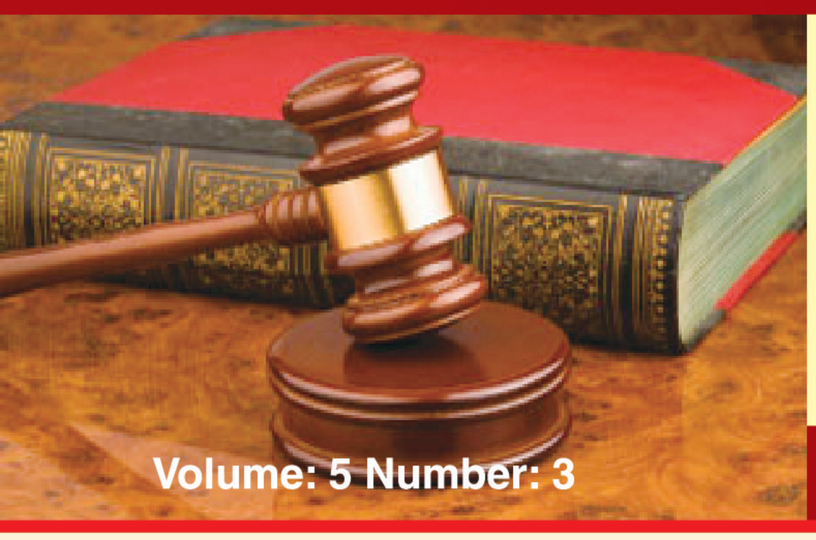

BIAC

Bangladesh International Arbitration Centre (BIAC)

The Institution for Alternative Dispute Resolution

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Dhaka Bank signs MoU with BIAC to resolve money-loan disputes

Dhaka, 24 July, 2016: Bangladesh International Arbitration Centre (BIAC) signed a Memorandum of Understanding (MoU) with The Dhaka Bank Limited (DBL) to assist resolution of commercial and money loan disputes through alternative dispute resolution (ADR).

Chief Executive Officer of BIAC Mr. Muhammad A. (Rumee) Ali and Managing Director of DBL, Syed Mahbubur Rahman signed the MoU on behalf of their respective institutions. Senior officials from both the institutions were also present during the signing ceremony at DBL Corporate Office, Dhaka.

Mr. Muhammad A. (Rumee) Ali emphasized the need and importance of ADR for the banking sector and how it can contribute to the expeditious resolution of money loan disputes.

Syed Mahbubur Rahman encouraged the use of ADR for the banking sector and welcomed the collaboration between the two institutions.

Financial institutions require efficient and effective resolution methods for such disputes that will allow parties to keep matters confidential and preserve their relationship.

One day training on Mediation held at BIAC

28 July, 2016 BIAC organized One-day training on "Mediation Process and its Application" on Thursday 28 July, 2016 at BIAC.

The 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 Shireen Scheik Mainuddin and Shahariar Sadat- both of whom are Accredited Mediators of Centre for Effective Dispute Resolution (CEDR). Fourteen participants from different Banks, law chambers and other organizations participated in the training.

Training on "Application and Process of Arbitration"

A day–long training programme on "Application and Process of Arbitration" was organized by Bangladesh International Arbitration Centre (BIAC) on Tuesday, 30 August 2016.

The training highlighted the concept of ADR Methods, 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.

This training programme will help a long way in creating

a pool of ADR professionals in the country and will popularize ADR methods which will also encourage foreign direct investors to do business in Bangladesh.

Barrister Imtiaz Farooq was the trainer, while trainees from different banks, legal professions, government organizations and private companies participated in the programme. Certificates were distributed among the trainees after successful completion of the programme.

BIAC signed Collaboration Agreement with Malaysian Arbitral Tribunal Establishment (MATE)

Chief Executive Officer of Bangladesh International Arbitration Centre (BIAC) Mr. Muhammad A. Rumee Ali and President of Malaysian Arbitral Tribunal Establishment (MATE) Prof Dato' Seri Dr (Munsyi) Muslim Bin Yacob recently signed a Collaboration Agreement on behalf of their respective organizations. This Collaboration Agreement is intended to explore areas for co-operation in respect of the use of facilities and services of both the centres on alternative dispute resolution (ADR). Both the organizations hope that such initiatives of signing this agreement will help both countries to work together for resolving commercial disputes.

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Muhammad A. (Rumee) Ali

Malaysian Arbitral Tribunal Establishment (MATE)

Prof Dato' Seri Dr (Munsyi) Muslim Bin Yacob

The Malaysian Arbitral Tribunal Establishment (MATE) was founded in 1980 and registered under the Trade Marks Act. Its main objective is to provide alternative dispute resolution services to individuals and business and to administer arbitration, mediation, and an adjudication schemes behalf of trade associations, professional bodies and individual companies. MATE is constituted by three renowned organizations namely, Chamber of Commerce and Industry of Malaysia, The National Council of Justices of the Peace Malaysia and Malaysian Consumers Associations (FOMCA) and supported by several associations.

