ARBITRATION AND MEDIATION AS A MECHANISM TO SETTLE CORPORATE DISPUTE IN BANGLADESH

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ABSTRAK

Kajian ini mengkaji mekanisme timbang tara dan proses mediasi dalam menyelesaikan pertikaian korporat di Bangladesh. Kajian ini bertujuan memberikan pendedahan kepada syarikat di Bangladesh tentang kepentingan penimbangtaraan dan mediasi dalam menyelesaikan pertikaian korporat. Pada masa ini terdapat lebih kurang 2.3 juta kes tertunggak yang masih belum diselesaikan di mahkamah-mahkamah Bangladesh. Walaupun sangat penting untuk semua kes tertunggak ini diselesaikan, mahkamah masih belum dapat menyediakan penyelesaian kes yang memuaskan yang mengakibatkan kesusahan berterusan kepada litigan. Objektif kajian ini adalah untuk mengkaji peranan penimbangtaraan dan mediasi dalam menyediakan mekanisme alternatif bagi menyelesaikan pertikaian korporat di Bangladesh. Kajian ini menganalisis peruntukan undang-undang terutama Akta Timbang Tara 2005 dan Kanun Acara Sivil 1908 mengenai proses penimbangtaraan dan mediasi di Bangladesh. Data dianalisis menggunakan pendekatan historikal, analitikal, falsafah dan perbandingan. Hasil kajian menunjukkan bahawa mekanisme penimbangtaraan dan mediasi mempunyai ciri-ciri berikut: lebih cepat, mudah, sulit, kurang prosedur, kos yang efektif dan boleh dikuatkuasakan oleh mahkamah; sebaliknya, kelewatan yang berterusan, kos yang besar, gangguan pelbagai pihak serta bilangan kes tertunggak yang banyak menyebabkan pihak korporat atau komersial tidak memilih untuk pergi ke mahkamah. Kesimpulan kajian menunjukkan penimbangtaraan dan mediasi adalah pilihan terbaik bagi menyelesaikan pertikaian korporat atau komersial di Bangladesh. Walau bagaimanapun, pelaksanaan mekanisme penimbangtaraan dan mediasi bagi menyelesaikan pertikaian korporat ini hanya boleh berjaya dengan sokongan yang mencukupi daripada kerajaan dan undang-undang, etika professional, latihan dan kemudahan yang bersesuaian.

Kata kunci: Timbang tara, pertikaian korporat, litigasi, mediasi

ABSTRACT

This study examines the mechanism of arbitration and mediation to settle corporate disputes in Bangladesh. This study intends to create awareness among the Bangladeshi corporations of the importance of addressing arbitration and mediation to settle corporate disputes. Currently there are around 2.3 million backlog of cases pending in the courts of Bangladesh. It is extremely crucial to clear off these backlog of cases, but so far the courts are unable to provide a satisfactory settlement of the cases, causing endless suffering to the litigants. The objective of this study is to examine the role of arbitration and mediation in providing alternative mechanisms to settle corporate disputes in Bangladesh. This study analyses the provisions of laws specially the Arbitration Act 2001, and the Code of Civil Procedure 1908 regarding arbitration and mediation in Bangladesh. The data of this study was analyzed through the historical, analytical, philosophical and comparative approaches. The findings show that the arbitration and mediation mechanisms provide the following positive characteristics: quicker, convenient, confidential, less procedural, cost effective and enforceable by the court; on the other hand, extensive delay, huge costs, harassment of the parties and the huge backlog of cases that could lead corporate or commercial parties not to go to the courts were negative. The study concludes that the use of the arbitration and mediation mechanisms is the preferred way to settle corporate or commercial disputes in Bangladesh. However, implementation of the arbitration and mediation mechanisms to settle corporate disputes in Bangladesh can only be successful if there is sufficient government support and regulation, professional ethics, relevant training and facilities.

Keywords: Arbitration, corporate dispute, litigation, mediation

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LIST OF ABBREVIATIONS

CalPERS	California Public Employees' Retirement System
ADR	Alternative Dispute Resolution
UNCITRAL	United Nations Commission on International Trade Law
CPC	Code of Civil Procedure
CrPC	Code of Criminal Procedure
BIAC	Bangladesh International Arbitration Center
CPR	Conflict Prevention and Resolution
CERD	Centre for Effective Dispute Resolution
ACAS	Advisory Conciliation and Arbitration Service
NJC	Neighborhood Justice Center
IACA	Indian Arbitration and Conciliation Act
BIT	Bilateral Investment Treaty
ICSID	International Center for Settlement of Investment Disputes
ICC	International Chamber of Commerce
DCCI	Dhaka Chamber of Commerce and Industry
MCCI	Metropolitan Chamber of Commerce and Industry
BICF	Bangladesh Investment Climate Fund
IFC	International Finance Corporation
EU	European Union
CMC	Civil Mediation Center
MLAA	Madaripur Legal Aid Association
BLD	Bangladesh Legal Decisions

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Corporate disputes and conflicts are normal occurrence in business setting. Some of them are unavoidable but the system they are managed may have tremendous brunt on the effectiveness and possibility of business.[1] Badly dealt with conflict can be costly, create uncertainty in business and humiliate decision quality by managers.

