective in addressing these issues. An amendment to the Bank Companies Act of 1991 was enacted in 2013. Some bankruptcy cases fall under the Money Loan Court Act, which has more stringent and timely procedures.

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Arbitration & Mediation

Justice Latifur Rahman
Former Chief Justice of Bangladesh

Alternate Dispute Resolution (ADR) is gaining Popularity all over the world, including developing countries like Bangladesh . Various forms of alternative dispute resolutions have been in existence in every society from time immemorial. Most human disputes can be profitably resolved outside the court room without unnecessary loss of time and money. ADR can be brought under two broad categories, namely (1) resolution of disputes outside the Court and (2) court- sponsored programs through which disputes may be resolved without a full trial.

Arbitration may be regarded as the fastest growing method selected by Parties to resolve their disputes. It flows from the perception that arbitration is a faster and more economic way to resolve domestic and international commercial disputes.

I would like to emphasise that mediation as a form of ADR is an art. One cannot work as a successful mediator unless he or she learns the skill and technique of mediation. In that perspective, the training of Mediation is very important in Bangladesh where we talk of introducing mediation at all possible levels of our court system. We must try to understand at the initial stage the difference between mediation and arbitration. In mediation, a dispute is resolved through mutual consent of the parties; whereas in arbitration the arbitrator passes an award upon evidence presented by the parties.

Lord Woolf, a former Chief Justice of U.K. in his report described mediation as a form of facilitation of disputes including family disputes, neighbour disputes, industrial and commercial relations.

In our country, since mediation is not in practice. Judges and lawyers who are selected as mediators must have some basic training as to how a dispute can be resolved quickly and within less expenses. For that we need special skill, we need education, training and experience in mediation procedures. I understand that in the United States of America, in many jurisdictions, mediation as an alternative dispute resolution has become a popular mechanism. While I was the Chief of Bangladesh, Mr. Justice Clifford Wallace of U.S. A., a retired Justice of the 9th Federal Circuit Court, told me that mediation was being practised in his Country for more than 60 years. According to him, this mechanism has brought a great deal of success in reducing back- log of cases with good results.

I am confident that giving effective training to the judicial officers, lawyers and others, we can reap the benefit of mediation in our country. Benefits of mediation are manifold. Procedures can be modified to meet the needs of a particular case. One very important thing is the trust in the mediator. If the parties trust the mediator and take him in confidence then the dispute could be easily resolved. I am sure that the mediator, with some knowledge or expertise in the area of dispute, can settle disputes peacefully with less trouble.

From our common experience we have find that at times small disputes may be settled by negotiation between neighbours, friends and relations. In many cases better results have followed from such informal mediations than can be obtained through a formal court proceeding. Even big companies decide to mediate business disputes and claims as they do not like to prolong their litigations in court proceedings which is harmful to the interests of the business community.

Strictly speaking, mediating can include arbitration. The Arbitration Act, 2001 contemplates settlement of disputes. According to section 22 of the Arbitration Act, 2001, in the midst of an arbitration the parties can settle the matter and award may be passed on agreed terms in accordance with section 38 of the Act. This is really a compromise, in other words a mediation. Mediation is less expensive as it does not require the appointment of an attorney, parties and the mediator dispose the case quickly in a non-formal court procedure. Confidentiality is maintained in mediation.

Mediation is also a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with the help of mediator who is an expert in this method. The mediator knows the skill as to how the dispute between the parties can be resolved.

In arbitration, the arbitrator acts like a judge, but in mediation the dispute is resolved in an out of court settlement and it is less formal.

Mediation is very common in domestic disputes, such as, divorce, child custody, visitation. In developed countries like USA and Europe mediation is practised in almost all cases of contract and civil damage.

Mediation does not always result in a settlement. It may fail and then the parties can have recourse to law suits.

Arbitration in USA, dates back to the eighteenth century; whereas mediation is referable to nineteenth century.

There is no scope of appeal in mediation, whereas in arbitration appeal is provided under the law. Mediation agreement is enforceable in a court of law.

We are in the midst of economic development when our institutions and procedures for dispute settlement must be made efficient, fair and business-friendly. We live in a global village and our business, commerce, trade and industry are extended throughout the globe and there is interchange and exchange of commerce and trade for the benefit of all countries of the world. To-day, no nation can live in isolation and in fact the frontiers of trade and commerce have extended the boundaries of nations. Hence it is profitable to settle commercial disputes quickly, outside the rigours of strict court procedure.

