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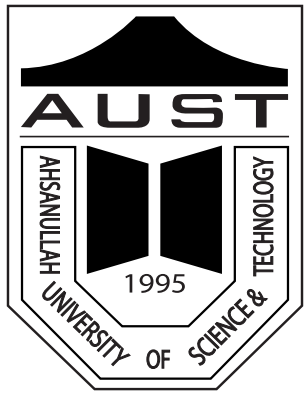

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Commercial Dispute Settlement in Bangladesh: A Critical Review

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Abstract: *Commercial Dispute Settlement is the process by which one or more parties settle or resolve any dispute arise in commercial transaction. So this process is very important in commercial transactions both in domestic and international. This article discusses settling commercial disputes by using different mechanisms available for the entrepreneurs'. In this article, the authors have tried to discuss different commercial dispute settlement institutions, their necessities, purpose and conduct for the settlement of specific types of disputes of an economic ("commercial") nature. This article also suggested so as following by the authority to improve the facility of commercial dispute settlements mechanisms in Bangladesh.*

Introduction

Commercial Dispute Settlement has a tradition of many centuries, both at the domestic and international level. However, it started to be used widely when the first bilateral investment treaties (BITs) were concluded in 1959 and thereafter, when the World Bank initiated the ICSID Convention in 1965. Even though, at the beginning there were only about one case per year but in later years, dispute settlement mechanism has been chosen or used in thousands of cases such as treaties, investment contracts to provide a peaceful solution to solve the commercial dispute between parties. Therefore, the popularity of commercial dispute settlement mechanism has leaded the parties to include it while concluding an agreement, which will contain a 'normal' dispute settlement clause referring to an institution of commercial dispute settlement mechanisms. Commercial Dispute Settlement, different factors such as the environment provided by the local political system, the professional background of the entities and persons involved, the involved sections of society has a strong impact on the legal framework and its implementation. For example, after the political revolution in Iran, Iran-United States Claims Tribunal at The Hague involved nearly 4,000 cases from the two states that were and still are bitter enemies and had and have no diplomatic relations.2 In a commercial dispute settlement, two systems namely the 'common law' system and the 'Civil Law' system of continental Europe are widely used by counsel and arbitral tribunals both at the national and international levels. The differences in the legal culture between countries and regions of the world become particularly relevant in a commercial dispute settlement. In many cases, the very different role that governments and other state institutions have has an impact in settling commercial dispute, even though Article 21 (2) of the new ICC Rules states that the tribunal has to take into account the relevant trade usages.3 The commercial dispute settlement mechanism established to handle commercial disputes between two enterprises but due to local governmental administration, it was in fact usually a form of administrative adjudication with a high level of political and administrative control over the entities created to settle those commercial disputes. In such a case, international standard

1 *Assistant Professor & Coordinator, School of Law, Canadian University of Bangladesh.*

2 *A. F. Lowenfeld, International Economic Law (Oxford: Oxford University Press, 2003). See www.iusct.net for more details.*

3 *A Cassese, International Law (Oxford: Oxford University Press, 2005) Second Edition. See www.iccwbo.org.*

was not maintained properly, even when a commercial dispute happened to include a foreigner as one of the parties; domestic law was applied, both as to the procedure and, more importantly to the substance of the dispute as well.[4]

Commercial Dispute Settlement

Commercial Dispute Settlement is the process of resolving commercial disputes between parties. A commercial dispute arises when one party adopts a trade policy measure or takes some action that other party considers to a breach of the agreements or to be a failure to live up to obligations. By signing or concluding an agreement, both parties can agreed that if one believes the other party is in violation of trade rules, they will settle their commercial disputes by using the multilateral system of settling disputes instead of taking action unilaterally. Therefore, a commercial dispute settlement system is considered or seen as "the most active adjudicative mechanism in the world today." In some legal systems the word "Commercial" is a technical term of great legal significance. In other legal systems the word has no particular legal connotation. So, there is no clear concept of what is meant by "commercial" but it has been given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature includes: any trade transaction for the supply or exchange of goods or services; exploitation agreement or concession; licensing; distribution agreement; carriage of goods or passengers by air, sea, rail or road; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; investment; banking; insurance; financing; joint venture and other forms of industrial or business co-operation. Each contracting parties reserves the right to limit their obligation as to contracts which are considered as commercial under its national law and agree to submit to dispute settlement mechanisms all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by it. This practice by the parties was carried forward to the 1927 Convention for the Execution of Foreign Arbitral Awards and later in 1958 New York Convention.5

Objectives of the Study

The judiciary is one of the main organs of the government. This organ is busy to settle the ordinary cases. It does not show any interest to handle commercial dispute settlement. They are picked up with huge pending cases. So, it is needed to improve our legal system. It is also added that the number of judges working in the judiciary is not sufficient enough to dispose rapidly pending ordinary cases in our country. But it is not possible to recruit such huge number of judges for a developing country like Bangladesh. Our government is trying to improve alternative procedure to settle ordinary cases rapidly by amending legal provision like alternative dispute resolution in different existence Act. But our legal system is not incorporated to the settlement of commercial dispute for increasing present cries. So it is badly need to establish a model of body for this purpose. There are some objectives sets for these studies are,

1. Find out the overview of commercial dispute settlement mechanisms.
2. Find out the appropriate measure for commercial dispute settlement among the existing alternative dispute resolution mechanism.
3. Find out the appropriate authority for enforcement of commercial dispute settlement.
4. Indicate the problem of present mechanism of Bangladesh.

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4 Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v Italy), ICJ Reports, 1989, p.15, para.119.