The practice by which corporations are bound for and managed can be matter of standards and rules fixed in the legal system, corporate governance frameworks and companies' memorandum and articles of association. These processes are intended to help companies obtain optimum benefit in business, avoid trouble and diminish the overheads of assets by guaranteeing shareholders and creditor's rights that they might be able to get a flaxen return on their venture.[2] Furthermore, the companies have to follow some standard rules and mechanisms to settle the disputes with no troubles so that investors can place reliance on the loyalty of companies' rules and their officers.

When a dispute occurs in a company, it can be the top benefit of the company to resolve the disputes successfully, professionally and competently. Corporate disputes can range from disagreement between any shareholder and the Board of

[1] Nadja Marie Alexander , Global trends in mediation. (Vol. 1. Kluwer Law International, 2006),2-17
[2] Institute of Directors in Southern Africa, *Bulletin*, 1st Quarter 2007. http://www.iodsa.co.za/, accessed February 10, 2014

directors, between any employee and management of the company or between the company and its trading partner or creditors.[3]

It is a significant governance matter for a company to determine a suitable mechanism to resolve any corporate disputes. Dispute settlement mechanisms can range from the legal mechanism to alternative mechanism. For instance, the company law provides specific laws governing corporate disputes such as company insolvency, breach of company's memorandum or article of association or insider dealings. On the other hand, arbitration and mediation mechanisms could also be explored to manage disputes, for instance employer-employee relationship in a company. For example, mediation and arbitration can become a supervisory means to prevent company internal conflict.

Organizing business affiliations between corporations and their important investors is closely related to high-quality corporate governance. CalPERS[4], provides that companies should resolve their disputes amongst employees, administrations, investors, and managers through negotiation, mediation or arbitration. These alternative means could enhance corporate governance within the corporations.

When dispute arises between the parties they usually go to the court for litigation but in corporate world this trend is being changed. The modern trend is for parties to use alternative methods of dispute resolution (ADR) as the neutral and reliable method of dispute resolution to settle disputes or differences that may arise from corporate

[3] Nadja Marie Alexander, ed. *Global trends in mediation.* (Vol. 1. Kluwer Law International, 2006), 2-17

[4] California Public Employees' Retirement System (CalPERS): *Global Corporate Governance Principles.* http://www.ecgi.org/codes/documents/calpers.pdf, Accessed June 2, 2014

contracts. Such disputes are likely to be resolved by arbitration, mediation and other ADR mechanisms as opposed to litigation.[5]

Such ADR methods allow parties to select their arbitral tribunal or mediators. Parties can also choose their own representation. They can set up tailored procedures and the resulting proceedings are kept private and confidential. The principles and methods of ADR, for example arbitration is carried out in accordance with familiar and well-established law and practice based on the UNCITRAL Model Law on arbitration.

ADR methods, for example, arbitration and mediation may help to get fresh results in the contracting parties that court may never do. In judicial process, normally only one party wins but in arbitration and mediation process both parties gain a win-win solution. These ADR methods are faster, cheaper, private, and conserve commercial connections, while court proceeding is adversarial and could destroy affiliations.[6]

The existence of arbitration or mediation provisions in contracts allows the parties to be aware of dispute resolution framework at the beginning of the contractual relationship and not when a conflict arises. In the case of conflicts between members of a company and management of the company, both parties try their best to resolve the conflicts out of court in order to preserve the goodwill of the business.

The Memorandum and Article of Association of a corporation may have a negotiation, mediation, and arbitration clause that might give shareholders,

[5] Sundra Rajoo: Arbitration and Mediation as Alternative Dispute Resolution Mechanisms, The Law Review, 2011 available at : http://www.klrca.org.my. Accessed January 2, 2014

[6] A. F. M, Maniruzzaman, "The new law of international commercial arbitration in Bangladesh: a comparative perspective." *American Review of International Arbitration* 14 (2003): 139-174

executives, employees, and creditors a willingly accessible method to settle their disputes outside the court.

In the case of a corporate dispute being tried in court, the court process sometime might take more than a year to get a trial date which is not well for a business. To flourish in business the company may need well managed and reliable mechanisms to solve their unavoidable disputes.

From the perspective of commercial preservation, arbitration and mediation provide suitable solution to resolve corporate dispute and keep the relationship among the parties secured. To maintain their business reputation, the corporations cannot ignore the significance of the arbitration and mediation as their management tool to resolve disputes amicably and confidentially.

However, financial development in rising nations like Bangladesh relies on upon various factors. One such essential element is the development of foreign ventures, which prompts foreign parties participating in business schemes in Bangladesh. Sometime during business, when dispute emerge, these foreign parties generally would prefer not to submit their case to the domestic courts in Bangladesh.[7] One of the principle explanations behind this is the unsatisfactory hindrance in getting a dispute determined through courts. Disputed parties like to settle their disputes through alternative dispute resolution but the system of alternative dispute resolution is not so convenient or familiar to the parties. [8] This study argues that arbitration and

[7] Sameer Sattar, "The Asia-Pacific Arbitration Review 2014," (Global Arbitration Review 2014) 35-38 Accessed December 1, 2014, www.sattarandco.com .
[8] Ibid

mediation can be the preferred alternative to settle corporate disputes conveniently without getting any further conflict.

