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BIAC

Bangladesh International Arbitration Centre (BIAC)

The Institution for Alternative Dispute Resolution

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Chief Executive Officer of BIAC attended meeting of EU Business Council

A meeting of EU Business Council- Bangladesh was held on Wednesday, 21st October, 2015 at Spanish Embassy to discuss the US Statement on Bangladesh Investment Climate 2015. EU Delegation to Bangladesh invited representatives from Bangladesh International Arbitration Centre (BIAC) to attend the meeting. Chief Executive Officer of BIAC Mr. Muhammad A. (Rumee) Ali and Director A H M Nurul Islam attended the meeting. Head of EU Delegation to Bangladesh chaired the meeting.

The meeting was divided into two sessions: first session was a presentation on Bangladesh Investment Climate Statement 2015 of the US Department of State and second session was on New EU Trade Strategy and Obstacles to Market Access.

In the second session, on invitation from the Chair, Chief Executive Officer of BIAC Mr. Muhammad A. (Rumee) Ali made a statement on ADR and BIAC. He explained why an institution like BIAC is necessary to improve business climate of the country and facilitate investment. He narrated the provisions of two ADR methods- arbitration and mediation in our laws, and the

role BIAC as the country's first and only ADR institution is playing. BIAC is now fully prepared to support businessmen and investors by providing ADR related services to settle their commercial disputes, if any, outside courts, he added. He also elaborated the critical factor responsible to make an ADR institution like BIAC successful, namely, recognition of BIAC by the Government in the legal framework. Head of EU Delegation to Bangladesh Mr. Pierre Mayaudon commented that EU would like to launch advocacy campaign to make BIAC fully functional.

As a follow up, BIAC proposed to EU businessmen and investors through Ambassador Pierre Mayaudon to consider use of BIAC ADR services and facilities for settlement of their commercial disputes. BIAC also proposed to organize a half-day awareness workshop on Bangladesh ADR laws, ADR facilities at BIAC and its comparative advantages, exclusively for EU Business Council Members and selected businessmen/ officials. This would enable them to take an uniformed decision on dispute resolution in the event of any trade or investment dispute. BIAC is now awaiting a response from EU Head of EU Delegation to Bangladesh.

One-day Training on Mediation held on 31st October 2015 at BIAC

Bangladesh International Arbitration Centre (BIAC) organized One-day training on "Mediation Process and its Application" on Saturday 31st October, 2015 at DCCI Auditorium. This training focused on the concept of Mediation and its application particularly under the Artha Rin Adalat Ain and Civil Procedure Code. The training covered: Overview of Alternative Dispute Resolution, Principles and Process of Mediation, Skills of a Competent Mediator, Mediation under Artha Rin

Adalat Ain and Civil Procedure Code and Mediation under BIAC Mediation Rules. This was a basic level training on Mediation.

Certificates were awarded to the participants at the end of the training. Resource persons for this training were Barrister Syed Afzal Hossain and Advocate Shahariar Sadat- both of whom are Accredited Mediators of Centre for Effective Dispute Resolution (CEDR). Thirty three participants from different Banks, law chambers



and other organizations participated in the training.

Mr. Muhammad A. (Rume) Ali, Chief Executive Officer of BIAC inaugurated the training course and observed that it is very important for the country's economy to facilitate resolution of commercial disputes outside courts. To make this initiative successful, there is immense need to train professionals in ADR, specially, mediation and arbitration techniques.

Mr. Hossain Khaled, President Dhaka Chamber of Commerce & Industry encouraged the trainees to learn mediation techniques and apply those in resolving disputes for the benefit of all involved. He, however, urged upon Government to recognize ADR institutions, like BIAC in legal framework to boost people's confidence in the use of ADR methods, namely mediation and arbitration.