5 See www.newyorkconvention.org for more details.

5. To give some effective suggestion for development of commercial dispute settlement mechanism.

Methodology of the Study

The objective of this article is to find out how a commercial dispute is settled in Bangladesh by using different ADR mechanisms as well as Artha Rin Adalat or Money Loan Court. The private initiative has been taken by establishing BIAC established in 2011 to assist the entrepreneurs' to settle their commercial dispute easily but to know if it has achieved the goal so far, a public survey was conducted amongst prominent lawyers, academicians, entrepreneurs' (medium, large & multinationals). The survey also reflects satisfaction level of participants regarding present laws and regulations and complete result is shown in table no.

This paper is prepared based on both primary and secondary data. Primary data was collected through face to face interview or conversion with respondents, observation experience, different statutory laws, etc. Secondary sources of data were collected from different books, journals, documents of different government and non-government institutions, research reports and internet materials. Total 40 respondents were selected for this study. They include 5 judges, 5 lawyers, 10 litigant people, 5 court staffs, 5 Advocates clerks, 5 NGO officials, 5 local leaders. The respondent were selecting through non probe purposive sampling procedure. Total 25 questions have been asked to the respondents. Each questions had four alternative answers. The collected data and information has been carefully reviewed, edited and scrutinized on the basis of the study objectives.

History of International Commercial Dispute Settlement Mechanism

The first dispute settlement took place nearly ninety five years ago in 1923[6] and since then most societies adopted and developed dispute settlement mechanism to solve commercial dispute between two commercial enterprises. Therefore, commercial dispute settlement mechanism that developed reflected the nature of the particular society so as to find vast differences in Continental Europe, Islamic countries, Latin America, China and the United States.[7] The 1923 Geneva Protocol on Arbitration Clauses adopted by the League of Nations was an outstanding success both in terms of the number of States that became party to it and in regard to its contents. Its essential provision was that,

"Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."[8]

The 1923 Geneva Protocol also provided that commercial dispute settlement need to be governed by the will of the parties and by the law of the country in whose territory the arbitration took place.[9] In 1927, the League of Nations successfully adopted the Geneva

6 *See the Report of Working Group II (Arbitration and Conciliation) on the work of its forty-second session, A/CN.9/573 (New York, 10-14 January 2005).*

7 *Mr. Eric E. Bergsten, Dispute Settlement in International Trade, Investment and Intellectual Property, 2005.*

8 *http://interarb.com/vl/g_pr1923*

9 *The Content Of The Protocol Was Incorporated into Articles II and V (d) of the 1958 New York Convention.*

Convention for the Execution of Foreign Arbitral Awards to solve the difficulty in regard to the recognition and enforcement of foreign arbitral awards.[10] The international community felt a need for an arbitration organization in 1922; consequently the International Chamber of Commerce (ICC) adopted its first rules of arbitration and in 1923 established the Court of Arbitration. Later, the International Law Association adopted the Amsterdam Rules in its 1938 session, which contained "provisions concerning the constitution of the arbitral tribunal, the power of arbitrators, the role of the Chairman of the Committee on Commercial Arbitration of the International law Association, procedures for the transmission of documentation between parties, administration of evidence, the hearings ..., content of the award, fixing of costs, and so forth."[11] Moreover, the International Institute for the Unification of Private Law (UNIDROIT) prepared a draft uniform law on arbitration, but those efforts were put on halt due to the outbreak of the Second World War in Europe in 1939. During the Second World War there was a steady development in Europe of arbitration as a recognized means of dispute settlement in international commercial matters. The development of mechanism for international commercial disputes that existed in Europe did not generally extend to the rest of the world because the amount of dispute settlement between commercial firms from different countries was still rather small, except for certain commodity trades where commercial dispute settlement took place within the relevant trade association. In 1961, the European Convention on International Commercial Arbitration was adopted to settle commercial dispute and it was the first international instrument to have the words "international commercial arbitration" in its title.[12] The Convention is noteworthy as it signalled a change in the attitude towards mechanism of international commercial disputes. According to the convention, the nation-State would be in charge of the rules but those rules should recognize the special requirements of commercial dispute settlement mechanism, which involves international economic matters as well as involving one or both parties who may be foreign. Furthermore, to develop commercial dispute settlement mechanism, in 1966 the Arbitration Rules for ad hoc arbitrations were adopted by both the United Nations Economic Commission for Europe (ECE)[13] and the United Nations Economic Commission for Asia and the Far East (ECAFE).[14] The same year the Council of Europe adopted the European Convention Providing a Uniform Law on Arbitration.[15]

In April 1976 United Nations Commission on International Trade Law adopted UNCITRAL Arbitration Rules which were specifically designed for use in ad hoc common law/civil law arbitrations, received the endorsement of the Asian-African Legal Consultative Committee (AALCC) in July of that year.[16] The Rules recognized that the law governing the arbitration might contain a "provision of law from which the parties cannot derogate", in which case that provision would prevail.[17] The UNCITRAL Arbitration Rules were followed in the Model Law in 1985, which was drafted to govern only international commercial dispute settlement through arbitration with the expectation that a State that enacted it might have a separate law governing domestic dispute settlement mechanism. Even if a State wished to limit the freedom of the parties, commercial dispute settlement institutions and tribunals in respect

10 *http://interarb.com/vl/g_co1927.*
11 *www.unctad.org/UNCTAD/EDM/Misc.232/Add.38*
12 *http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/*
13 *http://www.jus.uio.no/lm/un.sg.report.itl.development.1966/_5.html*
14 *www.unescap.org*
15 *www.conventions.coe.int/Treaty/en/Treaties/Html/056.htm*
16 *The resolution of the AALCC (now known as the Asian-African Legal Consultative Organization) is reproduced by UNCITRAL in A/CN.9/127.*
17 *Article 1(2).*

of domestic dispute settlement, adoption of the Model Law would permit the State to offer a law of commercial dispute settlement that met the prevailing consensus on the procedures that should govern international commercial dispute settlement mechanism.[18] In later years, even though falling under the rubric of "commercial" dispute settlement mechanism, the public policy issues had an important impact on it.