I may mention that the Jurisprudential Concept and the philosophy relating to arbitration have undergone a great change due to free market economy throughout the world. Free-market economy presupposes freedom of the parties to transaction without state interference and statutory constraints as far as possible, which is true in case of domestic as well as international transactions. As Bangladesh is a developing country, it is entering into various international commercial transactions with different countries for its economic development. And hence the Bangladesh International Arbitration Center (BIAC) has a significant role to play in the context of "The Arbitration Act, 2001 and BIAC Arbitration Rules 2011. The international business community desires quick settlement of disputes instead of a lengthy judicial encounter. A foreign award is also enforceable in Bangladesh as if it were an award made on a matter referred to arbitration in Bangladesh.

The court's intervention is necessary when it is only indispensable.

I must put on record that in Bangladesh the period of conclusion of arbitration proceedings needs to be minimized; otherwise this method of dispute resolution will be meaningless and interest in it will decline.

In Sri Lanka, ADR is being practised both in Civil and Criminal Jurisdictions.

At present Conciliation Board Act, 1958 is in force in Sri Lanka and in a reported decision of the Sri Lanka Supreme Court it was observed as follows:

" The Act was intended to provide an expeditious and inexpensive means of settling disputes between the parties without the necessity of having recourse to the complicated process of law suit."

In India, Lok Adalat has been set up in several states under Legal Service Authority Act, 1987, and the People of India are getting positive benefits out of arbitration. In India, through ADR a large number of cases are being decided every year.

In Bangladesh, The Arbitration Act, 2001 was enacted on 24th January, 2001, relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations including domestic arbitration. This new law has been made on the basis of UNCITRAL model law prepared by the United Nations Commission on International Commercial Arbitration. This enactment is a step forward in the matter of speedy disposal of commercial disputes and has ushered in an era of dispute settlement procedure.

While dealing with several arbitrations as Chairman, I found that the Arbitration Act, 2001 is a comprehensive law dealing with the subject of arbitration. But from my personal experience, I can also vouchsafe that the litigating parties at times do not get quick result of the arbitration as the disposal of arbitration takes unusually long time. There are instances where arbitrations take 4(four) to 5(five) years from the passing of the award itself before a tribunal. I can cite one instance, where a Thai party in the arbitration left the arbitration due to delay in disposing the arbitral proceedings before me. The Thai party brought many equipment and accessories from Thailand after custom clearance. I do not know what had happened to those equipment and to that party. Late Dr. Mohammad Zahir Bar-at-Law was a lawyer in that case.

I may point out that the appeal procedure after the award has also become very lengthy in our country. Truly speaking, as the Arbitration Act, 2001 stands now, the jurisdiction and scope of appeal is very limited. But in many cases, the District Court/ High Court Division entertain an appeal and in that process it takes a very long time for final adjudication up to the Appellate Division of the Supreme Court.

I may point out here that if an award is made under Section 38 of the Act, one can challenge the award on the grounds specified under section 43 of the Act. The grounds enumerated are, that a party to the arbitration agreement is under some legal incapacity; that the arbitration agreement is not valid under the law; that the applicant was not given any notice of the appointment of an arbitrator or of the arbitral proceedings or that he was prevented by sufficient reason from presenting his case before the tribunal, or that the award is made on matters not submitted to the arbitration tribunal; or that the composition of arbitration tribunal was not in accordance with the provisions of the act. Further, when it is established to the satisfaction of the court that the subject matter of the dispute is not capable of settlement by arbitration under the law in force in Bangladesh; or that the award is ex facie opposed to the Public Policy or the law of Bangladesh and that the award is induced or procured by corruption or fraud.

These grounds are related practically to the jurisdiction and procedure adopted by the tribunal; but not related to the merit of the case at all. The District Court/ the High Court Division in Appellate Jurisdiction has no authority and power to entertain an appeal other than those grounds mentioned above. But I have noticed that the appellate courts in many cases enter into the merit of the case and thereby the appeal is wrongly admitted and final hearing and conclusion of it takes a very long time, contrary to the objective of the Arbitration Act. The appellate court cannot set aside an award on the ground that a separate interpretation or opinion could be taken by the arbitrator differently on the merit of the case. The decision of the arbitral tribunal is final and the appellate court in many cases illegally sit as a court of appeal.

In the case of K.M. Shafi Ltd. vs. Government of Bangladesh, 1982 reported in BLD at page 111, and Bangladesh T & T Board - Vs. Lili Enterprise Ltd., 50 DLR (AD) at page 63, the correct appellate jurisdiction against an arbitral award has been enunciated by the higher court. Before entertaining an appeal the appellate Court should scrutinize section 43 of the Act.