BIAC decided to be an Institutional Partner at the 'Asian Banking Summit in Dhaka'

NIMAI Management Consultants, organizer of 'Asian Banking Summit in Dhaka' had offered BIAC to join as an Institutional partner at the 'Asian Banking Summit' to be held on 3rd and 4th November 2015 at Le Meridian Hotel, Dhaka. BIAC CEO, Mr. Muhammad A. (Rume) Ali accepted their offer to project BIAC as country's first and only ADR institution in the Summit. He is also selected as a distinguished speaker at the conference of this Summit. He will deliberate on Economic issues Impacting emerging markets where he will highlight BIAC's role in resolution of commercial and investment dispute.



BIAC signs MoU with Eskayef Bangladesh Limited (SK+F) on 21st November 2015

Bangladesh International Arbitration Centre (BIAC) signed a Memorandum of Understanding (MoU) with Eskayef Bangladesh Limited (SK+F) for resolution of commercial dispute (if any) through use of BIAC's

ADR services. The Signing Ceremony was held on 21st November 2015 at the Head Office of Eskayef Bangladesh Limited (SK+F) in Gulshan, Dhaka. Mr. Muhammad A. (Rume) Ali, Chief Executive Officer, BIAC and Ms. Simeen Hossain, Managing Director, Eskayef Bangladesh Limited (SK+F) signed the MoU on behalf of their respective organisations.



The MoU will provide a framework to facilitate resolution of contractual and commercial disputes (if arises) of Eskayef Bangladesh Limited (SK+F) and its affiliated companies using specialized ADR services of BIAC.

BIAC Mediator's Rendezvous held at BIAC on 24th November 2015

A meeting on Mediation with BIAC Accredited and Skilled Mediators was held on Tuesday, 24th November 2015 at BIAC. Among others, Mr. Mahbubur Rahman, Chairman, BIAC, Mr. Muhammad A. (Rume) Ali, Chief Executive Officer, BIAC and BIAC panel of mediators Mr. Abdul Mueyed Chowdhury, Former Adviser to the Care Taker Government, Barrister Fida M. Kamal, Former Attorney General and Ms. Shireen Scheik Mainuddin took part in the discussion meeting. The purpose of the meeting was to develop networking among the discussants. BIAC's role in promotion of ADR, BIAC Membership Registration, inclusion of BIAC Clause in commercial contracts and several other issues were comprehensively discussed in the meeting.



BIAC Workshop on ADR held at University of Liberal Arts, Bangladesh

University of Liberal Arts, Bangladesh (ULAB) and Bangladesh International Arbitration Centre (BIAC) jointly organised a Workshop on ADR on 26th November 2015 at the Auditorium of the University. Students and faculty members of the Business Department of ULAB attended the programme. AHM, Nurul Islam Director of BIAC presented the paper on ADR and BIAC and Barrister Afzal Hossain and Advocate Shahariar Sadat, presented paper on Arbitration and Mediation as Dispute Resolution Methods.

Professor William H. Derrenger, Dean, School of Business along with other faculty members of ULAB were present in the event.



BIAC considers such programme important as appreciation of the concept of Alternative Dispute Resolution (ADR), specially arbitration and Mediation is critical in the context of recent changes in our laws.

Day-long Training on Arbitration held on 28th November 2015 at BIAC

A day-long training programme on Arbitration was organized by Bangladesh International Arbitration Centre (BIAC) on Saturday, 28th November 2015 at its multi-purpose room at Panthapath, Dhaka.



To ease congestion of cases at every level of our court system and to get around complex court procedures, Bangladesh Government has undertaken a number of measures to expedite

disposal of cases. As a part of their effort, a number of significant enactments have also been passed in recent years incorporating provisions making ADR as an alternative method of dispute resolution. But to

get results of these changes in our laws we require trained ADR professionals in the country. This training programme, organized by BIAC, will help a long way in creating a pool of ADR professionals in the country.

Barrister Imtiaz Farooq and Barrister Moyeen Firozee were the trainers, while twenty trainees

from different law houses, banks and companies participated in the programme. Certificates were distributed among the trainees after successful completion of the programme.