Different Commercial Dispute Settlement Mechanism

Commercial Dispute Settlement mechanism is an important requirement in commercial trade nowadays and it falls into two major categories:[19]

Adjudicative Processes – a judge, jury or arbitrator determines the outcome of the commercial dispute between parties, such as lawsuits (litigation) or arbitration.

Consensual Processes – the parties attempt to reach agreement, such as collaborative law, mediation, conciliation, facilitation or negotiation.

Lawsuits (Litigation)

A lawsuit or suit in law is a claim or dispute brought to a court of law for adjudication and it may involve commercial dispute resolution of private law issues between individuals, business entities or non-profit organizations. A lawsuit may also enable the State to be treated as if it were a private party in a civil case, as plaintiff, or defendant regarding an injury, or may provide the State with a civil cause of action to enforce certain laws.The local legal system provides a necessary structure for the settlement of many commercial disputes, for instances, when parties fail to reach agreement through a collaborative processes or when theyneed the coercive power of the State to enforce a resolution and more importantly, when parties want a professional advocate to resolve a commercial dispute, particularly if the dispute involves perceived legal rights, legal wrongdoing, or threat of legal action against them. When one party files suit against another, outcomes are decided by an impartial judge and/or jury, based on the factual questions of the case and the application law. The verdict of the court is binding upon them but both parties have the right to appeal regarding the judgment to a higher court.

Arbitration

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of commercial disputes outside the courts, in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding. Parties often seek to resolve their commercial disputes through arbitration due to a number of perceived potential advantages over judicial proceedings:[20]

- When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed (as one cannot "choose the judge" in litigation).
- Arbitration can be cheaper and more flexible for businesses.

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18 Model Law, Article 19(1).

19 Gary Born, International Commercial Arbitration Commentary and Materials (2d ed. Transnational Publishers/Kluwer Law International 2001).

20 International Trade Centre, Arbitration and Alternative Dispute Resolution (2001).

- In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the country of the competent court will be automatically applied.
- Arbitration is often faster than litigation in court.
- In most legal systems there are very limited avenues for appeal of an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability.
- Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential.

Some of disadvantages include the formal or semi-formal rules of procedure and evidence as well as the potential loss of control over the decision by the parties after transfer of decision making authority to the arbitrator.

Collaborative Law

Collaborative law is a legal process enabling parties who have decided to resolve their commercial dispute to work with their lawyers in order to avoid the uncertain outcome of court and to achieve a settlement peacefully that best meets the specific needs of both parties.

Mediation

In a commercial dispute, the contracting parties use mediation, which is a form of alternative dispute resolution (ADR) method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. Mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks and mediators use various techniques to open, or improve, dialogue between disputants, aiming to solve their commercial dispute peacefully.

Conciliation

Conciliation is another dispute resolution process that involves building a positive relationship between the parties of commercial dispute. A conciliator meets with the parties separately in an attempt to resolve their dispute and do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. However, it is fundamentally different from mediation and arbitration in several respects. Conciliation is a method employed in civil law countries like Italy and is a more common concept than mediation. It is unlike arbitration, in that conciliation is a much less adversarial proceeding.

Negotiation

Negotiation is another form of alternative dispute resolution (ADR) method where each party involved in negotiating tries to gain an advantage for themselves by the end of the process. While negotiating to resolve point of commercial disputes, both parties must have intention to compromise to reach an understanding or gain advantage in outcome of dialogue. There are two types of negotiations – distributive and integrative negotiations. In a distributive negotiation, each party often adopts an extreme position with no real intention to settle the commercial dispute. Both parties knowingly employ a combination of guile, bluffing, and brinksmanship in order to cede as little as possible before reaching a deal. An integrative negotiation focuses on the underlying interests of the parties rather than their arbitrary starting positions and attempts to create value in the course of the negotiation to resolve commercial dispute peacefully.

Facilitation

Facilitation is another commercial dispute resolution process that involves parties with a common purpose to solve their dispute.

Necessity of Different Commercial Dispute Settlement Mechanisms

Different Commercial Dispute Mechanisms are a part of the business now a day and have positive effects in the economy.[21] A commercial dispute can be settled much sooner between the parties with Alternative Dispute Resolution (ADR); often in a matter of month, even weeks, while bringing a lawsuit to trial can take a year or more. As it takes much less time to resolve the dispute through Alternative Dispute Resolution (ADR), the parties are able to save money, which they would have spent on attorney fees, court costs and experts' fees etc. In most of the Commercial Dispute Settlement Mechanisms, both parties have more opportunity to express their demand or side of the story than they do at trial. In mediation, parties are allowed to fashion creative resolutions that are not available in a trail; therefore they can typically play a greater role in shaping both the process and its outcome. Other commercial dispute settlement processes, such as Arbitration, allow the parties to choose an expert in a particular field to decide the commercial dispute. Alternative Dispute Resolution (ADR) is considered to be a less adversarial and hostile way to resolve a dispute, for example, an experienced mediator can help the parties effectively communicate their demand and point of view to the other side. This can be an important advantage where the parties have a relationship to preserve but in a trial, there is typically a winner and a loser. The losing party is not likely to be happy, and even the winner may not be completely satisfied with the outcome. Such a case Alternative Dispute Resolution is able to help the parties to find win-win solutions and achieve their real expectation. Thus, along with all of Alternative Dispute Resolution (ADR)'s other potential advantages, may increase the parties overall satisfaction with both the dispute resolution process and the outcome. Quick, cost effective and satisfying resolutions are likely to produce happier clients and thus generate continuing business with the parties. Due to the above potential advantages, the entrepreneurs' consider different commercial settlement mechanisms to resolve their dispute.