1.2. Problem Statement

Determining disputes or conflicts rapidly and cheaply is the primary concern to preserve important business relationship in contemporary commercial environments. To settle any corporate disputes by delayed resolution may have horrible effect on the economy as well as reputation of the company will be affected.

Bangladesh is developing to be a popular choice for national and international investors to invest their capital for getting best outcomes and profits. To secure investors' confidence and loyalty in Bangladeshi economy, it is the primary concern of the investors to be able to settle their disputes quickly, low-priced and without any harassment so that they can take part in any business undertaking confidently. The choices that investors have in relation to dispute mechanism range from court litigation to ADR methods.

The current court litigation system of Bangladesh is not in a good condition.[9] There are many backlogs of cases pending in the courts. This is extremely crucial to clear off backlogs of cases, but so far courts are unable to provide satisfactory settlement of cases. The reason for this backlog can be because of political pressure or lack of legal expertise or judges. According to the annual report of the Judiciary of Bangladesh 2012 there are 701,789 civil cases currently pending in the District Court; 79,890 with the High Court and 9,521 in the Appellate division of the

[9] Mahjabeen and Mazedul , "Changing Face of Dispute Resolution Regime in Bangladesh," New Age,June 27, 2012, accessed January 1, 2014

Supreme Court. The total pending cases are 791,200 within them 118,680 are commercial cases.[10]

Table 1 Backlog of Civil Cases in Bangladesh 2012

Different courts	Backlog of cases
District Court	701,789
High Court	79,890
Appellate Division	9,521
Total cases pending in the different courts	791200
Number of pending commercial cases	118,680

Source: New Age (News Paper)

Apart from the above, according to a report in the Daily Star (March 18, 2013) there are around 2.3 million backlog of cases pending in the different courts across Bangladesh together with the Appellate Division and High Court Division of the Supreme Court (SC), causing endless suffering to the litigants.[11] The high numbers of pending cases indicate weak or unsatisfactory judicial enforcement by the courts.

In many countries particularly developing countries judicial enforcement on corporate disputes remains weak.[12] Bangladesh is one of them where judicial enforcement is still very weak. Nonetheless, yet in numerous countries the court proceedings can be expensive and lengthy though their rule of law is efficiently in position.[13] Therefore, ADR mechanisms are undoubtedly necessary for corporation to determine their disputes out of court. The findings and recommendations by

[10] Ibid

11 Ashutosh Sarkar , "Backlog of cases," The Daily Star, March 18, 2013, accessed January 10, 2014

[12] Berglöf, Erik, and Stijn Claessens, "Enforcement and good corporate governance in developing countries and transition economies," *The World Bank Research Observer* 21, no. 1 (2006): 123-150.

[13]Runesson, Eric M., and Marie-Laurence Guy, "Mediating corporate governance conflicts and disputes," Global Corporate Governance Forum, 2007: 5-31

arbitrators and mediators can pave for receptive determination of disputes instead of challenging the disputes through the court system.

The current dispute resolution procedure in Bangladesh addressing corporate disputes is mainly litigation. ADR system has not been exposed and understood yet by the people of Bangladesh.[14]Litigation has been considered as one of the oldest process of settling disputes. Generally, litigation takes long time by way of sluggish investigation, documentation and so many voluminous processes which can be costly and time consuming.[15]

Furthermore, the court based litigation may offer justice to the parties but it is a public process available for public viewing and media inspection. This could be extremely harmful for the corporations and their investors because people will know about their disputes, consequently they could harm their business relationships as well as other potential business clients and partners may stay away from them.[16] Kratzsch [17]argued that the court can ensure justice and even can order for interest of delay. Nonetheless the damage caused by the cashflow problem is frequently higher than the benefits received by the court's judgment.

The Constitution of the Peoples Republic of Bangladesh, the supreme law of the land, has guaranteed for every citizen the right to access to justice in Articles 27 and

[14] Md Nazmul Islam: The Practice of ADR in Bangladesh: Challenges and Opportunities, Accessed January 16, 2014. https://www.academia.edu/ .
[15]Feld, J.& Carper, K. L, "Construction failure," John Wiley & Sons, Inc. USA, (1997) and Merna, A . & Bower, D, "Dispute Resolution in construction and infrastructure Project," Hong Kong, Asia Law & practice publishing Ltd, 1997.
[16] Anthony Speaight, "Architect's Legal Handbook: The Law for Architecs(9ed.)," UK, Elsevier Ltd (2010) .
[17] Susanne Kratzsch, "ICC Dispute Resolution Rules: ICC dispute boards and ICC Pre Arbitral Referees," Construction Law Journal, (2010,) 26(2), 87-97.

31. The constitution states that "All citizens are equal before the law and are entitled to protection before the law." [18] However in practice, the constitutional guarantee of equality is a far away for the large section of its population. People who are weak, poor, and disadvantaged face countless obstacles in accessing justice. The obstacles may be due to the formal court systems being overwhelmed by corruption, delay, complicated procedures, extreme costs, and huge backlog of cases.[19] Since business industry contributes to the country's economic well being, it is important to find alternatives in resolving commercial and corporate disputes. The current difficult dispute settlement in Bangladesh clearly demands alternative to court litigation.