BIAC acts as an appointing authority on a PCA Case

On 1 January 2014, the Permanent Court of Arbitration (PCA) with the request of the claimant had designated Bangladesh International Arbitration Centre (BIAC) as the appointing authority under the UNCITRAL Arbitration Rules in a case involbing an Irish and Bangladeshi party. The authority to designate is reserved only by the Secretary General of PCA. Arbitrators were appointed by BIAC, namely Barrister Akhtar Imam, Former Attorney General Fida Kamal and the Chairman of the tribunal- Justice Awlad Ali. The proceedings are in the final stage and the award is expected to be granted in the next session. The dispute is being resolved in 5 hearing within three month.

Settlement of an International Commercial Dispute under BIAC Rules

Bangladesh International Arbitration Centre (BIAC) framed Arbitration Rules on 2011. BIAC rules became very popular among the legal professionals and business personnel and they are incorporating BIAC model arbitration clause voluntarily in the agreements for their clients. BIAC is pleased to announce that Rahman's Chambers, Barristers & Advocates, a leading law firm has invoked BIAC Rules and commenced an Arbitration Proceeding on behalf of their German client in an investmnet related dispute between 2 (two) shareholders of an export oriented Joint Venture Company. The disputre has been settled successfully. It is conducive that settlement of International disputes in an efficient and expeditious manner will help to promote and create confidence in the International investment scene.

Shahriar Sadat appointed as a mediator of IFC

It's a delight to share that Mr. Shahriar Sadat a member of BIAC list of mediators has been appointed as a mediator by the International Finance Corporation (IFC) in its office of the Compliance Advisor Ombudsman (CAO). The Compliance Advisor Ombudsman (CAO) is the independent recourse mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA). This is a short term appointment which he will carry out till the end of 2016.

Shahriar Sadat

Mr. Shahriar Sadat is the Academic Coordinator of South Asian Institute of Advanced Legal and Human Rights Studies

(www.sails-law.org)

Mr. Sadat has been an integral part of BIAC's work on mediation. He is a regular trainer at BIAC's mediation training program. He is a CEDR, UK accredited mediator and a Master Trainer of CEDR.

Mediation now mandatory- a critical analysis of the recent amendment to the CPC 1908

*Barrister
Ashraf-Ul-Bari Nobel

The idea of resolving a dispute outside the court system, often referred to as Alternate Dispute Resolution (hereinafter "ADR"), is not a new concept when it comes to civil disputes as court litigation offen tend to make the process of obtaining relief lengthy and in turn costly for all parties involved. The problem of lengthy litigation proceedings is particularly noticeable in developing countries such as Bangladesh where the backlog of cases pending disposal is consistently high. Based on such premise, it is highly important to understand how the recent amendment to the Code of Civil Procedure (hereinafter "CPC"), 1908 with regard to mediation process by way of the Government Gazette notification of 19 January 2016 will be changing how the Bangladeshi courts and parties to a civil dispute view this ADR process in facilitating the resolution of a particular dispute.

Provision pertaining to mediation has existed within the CPC, 1908 since its amendment in 2003 which was the first time when ADR procedures, namely mediation and arbitration, were incorporated into such legislation. Mediation itself was defined at the explanation paragraph to s 89A as a "flexible, informal, nonbinding, confidential, non adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes in the suit between the parties without directing the terms of such compromise" and this definition has remained unchanged over the years. The primary provision dealing with mediation was s 89A which later was supplemented by the insertion of s 89C in the 2006 amendment of the CPC, 1908 to address mediation during appeal stage. The effect of s 89A was that it empowered the court with an option either to mediate a dispute between the parties to a suit itself or refer the parties to their respective pleaders or the parties themselves (where no pleaders were engaged) or to the mediator from the panel to be prepared by a District Judge, for undertaking efforts for settlement through mediation. Similarly, by way of s 89C, the Appellate Court was also accorded the option to mediate in an appeal itself or refer it for mediation if the appeal is an appeal for an original decree under Order XLI. The fact that ss 89A and 89C made mediation optional could be implied from the use of word "may" in the respective provisions.

The main problem with such wording of ss 89A and 89C was that the concerned court could always choose not to refer the dispute to be resolved through mediation as the word "may" implicated that it was purely at the discretion of the court. Thus, if a party wished to prolong the process of obtaining an award by the court through stretched-out court proceedings, the party could argue before the court with the aim of persuading it to decide not to invoke its discretionary power under s 89A and/or 89C. This thus created a significant hurdle to the whole idea of favouring mediation over court litigation which as a result affected the success and effectiveness of these provisions within the CPC, 1908.