Differences between a Domestic and an International Commercial Dispute Settlement

The modern view is that commercial dispute settlement is governed by the local law in which it takes place, however, at the same time the parties are free to choose the place of settling their commercial dispute. Therefore, in that sense every commercial dispute taking place within a State is a domestic arbitration in that State. However, many States draw a distinction between domestic and international commercial dispute settlement mechanism. One of the consequences may be that the types of disputes that may be submitted to arbitration are different in an international arbitration. For example, in some States claims of anti-trust violation may be submitted in an international arbitration but not in a domestic arbitration.[22] Similarly, some States permit the State or State entities to enter into valid arbitration agreements only if the arbitration would be international. Finally, following the

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21 Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003).

22 E.g. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (U.S. Supreme Court 1985) in which the Supreme Court of the United States held that anti-trust claims could be submitted to arbitration when they arose in an international dispute, "even assuming that a contrary result would be forthcoming in a domestic context."

lead of the Model Law, many States have different laws governing domestic and international arbitrations. It follows that the distinction between domestic and international arbitrations is a matter of national law. There is no generally accepted distinction and there does not need to be since the New York Convention applies to "foreign "awards.23

Commercial Dispute Settlement in Bangladesh

The courts in Bangladesh are overburdened with cases but the situation is worsening every year. According to the annual report 2010 of the judiciary,24 a total of 9,521 civil cases are pending in the Appellate Division of the Supreme Court while the number is 79,890 in the High Court and 701,789 in the district courts. There are about 118,680 commercial cases are currently pending in the formal courts in Bangladesh. Even though Bangladesh has a sound legal framework with the High Court providing an appropriately powerful forum for enforcement of fundamental rights and for judicial review of administrative action but there is a significant concerns as to the accessibility of the court system. There is huge backlog of cases as evidenced by official statistics and due to procedural delays; timely commercial dispute resolution is not often available. As a developing country, our economic growth is decidedly reliant upon investment both from the internal private sector and outside the country, therefore, a quick and ease of commercial dispute settlement procedure has always been one of the most important considerations for any investor to do business here. Delayed resolution of any commercial dispute has adverse impact on the economy both from micro and macroeconomic viewpoint, as a result, a colossal amount (approx. $1.4 billion)25of private capital funds locked up in all these commercial disputes that eventually impeding our economic growth significantly. Our commercial dispute resolution is complex which has a detrimental effect on our standing as an investor-friendly state and causes foreign investors to lose confidence in Bangladesh. Not only that it discourage internal or existing investors from investing further but also generate bad publicity amongst prospective investors and deter future foreign investments to Bangladesh. The lack of any comprehensive review and updating of substantive laws is a significant issue. There are only few mechanisms in place to prevent or reduce delays with regard to case management. Technical and personnel limitations also exist, for example, the absence of any system for recording transcripts of hearings as well as the lack of recording, transcribing or computer facilities. The implications of these delays are, therefore, not providing for effective resolution of commercial disputes, most particularly because it does not offer timely resolution. Entrepreneurs' require a very simple, quick, efficient and straightforward approach to resolve commercial dispute, soan investment culture that allows for effective commercial dispute resolution system would clearly benefit Bangladesh, which will promote local or foreign investment and thereby increase the economic growth for Bangladesh.

However, the government is working to reform the legal system so that entrepreneurs' can settle their commercial dispute, in doing so, introducing mandatory Alternative Dispute Resolution (ADR). Once Alternative Dispute Resolution (ADR) functions properly, the litigants would go to the court as a last resort and it would also save their costs and facilitate quicker commercial dispute resolution. Besides the above mentioned measures adopted as the process of Alternative Dispute Resolution (ADR), Bangladesh Government has promulgated the following acts for the effective application of Alternative Dispute Resolution (ADR) procedure for dispensing the commercial dispute outside the court:

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23 Alan Redfern, Martin Hunter with Nigel Blackaby, Constantine Part asides, Law and Practice of International Commercial Arbitration 4th edition (Sweet & Maxwell, 2004).

24 http://www.jscbd.org.bd/a_report.php

25 The New Age Reports on 27th June 2012.

(a) In Sections 89A, 89B and 89C in the Code of Civil Procedure, 1908[26]

(b) The Bankruptcy Act, 1997[27]

(c) The Arbitration Act, 2001[28]

(d) Arthorin Adalat Ain, 2003[29]

The Code of Civil Procedure, 1908 provides for the provisions of Alternative Dispute Resolution (ADR) through Section 89A, 89B and 89C. In 2003 through 3rd Amendment of the Code of Civil Procedure 1908 these provisions have been inserted. Here it is said that if all the contesting parties are in attendance in the Court in person or by their respective pleaders, the Court may, by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit to the engaged pleaders have been engaged or to a mediator from the panel as may be prepared by the District Judge under Sub-Section (10), for undertaking efforts for settlement through mediation. Moreover Section 89A of the Code of Civil Procedure 1908 says about different procedures for mediation where Section 89B and 89C says about the Arbitration and Mediation in Appeal. As the basic process of Alternative Dispute Resolution (ADR) is negotiation, mediation and arbitration, Code of Civil Procedure, 1908 has rightly discussed the basic Alternative Dispute Resolution (ADR) process.