Due to backlog of cases, delays in disposal of these cases and dispensing justice, procedural disputes, multiplicity of appeals, revisions, and reviews are some features of the court litigation that make litigants frustrated. Under such a critical situation, the necessity of resorting to ADR methods cannot be ignored and may be taken as an alternative mechanism to resolve corporate disputes.

1.3 Research Questions

This study is based on the following questions:

1. Are the current arbitration and mediation mechanisms in Bangladesh applicable to the corporate sectors in terms of settling corporate disputes?
2. How can the laws dealing with arbitration and mediation mechanisms be utilized in resolving corporate disputes in Bangladesh?

[18]The Constitution of People's Republic of Bangladesh (1972): accessed March 12, 2014. http://bdlaws.minlaw.gov.bd/.

[19] Anurug Chakma, "Alternative Dispute Resolution under Labor Law in Bangladesh," accessed March 10, 2014. https://www.academia.edu/ .

3. What are the relevant laws relating to arbitration and mediation in Bangladesh?

1.4 Research Objectives

This study aims to examine the mechanism of arbitration and mediation to settle corporate disputes in Bangladesh. The specific objectives are as follows:

1. To examine the current arbitration and mediation mechanisms to settle corporate disputes in Bangladesh.
2. To analyze the relevant laws relating to arbitration and mediation in Bangladesh.
3. To suggest improvement on the use of arbitration and mediation mechanisms in settling corporate disputes in Bangladesh.

1.5 Significance of the Study

Arbitration and mediation frequently provide quicker, low-cost and new pioneering resolutions even as escalating business stability and protecting existing relationships through win-win solutions.[20]

This study is conducted to provide alternative mechanisms to court litigation in order to settle corporate disputes between the corporations, shareholders, employees and creditors. It is hope that, the findings from this study will benefit both scholars and

[20]Runesson, Eric M., and Marie-Laurence Guy, "Mediating corporate governance conflicts and disputes," Global Corporate Governance Forum, 2007: 5-31

practitioners regarding the mechanisms of arbitration and mediation in settling disputes in Bangladeshi corporations.

From the theoretical perspective, potential findings from this study may contribute to the current body of knowledge on arbitration and mediation in settling corporate disputes. Apart from that, the findings from this study may also provide an effective contribution to the organization especially corporations, shareholders, employees and creditors to settle their disputes amicably and confidentially.

Currently Bangladesh is moving towards building the connection with alternative mechanisms to settle corporate disputes. However, there are very few researches have been carried out on this field which is not sufficient and directly related to this research. On the other hand, corporations are not fully aware of the consequences because of the unavailability of the information and awareness. The growth of this research will enable the corporations of Bangladesh to adopt information to settle their disputes. However, once this research has been completed, the demand for a better legal system to settle corporate disputes will arise. This study is aimed to create awareness for the Bangladeshi corporations towards the importance of addressing arbitration and mediation to settle corporate disputes.

1.6 Research Methodology

This study has been conducted by using doctrinal research. The method is used to produce reliable results to answer and achieve the research questions and objectives set out in this study.

1.6.1 Research Design

This study has applied the doctrinal (library based) research which is purely based on legal principles, concepts and doctrines. It includes a rigorous systematic exposition, analysis and critical evaluation on legal rules, principles and their inter relationship. The whole process of the study is to evaluate, analyze, scrutinize and propose relevant recommendations to the area of lacunas relating to alternative mechanism to settle corporate or commercial disputes.

1.6.2 Research Scope

This study focuses on the existing laws and methods on arbitration and mediation in Bangladesh. In particular, this study examines relevant Acts of Bangladesh such as The Code of Civil Procedure (CPC), 1908 and The Arbitration Act, 2001.

In addition, the following statutory laws relevant to the study were also referred to such as: The Code of Criminal Procedure (CrPC), 1898: The Artha Rin Adalat Ain, 2003: The Bankruptcy Act, 1997; The Muslim Family Law Ordinance, 1961; The Muslim Family Court Ordinance, 1985; The Conciliation of Disputes (*Municipal Areas*) Board Act, 2004; The Gram Adalat Ain, 2006 and The Bangladesh Labor Act, 2006.

1.6.3 Types of Data

The study used both primary and secondary data from different sources. The types of primary and secondary data used in the study are described in the subsequent sections.

1.6.3.1 Primary Data

In legal research, primary data refers to the laws passed by legitimate authority such as the constitutional acts of parliament, legislation, bills, acts, statutory rules, courts judgments (case law, government publications and reports), law reform, etc.[21] In this study the Arbitration Act 2001, The Code of Civil Procedure 1908 and some relevant cases have been used as the primary data.

1.6.3.2 Secondary Data

Secondary data in this legal research includes books including textbooks, legal dictionaries &glossaries, legal encyclopedias, journal articles, legal electronic discussion lists, websites and other key legal internet resources and guides.[22] All these sources contain rich information/observations and help to shed light on the analysis of the primary data.