Parley on Arbitration held at BIAC on 23rd December 2015

BIAC organized a Meeting on Arbitration with BIAC Arbitration Trainers on Wednesday, 23rd December 2015 at BIAC. Mr. Mahbubur Rahman Chairman, BIAC and Mr. Muhammad A. (Rumee Ali), Chief Executive Officer, BIAC were present at the event. The purpose of the meeting was to boost networking among the BIAC Arbitration Trainers who participated in the event.

Several other issues like: Arbitration scenario in Bangladesh and BIAC's position, inclusion of BIAC clause, BIAC membership, types of training based on target group were also discussed in the meeting.



Day-long Training on Arbitration held on 29th December 2015 at BIAC

A day-long training programme on Arbitration was organized by Bangladesh International Arbitration Centre (BIAC) on Tuesday, 29th December 2015 at its multi-purpose room at Panthapath, Dhaka. The training highlighted the Origin of ADR; ADR in Bangladesh Laws, Elements, Importance and Effects of Arbitration Clause; Composition of Arbitration Tribunal; Appointment of Arbitrator; Difference between ad-hoc and institutional arbitration; Role of national Courts in Arbitration; Commencement and conduct of arbitration proceedings, Arbitral Award and its enforcement. Barrister Imtiaz Farooq and Barrister Nabil Ahsan were the trainers, while trainees from different government organizations and private companies



participated in the programme. Certificates were distributed among the trainees after successful completion of the programme.

BIAC signs MoU with Summit Alliance Port Ltd. on 31st December 2015



Bangladesh International Arbitration Centre (BIAC) signed a Memorandum of Understanding (MoU) with Summit Alliance Port Ltd. for resolution of commercial dispute using ADR methods. The Signing Ceremony was held on 31st December 2015 at the Corporate Office at Summit Centre in Kawran Bazar, Dhaka.

Mr. Muhammad A. (Rumee) Ali, Chief Executive Officer, BIAC and Syed Fazlul Haque FCA, Director, Summit Alliance Port Ltd. signed the MoU on behalf of their respective organisations. Mr. Mahbubur Rahman, Chairman BIAC and Syed Ali Jowher Rizvi, Managing Director, Summit Alliance Port Ltd. were Present in this signing ceremony.

Dignitaries visiting BIAC



H.E. Mr. Shuja Alam, High Commissioner of Pakistan visits BIAC on 21st October, 2015



H.E. Mr. Alexander A. Nikolaev, Ambassador of the Russian visits BIAC on 17th November, 2015



H.E. Ms. Marcia Stephens Bloom Bernicat Ambassador of the United States of America visits BIAC on 23th November, 2015



H.E. Ms. Pema Choden Ambassador of the Kingdom of Bhutan visits BIAC on 10th December, 2015



**Ajmalul Hossain QC,
FCI Arb**

Senior Advocate

(Presented at the 4th Anniversary Seminar of BIAC entitled "Alternative Dispute Resolution- The Way Forward" on 12 September, 2015)

Like all creations, arbitrations also have a life cycle: birth, life and death. This life cycle of

arbitrations is recognised by the laws of all jurisdictions. Our Arbitration Act 2001 (as amended) is not an exception. The commencement of arbitration is stated in S. 27 to be when a dispute arises under the arbitration agreement, and a notice of arbitration is served by one party requiring the dispute to be referred to arbitration or to concur in the appointment of a tribunal to resolve that dispute. The conclusion of the arbitration proceedings is stated in S. 41 when the tribunal gives a final award or terminates the arbitration proceedings for specified reasons. Overall, if one looks at the index, it can be said that the birth is referred to in Chapters II, III and IV, the life in Chapters V, VI and VII and the death in Chapters VIII, IX and X.

Looking at the situation conceptually, it can be argued that there is also a pre-birth incubation period and a post-death after life. Pre-birth would include court interventions under S. 7(Ka) and post death would include court assistance in setting aside awards Ss. 42, 43 and enforcement, S. 44 for domestic awards and Ss. 45 and 46 for foreign arbitral awards.