In Bangladesh there were two laws- the Insolvency (Dacca) Act, 1909 and the Insolvency Act, 1920. The Bankruptcy Act, 1997 has repealed both the Acts and re-enacted the law on insolvency using the expression "bankruptcy" in place of "insolvency". The Bankruptcy Act 1997 is designed to handle problems relating to financial matters in a more effective and extensive manner, where company, association, partnership firm and their directors and owners are brought within the fold of the new law. Bangladesh thus on its way in its strides to achieve the goal of developing the areas of insolvency and creditor rights systems, marching ahead hand in hand with other members of the community of nations and this system of Bankruptcy inserts a new system of Alternative Dispute Resolution (ADR) in Bangladesh.

The Arbitration Act, 2001 is enacted by the government which came into force on 10th April 2001, repealing the Arbitration (Protocol and Convention) Act, 1937 and the Arbitration Act 1940. The new Act was again amended in 2004 in certain respects. Such legislative steps were urgent in the face of increasing foreign investment in Bangladesh in various sectors; especially in natural gas and powers, and the ever growing export trade with the rest of the world. The Act consolidates the law relating to both domestic and international commercial dispute settlement. It thus creates a single and unified legal regime for commercial dispute settlement and gives Bangladesh a face lift as an attractive place for commercial dispute resolution in the field of international trade, commerce and investment. Although the new Act is principally based on the UNCITRAL Model Law, it is a patch work quilt as some unique provisions are derived from the Indian Arbitration and Conciliation Act, 1996 and some from the English Arbitration Act, 1996.

Artha Rin Adalat or Money Loan Court was established under a law in 1990 to adjudicate the cases relating to the recovery of loans of financial institutions. Earlier, the cases for loan recovery were the jurisdiction of the general Civil Courts. To strengthen the Artha Rin

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26 http://lawcommissionofindia.nic.in/reports/report238.pdf

27 www.comlaw.gov.au/Details/C2004A05112

28 www.biac.org.bd/bangladesh-arbitration-act-2001

29 http://www.boi.gov.bd/index.php/component/businesslaws

Adalat (Money Loan Court), a new Artha Rin Adalat Ain was enacted in 2003. Under the law specialized courts for the settlement of disputes between the borrowers and the lenders were established in the premises of the District Judge's Court. The Courts of Joint District Judge establishes under the new law have overriding powers on other laws of the land. This means, in case of conflict with any other law in force, the provisions of the new law relating to money loan shall prevail. Under the provisions of the Act, subordinate judges are appointed judges of the money loan courts in consultation with the Supreme Court. The law requires filing of all suites for realization of the loan of the financial institutions, banks, Investment Corporation, House Building Finance Corporation, leasing companies and non banking financial institutions, constituted under the provisions of Financial Institutions Act 1993, with the money loan courts for trail. The money loan court has all the powers of the Civil Court.

Bangladesh International Arbitration Center (BIAC): A New Beginning

The first-ever alternative dispute resolution centre, Bangladesh International Arbitration Centre (BIAC)[30] is a not-for-profit organization, is the first international arbitration institution of the country. It was established in April 2011 and began its journey with a promise to help settle commercial disputes in a quick, transparent and cost-effective manner. A striking feature is that the initiative is led and driven by the private sector – International Chamber of Commerce-Bangladesh (ICC-B), Dhaka Chamber of Commerce & Industry (DCCI) and Metropolitan Chamber of Commerce &Industry (MCCI), Dhaka cooperatively established and sponsoring the BIAC. Under a co-operation agreement, the International Finance Corporation (IFC) with funds from UK Aid and European Union is also supporting BIAC in the initial stages.

Law Minister Shafique Ahmed said cases are piling up each year in the courts, resulting in a situation where people get frustrated. "Something needs to be done to resolve the cases out of the court. In this case, arbitration has a very important role to play."[31]

The economic adviser to the Prime Minister, Dr. Mashiur Rahman said, "The center will ensure better trans-border business by giving confidence to businessmen. The arbitration process widens opportunity to reach goals for which contracts have been signed."[32]

Paramita Dasgupta, IFC Regional Business Line Leader, called this initiative a "new paradigm of service delivery for lower cost and speedier resolution of commercial disputes."[33]

Mahbubur Rahman, Chairman of BIAC, said Bangladesh is already over-burdened with thousands of existing cases pending with courts. "As a result, business suffers." He said arbitration is the most formal system in the Alternative Dispute Resolution (ADR)regime.[34]

DCCI President Asif Ibrahim said with the progress in globalisation and acceleration of foreign trade, foreign businessmen and investors are exposed to new partners in new countries in different cultural settings and established trade practices. He added – "we hope BIAC will help bring in more transparency and reliability in the arbitration process and provide a more cost-effective, quick and efficient solution for companies, which otherwise would have to go overseas to settle disputes."[35]

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30 www.biac.org.bd
31 The Daily Star Reports on April 10, 2011.
32 ibid
33 ibid
34 ibid
35 ibid

The BIAC provides a neutral, efficient environment where clients can meet their arbitration needs and also has reliable commercial dispute resolution service; therefore, its work revolves around the best ways to adapt arbitration to the fundamental changes in the economy. Since establishment, BIAC is already renowned for its first-rate, state-of-the-art arbitration facilities, experienced panel of independent arbitrators.

The BIAC is assisting by

- ♦ Preventing the accumulation of further backlogs
- ♦ Reducing the huge backlog of commercial cases.
- ♦ Minimizing the delays of the formal justice system.
- ♦ Reducing the cost of doing business and legal uncertainties.