1.6.4 Data Collection Methods

Legal data in a qualitative research is normally gathered from review of applicable principles of law and reliance on earlier works on the topic including books, articles, reports, statutes, declarations, judicial decisions and opinions; and state practice. These materials were sourced basically from the library and from the websites of relevant organizations including Bangladesh International Arbitration Centre (BIAC) and the Internet generally.

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[21] Hamidi, Jazim, and Bambang Winarno, "The Law Political Setting of Strict Liability Principles for Polluters in Environmental Law to Realize Ecological Justice," *Journal of Law, Policy and Globalization* 30 (2014): 105-113.
[22] Ibid

1.6.5 Analysis of Data

The data in this research has been analyzed through the historical, analytical, philosophical, and comparative methods and forms for resolving the problems posed by the issues raised in this research. In addressing the issue of settling corporate disputes a critical analysis of data on arbitration and mediation was done in order to ascertain the best outcome of the research. In order to get satisfactory answer of the questions the literal and golden rule approaches have been used in the analysis of the data to make sentence clear and clean to avoid an absurd finding.[23]

The above methods of analysis was used in order to address the availability of arbitration and mediation mechanisms in Bangladeshi laws which have state practice and judicial pronouncement relating to settle corporate disputes. And in resolving the issue of whether the current arbitration and mediation system in Bangladesh can be applicable to business or corporate sector or not, the researcher made use of references to statutory laws and practice both in arbitration and mediation in justifying or criticizing the court litigation system of Bangladesh in arriving at conclusions. More importantly, the extensive delay, huge cost, harassment of the parties and huge backlog of cases are the main characteristics of the courts. After analyzing the data, the researcher reached to a conclusion that the applications of arbitration and mediation mechanisms can be the good way to settle corporate or commercial disputes in Bangladesh.

[23] Khushal Vibhute & Filipos Aynalem, "Legal Research Methods: Teaching Material , " (2009)

1.7 Limitations of the Study

The scope of study is the examination on ADR mechanisms arbitration and mediation. There are other possible mechanisms not elaborately discussed in the study but might have exogenous effects on the relationships of the study. In particular, other ADR mechanisms (e.g. early neutral evaluation, negotiation, conciliation, med-arb etc.) which may have essential competencies in settling corporate disputes are not covered in this study. Such other ADR mechanisms are suggested for further studies.

There were some problems that occurred in order to gather data due to the sensitivity of certain data or information that are also classified as confidential data. Some of the data may not be available because of certain terms and conditions as well as some are not relevant. There was also problem in searching relevant literature in Bangladesh for this research as this area of law is quite new to the Bangladesh and the information is not available to the internet gallery.

1.8 Literature Review

The purpose of this study is to examine the role, concept, current practice and application of arbitration and mediation mechanisms in settling corporate disputes in Bangladesh. This section provided the definition of operational terminologies and reviewed the use of arbitration and mediation mechanisms in settling corporate disputes. It then discussed the application of arbitration and mediation system as currently provided in domestic statutory laws and practiced in Bangladesh.

1.8.1 Definition of Operational Terminologies

1.81.1 Arbitration

Arbitration has been defined as an alternative private mechanism of settling corporate or commercial disputes outside the courts, selected and controlled by the parties and involved with an ultimate and binding decision to produce a reward which is enforceable in a national court.[24] Arbitration is a device to settle disputes by the third parties.[25] The process can be institutional or ad hoc (individual).[26]

Nonetheless, arbitration is considered as a process which has unique characteristics. This might not be a formulary aspect for world peace; however, it would supply an appropriate neutral transnational venue, commercial expertise and binding outcomes. Moreover, international commercial arbitration is remarkably and widely recognized by most of the key industry companies for the reason that of its enforceability, flexibility, finality and impartiality.[27]

In addition, arbitration is a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in the place of state courts by rendering a decision having effects analogous to those of a judgment'.[28]

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[24] Julian D.M Lew et al., Comparative International Commercial Arbitration (Kluwer Law International 2003) 3

[25] Rene David, Arbitration in International Trade (Kluwer Law and Taxation publication 1985)

[26] Margaret L Moses, *The principles and practice of international commercial arbitration*, Cambridge University Press, 2012, 1

[27] See Thomas E. Carbonneau, "Ballad of Transborder Arbitration, The," *U. Miami L. Rev,* 56 (2001): 773

[28] Poudret, Jean-François, and Sébastien Besson, *Comparative law of international arbitration*, Sweet & Maxwell, 2007: 1-3 and see Black's Law Dictionary, 8th edn, Thomson West, 2004, 112,

1.8.1.2 Mediation

Mediation is an act of a third party which intermediates within two opposing parties with a purpose of reconciling them or convince them in order to make an adjustment or settlement their dispute amicably.[29] Additionally, mediation exists as a mechanism to alternate the dispute of resolution and a method of facilitating the negotiation, where an impartial third party, the mediator, assistances the disputed party to understand their primary requirements and needs, in addition, the negotiation is a likely to be a settlement of their dispute.[30]

Mediation is "a process in where a neutral intervener used to assist two or more parties to make negotiation in order to identify and specify the matters of concern and direct to the development of enhanced understanding of the circumstances and develop proposals that is acceptable through mutual approach to the resolution of these concerns"[31]