Since we are here discussing "The Way Forward" for arbitrations in Bangladesh, I would like to identify some problems faced in each of the stages in the life cycle of arbitrations and provide some solutions as to how we can overcome them and truly make this jurisdiction an "arbitration friendly" jurisdiction. A phrase used in the arbitration industry is very apt to describe our experiences: the process is being used to "derail" the arbitration agreement and the arbitration process. The problems that I have identified in this paper have been faced by me in my practice in this jurisdiction and I am sure that my experiences have been the experiences of many others in this room.

One thing is now certain and must be borne in mind. Taking recourse to ADR is now part of the public policy of Bangladesh. Although not stated expressly anywhere, this can be derived from the fact that in 2003, our CPC was amended to include S.89A to

encourage mediation and S. 89B to encourage arbitration. We also have had the Artha Rin Adalat Ain providing for ADR for many years, and recently, the Income Tax Ordinance, the Customs Act, VAT Act, the Bangladesh Energy Regulatory Act and the Gas Act now provide expressly for resolving disputes variously by mediation and arbitration. The objective of these changes in the law is obvious: do not approach the courts to resolve disputes, try ADR. Of course, arbitrations have long been recognised in our jurisdiction by law.

Turning to the life cycle, the birth of arbitration in Bangladesh is painful. There is no other word for it: the process is cumbersome, lengthy and disruptive. There is no difference whether it is an ad hoc or institutional arbitration following the rules of the designated institution.

The difficulties that we face at the birth of the arbitration arise from the fact that our law requires three arbitrators as the default position where parties do not agree on the number of arbitrators. The laws of what I would call "arbitration friendly" jurisdictions, like England or Singapore, provide for a sole arbitrator as the default position. This is something that I would urge the legislators to consider when taking a fresh look at our law.

Most respondents do not nominate or appoint their arbitrators when served with a notice of arbitration. The situation is improving now but there are still a huge number of applications going to courts. This is the main problem relating to the appointment of arbitrators. An ancillary problem is the court to which the application can be made.

Dealing with the courts first, S. 12 states that application for appointment of arbitrator, the court in an international commercial arbitration should be made to the High Court and in other arbitrations to the District Judge in the geographical area where the arbitration agreement was made. Applications are frequently made to the wrong forum.

One special forum for appointment of arbitrators would be a solution but I do understand and accept the overriding need for taking the Republic's justice delivery to the doorsteps of the consumers of litigation services.

The next solution is for the lawyers to apply to the correct court and for the judges to check this point at the admission stage.

Once the application is made, there are issues relating to service. Although recent changes in the law now provides for expedited methods of service but the courts are still following the old archaic process of

service through the court process server and registered post with A/D. Once the application is served, the process for filing an affidavit in opposition or written statement takes months, if not years. Once the respondent's objections are filed, the hearing is never done expeditiously. Many adjournments take place and then the respondent's arbitrator finally appointed.

Then we have further issues when the two appointed arbitrators cannot agree on the third presiding arbitrator. We have the start of Round 2 again before the court.

The court process can be simplified by appointing one authority to appointing arbitrators. In Singapore, the law stipulates that the Chairman of the Singapore International Arbitration Centre (SIAC) shall nominate arbitrators in a dispute and applications should be made to him for such appointment. Everything is done on paper but the process requires notices to all sides and all matters put before him by either party are considered before the appointment is made.

This role can be assigned to BIAC to take the whole process away from the courts. Obviously, this will require a change in the law and the requisite due process can be set up to achieve this at a fraction of the cost and the time involved in appointing arbitrators.