BIAC introduced its Arbitration Rules in April 2012.[36] These Rules incorporate some of the leading developments in domestic and international arbitration, while conforming to the Bangladesh Arbitration Act 2001.In order to boost revenue collection and clear backlogs of thousands of tax-related cases pending at courts, the first public sector agency the National Board of Revenue (NBR) has recently used Alternative Dispute Resolution (ADR)for resolving tax disputes (disputes regarding income tax, value added tax and custom duty) of almost $1.4 billion.[37] The board has amended all the relevant acts in 2011 to introduce facilitation (largely derived from the concept of mediation) and very recently enacted tax Alternative Dispute Resolution (ADR) rules for all three taxes to implement out of the court tax dispute resolution in Bangladesh.

Commercial entities prefer some States over others for businesses only if there is enough protection and justice for them, so they want to know if there will be finality in case of a dispute resolution. In absence of an internationally recognized dispute settlement tool foreign companies get reluctant to invest, as they feel unprotected. With the establishment BIAC, Bangladesh is on course to improve its position in Doing Business in "enforcing contracts" and will increase foreign direct investment (FDI).BIAC's presence would not only put Bangladesh on the global map as an arbitration-friendly state but also help access to justice for businesses so that businesses can have rapid and uncomplicated access to solutions to their disagreements. The close conjunction of private sector and government working hand-in-hand suggests that Alternative Dispute Resolution (ADR) is an idea whose time has come in Bangladesh for effective commercial dispute resolution. They see Alternative Dispute Resolution (ADR) in any form as being an acceptable method of speeding up the delivery of justice and reducing their very heavy caseloads.

Findings of the Survey

A survey was conducted and results are the following :

36 *http://biac.org.bd/*

37 *https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/alternative-dispute-resolution/bangladeshi-businesses-try-mediation-to-resolve-their-tax-disputes.cfm*

Table – 1

Sl. No.	Subject	Multiple Answer	Percentage
1.	Do you think the formal judiciary system is sufficient for commercial dispute settlement?	a) Yes	40
		b) No	32
		c) Partially	28
		d) No Comment	0
2.	Is present alternative dispute resolution mechanism of Bangladesh possible to settle commercial dispute?	a) Yes	80
		b) No	10
		c) Partially	3
		d) Need amendment of existing law	2
3.	Which method is preferable to settle a commercial dispute?	a) ADR	96
		b) Court settlement	3
		c) Fixed by party	2
		d) No comments	0
4.	Which mechanism of alternative dispute resolution is effective for Bangladesh?	a) Arbitration	60
		b) Mediation	20
		c) Conciliation	15
		d) Negotiation	5
5.	Do you think alternative dispute resolution mechanism is better than formal trial procedure?	a) Yes	92
		b) No	5
		c) Partially	1
		d) Both are better	2
6.	Are the officers of the judiciary well trained to settle the commercial dispute settlement?	a) Yes	60
		b) No	35
		c) Partially	4
		d) No Comment	1
7.	Do you think alternative dispute resolution mechanism saves time to dismiss or settle a dispute?	a) Yes	80
		b) No	12
		c) Partially	2
		d) No idea	1
8.	Is the expense, to file a dispute costly than formal trial system?	a) Yes	66
		b) No	33
		c) No idea	1
		d) Partially	0
9.	Do you think the decision of authority is effective as ordinary trial procedure?	a) Yes	38
		b) No	56
		c) Partially	11
		d) No Idea	1
10.	What is the provision required against the award/ judgment of alternative dispute resolution?	a) Appeal	35
		b) Review	33
		c) Revision	32
		d) Not other remedy	0

11.	What are the remedies required, if any party fail to convey the order of alternative dispute resolution authority?	a) Penalty	25
		b) Fine	27
		c) Criticise	20
		d) Penalty and fine	32
12.	Do you think a separate court or institution is required to establish settling commercial dispute settlement?	a) Yes	67
		b) No	1
		c) Partially	32
		d) No comment	0
13.	Do you think our existing law is sufficient to operate commercial dispute settlement	a) Yes	73
		b) No	0
		c) Partially	18
		d) Need amend	10
14.	Is a separate authority necessary to enforce alternative dispute resolution award?	a) Yes	59
		b) Available	36
		c) No need	5
		d) No comment	0
15.	Do you appreciate private institutes for commercial dispute settlement?	a) Yes	25
		b) Yes but restricted	62
		c) No	10
		d) No comment	3
16.	Which institution is related to commercial dispute settlement?	a) BIAC	90
		b) BLAST	5
		c) ASA	3
		d) Democracywatch	2
17.	Is the procedure of BIAC sufficient for commercial dispute settlement?	a) No	33
		b) Yes	40
		c) Partially	12
		d) No Idea	15
18.	Do you think, BIAC will be supervised by government?	a) Yes fully	34
		b) Yes Partially	48
		c) No Need	18
		d) No Idea	1
19.	Do you think, the charges will be fixed by the government?	a) Yes	45
		b) Fixed by Institute itself	30
		c) Fixed on the basis of Suit Value	25
		d) No Idea	0
20.	Is the existing alternative dispute resolution system is suitable to settle the international commercial dispute?	a) Yes	58
		b) No	10
		c) Partially	14
		d) Need Amend	18
21.	Who will be a mediator for the commercial dispute settlement (Local and International)?	a) Fixed by Govt.	48
		b) Fixed by Party	45
		c) Existing Judges	7
		d) No Idea	0

22.	Do you know commercial dispute may be settled beside the formal judiciary system?	Well Known	59
		b) No Idea	9
		c) Have Idea	30
		d) No Comments	1
23.	How it will be popular in Bangladesh according to your opinion?	a) Publicity	60
		b) Awareness	27
		c) Compulsory	10
		d) Regular way	3
24.	Do you think ADR should be mandatory for any commercial dispute settlement?	a) Yes	66
		b) No	29
		c) Partially	5
25.	Do you recommend others to use ADR?	a) Yes	92
		b) No	8

Findings

Compromising by the Parties

Different commercial dispute settlement mechanism encourages compromise, which can be good way to settle commercial dispute but it is not appropriate for others. In serious justice conflicts and cases of intolerable moral difference, compromise is simply not an option because the issues mean too much to the disputes. According to question no. 11 of survey table, 32% respondents express their opinion to sanction fine and penalty, if any party fail to convey any order or decision.