However, mediation is commonly defined as a process in which a third party neutral assists disputing parties in reaching a mutually agreeable resolution, and that

[29] Dorcas Quek, "Mandatory Mediation: An Oxymoron-Examining the Feasibility of Implementing a Court-Mandated Mediation Program," *Cardozo J. Conflict Resol.* 11 (2009): 479;
[30] Ibid
[31] See James J. Alfini, Sharon B. Press, Jean R. Sternlight & Joseph B. Stulberg, "Mediation Theory And Practice 1," 2d Ed. Lexisnexis, 2006.

mediators normally aim to promote information exchange, promote understanding among the parties and encourage exploration of creative solutions.[32]

1.81.3 Litigation

Litigation is the process of taking legal action in the courts of law or regulations of the state or a nation is administered by any suitably constituted tribunal. However, litigation is an adversarial process where, one is partaking in opposite party; contested, as differentiated from an ex parte claim; one of the which is the party looking for the relief which has been particular for legal warning to the other party, and manage to afford to conclude some opportunities to be contested with it for the purpose of enforcing a right.[33] In the light of the study, disputing parties might commerce legal proceeding against the other in the court of law.

1.81.4 Corporate Dispute

In this study corporate dispute may include, any civil disputes relating to corporations such as, breach of contract, disputes over the proper construction of agreements, shareholder disputes, disputes over joint ventures, an employment dispute between the corporation and its employees.

[32] Michael L. Moffitt and Robert C. Bordone, The Handbook of Dispute Resolution (San Francisco, Jossey-Bass 2005) :304
[33] See Black's Law Dictionary, 8th edn, Thomson West, 2004

1.8.2 The Concept of Corporate Disputes relating to Corporate Governance and the Current Practice of Arbitration and Mediation Mechanisms for Resolving Disputes

A corporation is part and parcel of a society. Man, for leading a harmonious life in the society has to juggle issues relating to teamwork, co-operation, competition and argument. Sometimes argument turns into conflict when a conflict arises in a corporation, it may create suits between shareholders and corporations or employers and employees.

To resolve the above disputes, alternative dispute resolution (ADR) incorporates forms that can be accessed out of court. Worldwide arbitration and mediation have been picked up as central policy to settle corporate disputes but this practice has not often seen in Bangladesh. As a result, massive quantities of cases are pending in the courts.[34]

ADR methods i.e. arbitration and mediation have been chosen to open doors to parties in a corporate dispute to settle such disputes, relating to legal issues, money and passionate perspectives, in a private and off the record environment.[35]

Corporate disputes are incredibly sensitive issue and the parties do not want to make them known to public. The parties always want to settle disputes amicably and confidentially.[36] Moreover, when corporate disputes break out, the best recourse is to

[34] Mahua Gulfam, "Introducing Alternative Dispute Resolution (ADR) in Criminal Justice System: Bangladesh Perspective,"Dept. of Law, Dhaka International University, accessed January 1, 2014. http://www.bv-f.org/17.%20BV%20Final.-13.pdf .

[35] Conway , "Recent Developments in Irish Commercial Mediation," Part I, 27ILT 43, (2009)

[36] Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry, International commercial arbitration: an Asia-Pacific perspective, Cambridge University Press, 2010

have the discussion and settle the disputes rapidly to keep up a working business connection between the parties.[37]

ADR methods specifically arbitration and mediation are the focus of this study. Such methods can settle corporate disputes and, accordingly, add to improving corporate governance practice, increasing shareholders confidence and supporting company continuity. Arbitration and mediation can play vital role in advancing or improving corporate governance practices.

Corporate governance concerns not just how a board controls or runs a corporation and screens administration, but also the directors' duties and responsibilities to the company. The management of the company has an obligation to guarantee that there is an oversight system for disputes and procedures to settle such disputes as viably, speedily and effectively as could be expected under the circumstances. Such internal oversight and procedures may employ mediation or arbitration as alternative tool to settle disputes. [38]

The term 'governance' is originally derived from the Latin word 'gubernare' which means 'to rule or steer'[39]. One of the important 'rule' would be the ability of the company to handle and settle corporate disputes. It is absolutely great corporate

[37] Law reform Commission, Consultation Paper Alternative dispute resolution,(LRC CP 50-2008):7.02
[38] Ronán Feehily,"The development of commercial mediation in South Africa in view of the experience in Europe, North America and Australia," (2008)
[39]JAMS Guide to Dispute Resolution Clauses for Commercial Contracts (2006). Accessed February 15, 2014. http:// www.jamsadr.com.

governance to make a system to forestall and unravel rising disputes that may influence the company's status and execution.[40]

Managing corporate disputes through ADR mechanisms have been accepted by corporations worldwide. In the United State there are approximately 1,500 law firms that signed the conflict prevention and resolution (CPR) policy which is the law firm policy on alternative to litigation.[41] According to the CPR policy, the appointed lawyers will learn properly the ADR mechanisms and after that they will study the available clients and offer the clients to take the alternative mechanisms for resolving their corporate disputes.[42]

In May 2009 Singapore introduced alternative mechanisms for the corporate sectors known as – Mediate first.[43] Consequently, more than one hundred corporate firms are currently employing the alternative trend like mediation or arbitration to resolve corporate disputes before taking decision to commence litigation.[44]

Moreover, Powell-Smith[45] recommends that "arbitration is a methodology whereby the parties have an option to choose their arbitrator in settling disputes as an impartial third party and to be bound by the conclusion that such arbitrator make". On the other

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[40] Runesson and Guy, "Mediating corporate governance conflicts and disputes," Global Corporate Governance Forum, (2007): 44

[41] James F. Henry, "CPR law firm policy statement on alternatives to litigation," International institute for conflict prevention & resolution. Accessed January 25, 2014. http://www.cpradr.org/Portals/0/lawfirmpledge.pdf.