In England, the High Court deals with appointments as Arbitration Applications. The rules require that the application should state three matters: first, whether there is an arbitration agreement. Secondly, whether there is a dispute between the parties and finally, the suitability of the persons whose names have been put forward. The rules also require that any respondent served with the application should respond within a stated number of days and if he does not, the court will hear the application without considering any material from that party. At the first and only hearing, all matters are dealt with by the court making an appointment.

The solution for Bangladesh is to have express rules of the court which states the process to be followed in arbitration applications whether brought in the High Court Division or in the District Court. In the High Court, this can be done by issuing Practice Directions and the District Courts by promulgating rules.

After the appointment, i.e., after the arbitration tribunal has been formed, many problems can arise. Happily, once the process starts it normally continues towards an award without too much difficulty. The major issue here and where we stand out apart from current international best practices is that we replicate the trial process in the District Courts. This is objectionable since there are many accepted and published methods of saving time and costs in

arbitrations. Those involved in arbitrations in Bangladesh will have to accept that there are other systems of adjudication have been devised which can achieve the same result in much shorter period and at a reduced cost.

We have experienced problems relating to challenge to arbitrators. If during the course or argument, arbitrators ask questions which appear to support one party or goes against one party, the party concerned will immediately make an application under S. 14 alleging bias on the part of the arbitrator and seek to remove him. After the tribunal rejects that application, there is an appeal to the High Court. A further appeal to the Appellate Division can also take place. In the meantime, the arbitration remains stayed.

Other problems relate to enforcement of interlocutory orders made by the tribunal under S. 21(4). Again, the approach to the courts can hamper the flow of the arbitral process.

The solution to these types of problem and all problems during the life of the arbitration could be that these should be taken at the post award stage, i.e., at the setting aside of the award stage. This would also require a change in the law.

Finally, I turn to the death of the arbitration proceedings. This is always painful, like terminal cancer. The parties suffer at this stage the most. I have had several foreign clients abandon their efforts to enforce awards in Bangladesh due to the problems associated with this stage.

The Arbitration Act provides for the enforcement of domestic awards and foreign arbitral awards. The law also states that domestic awards and foreign awards will be enforced in different courts. Under Ss. 42 and 43, the enforcement court for domestic awards is the District Judge's Court where the final award was published. For foreign arbitral awards, the forum is the District Judge's Court in Dhaka.

Under our Arbitration Act, we have a process for setting aside a domestic award under Ss. 42 and 43 or for refusing to enforce a foreign arbitral award under S. 46. The concept of setting aside the arbitral award is very different from the old process of an appeal against the award under the old 1940 Act. I am surprised that most applications to set aside in the District Court are still being considered as appeals against the award and the process for hearing appeals is followed rather than a process for judicial review of the award on specified grounds.

Education and training of specialist judges to deal with arbitration applications, awards and enforcement should be the norm and many of the problems associated with enforcement can be avoided.

As far as the multiple courts that arbitration applications can be made to are concerned, we have a safeguard in our Arbitration Act which was also present in the old 1940 Act. There is also a healthy jurisprudence relating to this section in our neighbouring jurisdiction.

S. 53 of the Arbitration Act is an underused section in the course of arbitration proceedings. I recently tried to use it in one case and it was used against me successfully in another case.

This section clearly makes provision relating to the jurisdictions of courts dealing with arbitration

applications. In short, where there are multiple courts to which arbitration applications can be made, the section states that the first court to which an arbitration application relating to any arbitration was made will retain jurisdiction on all matters relating to that arbitration and no other court shall have jurisdiction to deal with any application relating to that arbitration.

We should all start using this section in appropriate cases and hopefully we can find a solution to one of the curses in our justice delivery system, multiplicity of proceedings.

ADR That Bangladesh Badly Needs



**Muhammad A.
(Rume) Ali**

In a recent World Bank survey Bangladesh was placed in the 174th position out of 189 countries on the basis of 'Ease of doing

Business'. It was not any 'breaking news' nor did it make us stop and think. It almost appeared that we expected no better. If that is indeed, we feel what our ranking in such an index should be: is it surprising that we are one of the lowest recipients of foreign direct investment (FDI)? Does this low rating stop at restricting FDI only? Not really. We pay a bigger price in the 'risk perception' it creates. A manifestation of the fact is that we pay 450 to 500 basis points over LIBOR for LC confirmation, much more than what our neighboring countries do.