Lack of Consent of the Parties

According to the Arbitration Act 2001, if a party send notice to the other party requesting arbitration to solve a particular commercial dispute but other party does not respond to the notice, the court on behalf of the non-responding party will appoint an arbitrator, as a result, it takes years together to even get the arbitration tribunal constituted and the hearing started. Should the parties fail to agree to settle their commercial dispute through arbitration or mediation, the expectation of the entrepreneurs' to have a simple, quick, efficient and straightforward approach to resolve commercial dispute through ADR is not fulfilled? According to the question no. 24 of the survey table no. 1, as the 66% respondents express their opinion that Alternative Dispute Settlement should be mandatory for commercial dispute settlement.

Lack of Scrutiny

All Alternative Dispute Resolution settlements are private and are not in the public record, therefore, are not open for public scrutiny.

Lack of Specific Rules

There are no specific rules for commercial dispute settlement. Though there is Arbitration Act, 2001, but does not cover the techniques. According to the Article 23 of the BIAC Arbitration Rules 2011, the Arbitration Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute, failing which, the Arbitration Tribunal shall apply the law which it determines to be appropriate. So, as it appears that there are no specific Rules of Procedure for arbitration, the parties need to depend on the rules of arbitration determined by the tribunal, therefore, an uncertainty exists of the outcome of the ADR. According to question no. 9 of the survey table no. 1, the 56% respondent disagreed that the decision of the authority who is doing Alternative Dispute Resolution is not effective as

ordinary trial procedure, 73% respondent think that the existing law is sufficient to operate commercial dispute settlement as per question no. 13 and 59% respondent recommended that there is a need of separate authority to enforce alternative dispute resolution award according to the opinion of responded as per question no. 14.

Barrier of Local Law Development

As commercial dispute resolution is moved from the local court system to the private sphere, it will prevent the local law from developing to meet changing circumstances.

Lack of Appeal on Merit

There is no room for filing an appeal on merit if any party is not satisfied with the outcome of a resolution of the commercial dispute through arbitration. If it appears that the commercial dispute settlement tribunal was biased, only then an award can be set aside, which discourages the entrepreneurs' to choose arbitration over lawsuits.

Increase Number of Dispute Claims

It is possible that keeping information about the details of commercial dispute settlements out of the public domain will prevent its use as a comparator, as a result, may lead to an increase in the number of dispute claims by the parties.

Not Much Institutional Support

Countries like USA, UK where Alternative Dispute Resolution (ADR) as a commercial dispute settlement mechanism is established; a great emphasis is given on institutionalization of the system of Alternative Dispute Resolution (ADR). In those countries, private institution such as, London Court of International Arbitration (LCIA), which offer institutional support for Alternative Dispute Resolution (ADR), have separate rules of procedure, panel of arbitrators etc., so newly established Bangladesh International Arbitration Center (BIAC) and other arbitration service provider should receive more institutional support from the government. 62% respondent recommend that the private institute to conduct the commercial dispute settlement but in a restricted guided rules as per question no. 15, 90% respondent answered BIAC is related to commercial dispute settlement as per question no. 16, 40% respondent agreed about the procedure of BIAC is sufficient for commercial dispute settlement as per question no. 17 and 48% respondent think the BIAC should partially governed by the government as per question no. 18.

Lack of Knowledge Management

Our present alternative dispute resolution mechanisms are prescribed different procedure in different laws in different cases. So the involved persons are not capable and properly trained and they not have adequate knowledge or how to manage and convince the disputants to settle the dispute. Even though Bangladesh International Arbitration Center (BIAC) exist now to settle all kind of commercial disputes but a large number of entrepreneurs' do not have the requisite knowledge of the system. Therefore, they will have to be made aware of the advantages of Alternative Dispute Resolution (ADR) and disadvantages of court based litigations to make Alternative Dispute Resolution (ADR) popular.

Lack of Publicity

As per question number 23 of survey, 60 percent respondents have claimed that we need more publicity to popular it and also 60 percent respondent have no idea about settlement of commercial dispute through formal judiciary as per question no.22.

Lack of Provision for Interim Period to Settle Dispute

The present provision describes the result after award but there is no provision for protection of valuable party in interim measures by the court. The highest 80 percent responded believe that clear provision required for covering losses of any party on interim time to settle dispute. On the other hand 15 percent believed that partial provision present in different laws.

Delay in Enforcement of Decision

The enforcement of the award or decision by the court depends on the court's Consideration. So the decree or order passed by court is proved toothless or linger of the cases. From the survey report 59 percent responded desire a separate authority for enforcement of the order.

Provision for International Commercial Dispute Settlement

As per survey question no. 20 of survey, 58% respondent agreed that the existing alternative dispute resolution system is suitable to settle the international commercial dispute, 66% respondent express that the commercial dispute settlement is costly than formal trial system, 45% respondent express their opinion that the charges will be fixed by the government, 80% respondent think the alternative dispute resolution is time save to dismiss or settle the dispute as per question no. 8, 19 and 7. 60% respondent agreed the judicial officers need proper training to settle the commercial dispute settlement as per survey report no. 6.