[42] James F. Henry, "CPR law firm policy statement on alternatives to litigation," Ibid

[43] See Speech by Mr. Wong Yan Lung, Secretary for Justice of Hong Kong, at the Mediation Roundtable Conference *"Changing the Mindset"*, Singapore, (March 2010). Accessed February 7, 2014. http:// www.info.gov.hk.

[44] Wong Yan Lung, Secretary for Justice of Hong Kong, at the Mediation Roundtable Conference *"Changing the Mindset"*, Singapore, (March 2010). Ibid

[45] Smith-Powell, Vincent, Sims HM John and Dancaster Christopher, *Construction Arbitrations 2e.* John Wiley & Sons, (1998) .

hand, Rajoo[46] characterizes arbitration or mediation as "an elective procedure of debate determination to a case by which an impartial outsider (arbitrator or mediator) renders a choice after a hearing at which both gatherings have an open door to be listened". This option is friendlier than litigation as parties may chose the arbitrator or mediator of their own choice.[47]

The Arbitration Act 2001 provides a single legitimate administration for arbitration in Bangladesh. This law of arbitration provides Bangladesh a preferred choice for determination of dispute in the field of universal exchange, trade, and venture. The enactment of Arbitration Act 2001 depends primarily upon UNCITRAL Model Law and also the Indian Arbitration and Conciliation Act 1996 and the English Arbitration Act 1996.[48]

Nonetheless, mediation involves renovating barrier and discovering a productive methodology to clash determination that conveys to the surface issues of shared apprehension; surveys the different edges of the matter in question; and, permits the clash to be utilized as a taking in instrument and as a groundwork for enhanced relations around the parties. Mediation empowers parties to continue, or frequently to start, transactions.

[46] Sundra Rajoo,The Malaysian Standard Form of Building Contract (The PAM 1998 Form) (2nd ed.), Kuala Lumpur: Malayan Law Journal Sdn Bhd, (1999)

[47] Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry, International commercial arbitration: an Asia-Pacific perspective, Cambridge University Press, (2010)

[48] See BIAC website, accessed October 25, 2014, http://biac.org.bd/

The Center for Effective Dispute Resolution (CEDR) illustrates mediation as: "An adaptable procedure led privately in which an impartial individual heartily aids parties in working towards an arranged understanding of a dispute or distinction."[49]

1.8.3 Development of Arbitration and Mediation Mechanisms in Settling Corporate Disputes

Worldwide researches have been carried out to settle the corporate disputes between shareholders, employees, investors and corporations. An extensive part of literature in the United States of America and, currently, in Canada, Australia and United Kingdom have been published relating to alternative dispute resolution of corporate disputes, to resolve disputes effectively and confidentially.[50]

In 2002, a luminous study was published by Lory Charvat providing a detail analysis on internal dispute resolution in the corporate workplace between employers and employees. She argued that corporate firm or its employees should follow the alternative dispute resolution (ADR) mechanisms to settle any internal disputes.[51]

In 2010, the Law Reform Committee of Ireland published a report on "alternative dispute resolution: mediation and conciliation". Chapter 8 on commercial disputes and ADR provides that a company's primary concern is to resolve the disputes successfully, professionally and competently. Corporate disputes can range from

[49] Centre for Effective Dispute Resolution, *The CEDR Mediator Handbook: Effective Resolution of Commercial Disputes*, 4th Edition (London: CEDR, 2004).

[50] Lori Charvat, "Promises and Challenges of Internal Dispute Resolution In the Corporate Workplace," PhD diss., University of British Columbia, 2002.

[51] Lori Charvat, " Promises and Challenges of internal dispute resolution in the corporate workplace. Ibid

disagreement between any shareholder and the Board of Directors, between any employee and management of the company or between the company and its trading partner or creditors.[52]

Corporate disputes leaked to media publicity are constantly terrible news for any company. They might cause poor execution, alarm speculators, produce waste, occupy assets and in a few cases paralyze a corporation. In order to avoid such repercussion, numerous corporate disputes have been settled outside of the courts, and that corporations are progressively turning to settle their disputes by way of arbitration and mediation. [53]

The following discussion provides an overview of the application of arbitration and mediation around the world. [54]

The establishment of the Center for Public Resources (CPR, now known as the International Institute for Conflict Prevention and Resolution) was pivotal to American corporations. CPR combined the corporate guidance of Fortune 500 organizations and accomplices in heading law offices to create economically arranged corporate disputes determination forums.[55]

[52] Law Reform Commission, Report Alternative Dispute Resolution : Mediation and Conciliation, 2010

[53] William Ury, Jeanne Brett and Stephen Goldberg, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict, San Francisco: Jossey-Bas Publishers, 1988

[54] Corporation have continuously engaged with the improvement of alternative methods to customary methods in light of frail implementation, the absence of trust in the judicial framework, the high expenses and deferrals of trials, the troubles of upholding non-tying benchmarks, and reputational expenses.