What are the factors behind the low rating for Bangladesh? Which are the critical factors that kept us behind 173 countries out of 189, in spite of the fact we are the 44th largest economy in the world with a GDP of around \$200b in size and growing at a healthy six percent plus?

Why is that in the recently-held Bangladesh Development Forum meeting in Dhaka on 13-14 November 2015, one of the issues identified and singled out by our development partners was 'competitiveness'? This is in spite of the fact that we have one of the most welcoming Legal frameworks for foreign capital and have one of the lowest costs of labour in the world.

One of the answers to the vexing question can be found in the World Bank Doing Business Rankings: <http://www.doingbusiness.org/data/exploreeconomies/bangladesh>

This ranking is a composite number and is derived

from several activities that one needs to do to set up a business. Out of the nine critical items that make up this composite score there are three important ones in which we are placed in the last five out of 189 countries surveyed. These three are: Registering Property--185th out of 189 countries, enforcing contracts--188th out of 189 countries and getting electricity--189th out of 189 countries.

If we look closely at these issues we will find that Getting Electricity is clearly a capacity issue which will be resolved over the next few years as both private and public sectors gear up production.

Issues with Registering Property again is a capacity and governance issue that will ease with the digitisation process that has already been started by the government.

The one in which improvement may remain a major struggle is the time taken in Enforcing Contracts through a judicial process. The survey puts the number of days taken for this at 1442 days or 4 Years compared to 538 in OECD countries. The other factor is cost. While in OECD countries it is 21.1 per cent of the claim, for Bangladesh, the figure is 66.8 per cent of the claim (it is 30.5 per cent for rest of South Asia). These two factors are interlinked and the cost is to a large extent due to the long time it takes to settle the dispute.

The main barrier to this appears to be the number of cases that are outstanding and the net number of new cases that get added to this every year. 2013 figures available to us suggest that there are 3.1 million cases outstanding, of which 1.3 million are civil cases (See: Table).

Average Resolution Time (IFC/World Bank Study 2008-9)

Civil (Appeal & Revision) Cases	15.3 years
Writ Cases	3.6 years
Civil (Original jurisdiction) Cases	5.8 years

If 'justice delayed is justice denied', it is even more so in commercial cases, in which all have monetary underpinnings. We know the time value of money is interest which keeps ticking over every second.

The picture is no different in the Money Loan Court (MLC) cases. Although the law says all disputes must be resolved in 90 days from submission of the written statement, the reality is far from it. The average time for the MLC is 5.8 years.

The total outstanding cases is 125,000 (appx) and the amount under litigation is Tk. 54,000 crore (appx). The opportunity cost at the bank rate (5 per cent) (for 1442-538 days 904 days, which is Tk 6,669 crore. If we take the other estimate of 5.8 years the cost will escalate to Tk. 11,340 crore.

What then is the way out of this impasse? We can get wheels in motion using global best practices. Most countries have realised that the courts must not be the beginning of a dispute resolution but the last resort.

In Bangladesh we do have the legal framework to make ADR work. Following are some of the laws and procedures that have ADR provisions in them:

- Arbitration Act 2001
- Artha RinAdalat Ain 2003 (amended in 2010)
- Civil Procedure Code 1908 (amended in 2012)
- ADR in Customs, VAT, Income Tax laws
- Bangladesh Energy Regulatory Commission Act 2003
- Real Estate Development & Management Act 2010 and a few other laws

But in reality, ADR is, at best, used very little and, at worst, unknown. The result is: almost all commercial disputes start with litigation, instead of litigation being the 'last resort'. This has resulted in accretion of outstanding cases and thereby evolving into a capacity issue.

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