Recommendations

A State-Run Parallel Authority Required

Steps should be taken to establish a commission for commercial dispute settlement through Alternative Dispute Resolution (ADR), which will lay down principles and policies to make Alternative Dispute Resolution (ADR) available to all entrepreneurs'. Additionally, a nationwide network needs to be envisaged for providing solutions through Alternative Dispute Resolution (ADR) and if necessary, disburse funds and grants to different Alternative Dispute Resolution (ADR) authorities for implementing Alternative Dispute Resolution (ADR) schemes and program successfully.

Establishing Legal Alternative Dispute Resolution (ADR) Frameworks

The government should take necessary steps to amend its local law so as to establish a legal framework for Alternative Dispute Resolution (ADR) with international standard.

Alternative Dispute Resolution (ADR) to Be Made Mandatory

The parties can be obligated to insert a clause into the agreement to settle any commercial dispute, if arises, though Alternative Dispute Resolution (ADR) or discuss about the possibility of commencing Alternative Dispute Resolution (ADR). Even though, parties retain the right not to choose Alternative Dispute Resolution (ADR) but legislature can introduce certain provisions which discourage initiation of litigation in cases where out of court settlements can easily be worked out.

Maintaining International Standard

BIAC is committed to maintain high standard while settling a commercial dispute but it should ensure that the tribunal maintains international standard, failing to do so, will discourage entrepreneurs' from using it.

Training Arbitrators

Training facilities should be increased to train local mediators and arbitrators, judges, legal community to be capable of settling commercial disputes.

Increase Awareness

Most of the people are not knowledgeable about Alternative Dispute Resolution (ADR). Since the establishment of BIAC, the local people still not aware of it. Alternative Dispute Resolution (ADR) is a fairly new concept to many and concepts like these not only take time in percolating to the grass root levels, acceptance of such a concept is also a big problem. So, to make the Alternative Dispute Resolution (ADR) successful, a robust program such as communications campaigns, conferences, workshops, publications etc. imparting legal literacy becomes a necessity. Cooperation and commitment from the entrepreneurs are a must for making timely commercial dispute settlement successful.

Enhancing BIAC's Capacity

The capacity of BIAC should be increased to be able to provide credible commercial dispute resolution or Alternative Dispute Resolution (ADR) services.

Alternative Dispute Resolution (ADR) Need to Be Taught In Law Institutions

Commercial dispute settlement mechanisms can be taught as an essential course in the university or law institutions, so that law graduates learn the necessity of using it by the parties.

Assurance to Be Given to Clients

The perceptions of the Bangladeshi legal system would also have to be addressed so as to reassure clients or parties that they would not become sucked into the courts following any award in their favor, especially those who will use arbitration and/or mediation.

Separate Commercial Dispute Settlement Policy

The mechanism for alternative dispute resolution is available in our existing legal system but government should make a policy for commercial dispute settlement.

Appointment of Panel Arbitrators and Mediators by Government

A panel of arbitrator and mediator for national or international settlement may be fixed by the government for a certain period among the experienced persons.

Fixation of Charges of Dispute Settlement by the Government

The charges to file a commercial dispute should be fixed by government. It may be revised from time to time.

New Separate Body of governing Commercial Dispute Settlement

A separate body is required to enforce the award of the commercial dispute settlement as a special branch of new legal policy like industrial police unit, Highway police unit, special tribunal etc.

Approval of Private Institutions from Government

For private institution to settle commercial dispute settlement the institution should be certified from government and the government will have power to cancel the incorporation, if it is not satisfy the people or weakness.

Accountability to the Government of Private Intuitions

All the private and government institution should be report to government officer a certain time like monthly or quarterly on half yearly or yearly.

Capacity Building Facility provide by the Government

Government should give facility to establish more private institution to create competition between the institutions to serve better, prompt, efficient service to people. In case of international commercial dispute settlement government should make a commercial tie and dialogue between the different countries like China, Japan, Korea, Malaysia, Hong Kong, Taiwan, Thailand, Germany, Italy etc. The government should census the remedies in legal framework, if any counter party disobeys the final award of commercial dispute settlement; otherwise the people will lost their believe on this legal policy and system. In case of government institution, the government should provide an adequate and sustainable fund for recruitment and technical training for judges and staff on the other hand, the private institutions will also followed the rules and regulations.

Political Persuasion

In Bangladesh, the government is the major litigant either as a plaintiff on a defendant. So sometime the decision of an alternative dispute resolution in commercial dispute settlement is biased and politically motivated and the vulnerable party is not getting a proper justice. So it needs a sufficient political support including mobilization and involvement of representatives.

Accommodation of relating rules

Present legislation of Bangladesh has prescribed different alternative dispute resolution mechanism and different procedures to settle dispute. So the persons who act as a neutral mediator and arbitrator faced some problems. So the government should make a separate legal procedure for commercial dispute settlement.

Conclusion

It appears that our commercial arbitration laws still require more improvement to maintain international standard. However, developing the law is not enough, institutional rules such as the BIAC Rules 2011used for commercial arbitration have, in regular intervals, need to be re-examined and revised in order to take into account new experiences from their practical implementation. Even though, it is quite difficult task to make the national court systems fit for dealing with different commercial mechanisms but the developing process should be continued. The parties or litigants who have been on the losing side in a number of arbitrations will see the fault in the system rather than in their own conduct, so to retain public confidence, modernisation and transparency of arbitration rules and institutions is a must. As Bangladesh is a major player in international trade nowadays and require more foreign investment for its economic growth, the government must provide some legal security for such investments including the option of settling commercial disputes through international arbitration standard.