There are several reasons why courts may decide not to invoke the discretionary powers under ss 89A and 89C.Unawareness of the benefits of mediation over court litigation is the primary obstacle towards the use of mediation in general. The idea of ADR itself is quite new among Bangladeshi judges, lawyers and clients. Thus, neither the parties to the dispute nor their representation lawyers are always aware that the resolution of their respective disputes might be quicker and more appropriate through mediation. Since, the traditional practice amongst Bangladeshi clients with regard to resolving a civil dispute is to initiate court proceedings, all such matters are first addressed to a judge. Here, the optional nature of referring to mediation by the judge played a key role towards undermining the effectiveness of ss 89A and 89C. If the judge could not properly examine the matter at the primary stage so as to refer it for mediation or did not possess proper knowledge of mediation process themselves, then it is likely that they would decide to proceed with court litigation and not invoke ss 89A or 89C.This is why it was necessary that proper amendment were made to these provisions to ensure that reference to mediation was not an option but a mandatory step prior to proceeding with court litigation. Fortunately, the Code of Civil Procedure (Amendment) Act, 2012 (Act No. XXXVI of 2012) has done exactly that.

Following 17 January 2016, making reference to mediation under ss 89A and 89C has becom longer option but mandatory. The word "may" in ss 89A and 89C of the CPC, 1908 has become substituted by the word "shall" by way of ss 2(a)(ii) and 3(a) of the Code of Civil Procedure (Amendment) Act, 2012 (Act No. XXXVI of 2012) respectively. Although the amendment Act was passed in 2012, it inserted s 89E into the CPC, 1908 which required that such change to mandatory mediation will not become effective until the Government decides to notify by official Gazette. After a wait of almost four years, such Gazette notification was finally published on 19

January 2016 which has now made the change official and effective as of 17 January 2016.

This indeed is a crucial change which will undoubtedly improve the effectiveness of ss 89A and 89C of the CPC, 1909. A number of the problems which existed prior to such change as discussed earlier have been removed through such introduction of mandatory mediation. Judges now have an obligation to refer any civil disputes before them to mediation which will inevitably help in reducing the case load in the courts. If the mediation is successful, parties should be able to now get faster relief resulting in minimising legal costs when compared to prolonged court proceedings. On the other hand, even if the mediation is not successful, it would still help the parties evaluate the merits of the case at a primary phase before again referring back to the court. It also ought to be mentioned that all the benefits that mediation entails will now be available to the parties, including flexible remedies, less adversarial process, confidentiality, etc.

However, there are still certain problems that are present under the new rules. Firstly, no provision exists in relation to what will happen if the parties act in bad faith in resolving their dispute through mediation after being referred to mediation by the court through ss 89A and 89C. It may be the case that after being referred to mediation by the court, one or both the parties simply do not act upon it and then submit to the court that mediation has failed on record. This is an important issue since this allows the possibility of abuse of the whole reference process and undermines the effectiveness of these provisions much like what it was the position before the amendment. If changes could be introduced to the effect that in case of default or act of bad faith by one or more of the parties after being referred to mediation, the party or parties at fault would be refrained from recovering costs or have to bear the legal costs of both parties of the dispute at the award stage, then the effectiveness of the provisions could be greatly strengthened. Provisions of such nature can already be seen in advanced legal systems such as that of the United Kingdom.

Secondly, no procedural rules on how the mediation would be conducted are detailed within the CPC, 1908. This issue becomes relevant when the court decides not to mediate the dispute itself but refer the parties to undertake mediation themselves. At this stage, they are left without any guidance as to how they should proceed with the mediation. This is where experienced mediators and/or ADR institutions such as Bangladesh International Arbitration Centre (BIAC) could play an important role in assisting such parties. BIAC is an organisation devoted on assisting client with ADR procedures in accordance with their institutional rules. If the parties decide to choose BIAC as their institution to assist in their court-referred mediation, BIAC can assist them by providing secretarial support and assistance in conducting the mediation. BIAC's Mediation Rules 2014 incorporates modern practices of other ADR institutions in foreign countries and organisation. The Rules contain details procedural rules to assist lawyers and clients on how to proceed with the process, including fixed time limits, costs margins, etc. The Rules also allow the client access to BIAC's Panel of experienced and Accredited Mediators who are bound by BIAC Mediator's Code of Conduct.

In conclusion, it could most certainly be argued that the recent amendment to the CPC, 1908 is indeed a positive change towards enhancing the effectiveness of the mediation provisions within it and furthering the use of mediation in civil disputes in Bangladesh. However, the position is still far from perfect as can be seen from the various problems highlighted above. Importantly, it is argued that until the present provisions are not supplemented by rules pertaining to negative consequences in case of bad faith by parties during mediation, the desired objective of encouraging the use of mediation to resolve dispute will not be achieved completely.

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*Barrister Ashraf-Ul-Bari Nobel

The writer is a PhD candidate of University of Nottingham, UK and a Barrister at law. He is also a CEDR Accredited Mediator and an Advocate.

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Suvastu Tower (6th Floor), 69/1, Pantha Path, Dhaka-1205, Bangladesh

Tel: +8802-964-1071; 964-1072; Fax: +8802-964-1074; E-mail: info@biac.org.bd

www.biac.org.bd