I may point out here that in the United States of America, the scope of appeal is also very limited, FAA (Federal Arbitration Act) states four grounds of appeal: (1) The award is corrupt/ Fraudulent; (2) Arbitrators misconducted in the proceedings (3) where arbitrators are partial; and (4) where arbitrators exceeded their jurisdiction. Strictly speaking, close scrutiny will show that the above grounds are practically the same as contained in the Bangladesh Arbitration Act, 2001, which is referable to a point of law or if the award is found to be erroneous on the face of it by mere perusal.

In the background of my discussion, I will suggest to the Law Commission of Bangladesh to make an amendment in the Arbitration Act, 2001, to limit the period of arbitration itself to a reasonable period of time so that litigating public can reap the benefit of arbitration, and in the case of international commercial arbitration a company or a foreign party can repose confidence in the process of arbitration in Bangladesh.

Section 89A of the Code of Civil Procedure speaks of mediation, Section 89B of the Code speaks of Arbitration and Section 89C of the Code says of mediation in appeal. This mediation at the appellate stage is a logical sequence, but the efficacy of the procedure is doubtful as the winning party is unlikely to agree to a settlement.

But till today, the efficacy of this amendment in the Code of Civil Procedure is not strictly followed neither by the lawyers nor by the litigating public. We must motivate the lawyers and judges for successful implementation of the scheme of mediation, otherwise it will be difficult to motivate the uneducated people of Bangladesh to switch over to this new system. This experiment of mediation needs support of the Bar and the Bench. It is necessary that right approaches be made for incorporating mediation in the legal culture of Bangladesh, bringing benefit to the litigant public of this country and relieving the legal system of a part of its burden.

[i] James Nicholson and John Gaffney, "Cost allocation in investment arbitration: Forward toward incentivization," Columbia FDI Perspectives, No. 123, June 9, 2014.

[ii] Baiju S. Vasani and Anastasiya Ugale, "Cost allocation in investment arbitration: Back toward diversification," Columbia FDI Perspectives, No. 100, July 29, 2013.

[iii] Matthew Hodgson and Chand Chopra, "ICSID tribunals' reasoning on costs: A survey of 145 public ICSID awards up to 31 May 2014," available at

[http://www.allenoverly.com/SiteCollectionDocuments/ICSID_Reasoning_on_costs_\(revised\).pdf](http://www.allenoverly.com/SiteCollectionDocuments/ICSID_Reasoning_on_costs_(revised).pdf)

[iv] See e.g. *Rompetrol v. Romania*, ICSID Case No. ARB/06/3, 1298.

[v] For average costs in treaty proceedings through 2012, see

http://www.allenoverly.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf.

[vi] UNCITRAL tribunals adjusted costs (at least in part) in 69% of cases, compared with just 36% of ICSID tribunals, see *supra* note 5.

[vii] See e.g. *Gemplus v. United Mexican States*, ICSID Case No. ARB/04/3, 117-20 – 17-24.

[viii] See e.g. *Alasdair Ross Anderson v. Costa Rica*, ICSID CaseNo.ARB/07/3, 162-64.

[ix] See *supra* note 3, part 2D.

"Matthew Hodgson, 'Cost allocation in ICSID arbitration: theory and (mis)application,' Columbia FDI Perspectives, No. 152, July 20, 2015. Reprinted with permission from the Columbia Center on Sustainable Investment

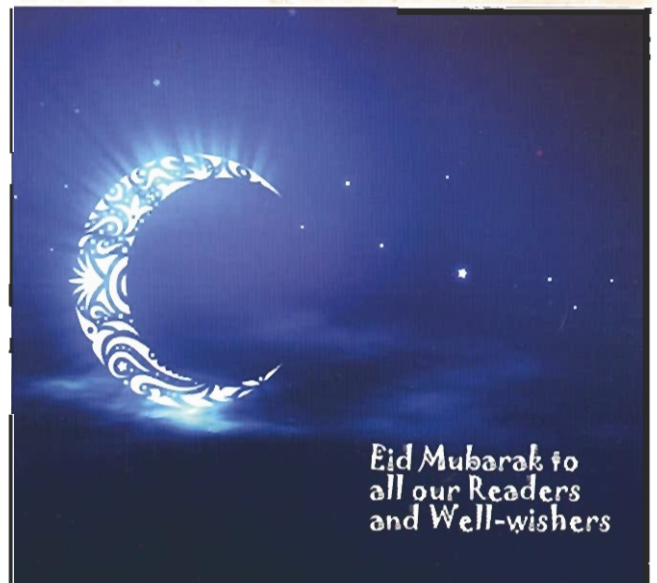
(www.ccsi.columbia.edu)."



Announcement

Training on Mediation

Training on 'Principles of Mediation and its Application' will be held on 22nd August 2015 at BIAC, Suvastu Tower (6th Floor), 69/1, Pantha Path. Please book your place early. Check BIAC website or call for details.



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