[55] See http://www.cpradr.org/, Accessed March 17, 2014

In Columbia, around 97 corporations have embraced their own particular corporate governance code and 52 have incorporated dispute determination mechanisms generally arbitration and mediation.[56] Arbitration has been specified the most, taken after by mediation and conciliation.[57]

On the other hand, courts and judges themselves are progressively seeing arbitrations or mediations profits and have begun sending disputes to court-attached mediation interiors. In Uganda, Bosnia-Herzegovina, and Pakistan, ADR approaches have been utilized in court cases.[58] This has the profit of determining either the entire or some piece of the case before litigation starts.

According to the report of Center for Effective Dispute Resolution (CEDR), in the United Kingdom, mediation process saves nearly 5.1 billion pounds every year.[59] On the other hand, 89 percent of corporate disputes have been settled through mediation successfully.[60] In the current financial atmosphere, the potential part of arbitration and mediation in the determination of corporate disputes are successful, confidential and without any delay.

Arbitration and mediation offer effective, confidential and quick settlement of disputes for corporations. In addition, the Advisory Conciliation and Arbitration Service (ACAS) were set up in 1974 to manage corporate industrial disputes in the

[56] Rafael Guillermo Bernal, "Arbitration Mediation in Corporate Governance Disputes: The Experience of the Bogota Chamber for Arbitration and Concilliation," Paris, (February 2007). Accessed March 1, 2014, http://www.gcgf.org.
[57] Rafael Guillermo Bernal, "Arbitration Mediation in Corporate Governance Disputes." Ibid
[58] Ibid
[59] Law Reform Commission Report of Ireland, Alternative Dispute Resolution: Mediation and Conciliation, (2010). Accessed April 20, 2014, http://www.lawreform.ie/.
[60] Law Reform Commission Report of Ireland (2010) Ibid

United Kingdom. At the end of the 1980s corporate based mediation methods got accessible, as explained by the Lord Chancellor's in a TV meeting, "Mediation and other alternative mechanisms for determining disputes prior, without going to court, produce palatable outcomes to both sides are, I think, a whole lot to be empowered".[61]

ADR has been utilized to settle an assortment of disputes in American organizations, including the family matters, houses of worship, schools, the work environment, government organizations, and the local courts.[62] The US national government supported Neighborhood Justice Centers (NJC) that provides free or minimal cost to settle disputes through mediation all over the United States and different nations with the court house vision of Professor Frank Sander's (Harvard University) that court should be the dispute determination hub " multi entryway courthouse" where each and every case will be resolved with the proper cares.[63] NJC is providing their services in everywhere in the city, courts, local area creating a friendly mediation environment.

Roughly 800 corporations in America including Time Warner, UPS, General Electric, the Prudential, and Coca-Cola – have pledged to look into alternative dispute resolution methods (ADR) before litigation at whatever point a dispute appear with a corporation.[64]

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[61] AF Acland, "Managing Conflict Through Mediation," Hutchinson Business: London, (1990).
[62]Roberts, Simon, and Michael Palmer, *Dispute processes: ADR and the primary forms of decision-making*, Cambridge University Press, 2005.
[63] Goldberg, Sander and Rogers, "*Dispute Resolution: Negotiation, Mediation, and other Processes,*" Boston, Mass: Little Brown, 1992.

[64] Available at: http://www.gcgf.org , Accessed March 12, 2014

ADR has been considered significant alternative after taking a practical focus on certain issues and cases by the USA Bar Association.[65] Numerous states passed law obliging compulsory mediation. In 1999, obligatory mediations for civil, non-family activities were introduced as first time in Ontario. The involved parties in altogether of these cases are required to go through with mediation within one and half months after wards their initial defense filling.

The mandatory mediation mechanism has been reached to a successful one right after more than 2 years since it is incepted.[66] The parties and lawyers manage to express their satisfactory contentment regarding the progression of mandatory mediation.

In Ontario, nearly, 88% of the lawyers have articulated their satisfaction with the process of mandatory mediation. Meanwhile, in Ontario, 82% of the litigants from the respective districts conveyed their overall satisfaction.[67]

According to the statistics, in Florida, more than 100,000 cases in a single year are estimated to be diverted to mediation process from the common court procedures.[68] According to the Florida Rules of Civil Procedure, within 2 months of time in the court referral, the first session of the entire mediation process must be

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[65] C Moore, "The Mediation Process: Practical Strategies for Resolving Conflicts," San Francisco, Jossey-Bass, (1996).

[66] Robert G. Hann & Carl Baar, "Evaluation of the Ontario Mandatory Mediation Program" (RULE 24.1): (2001), accessed June 2, 2014, http://www.attorneygeneral.jus.gov.on.ca .

[67] Quek, Dorcas. "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program'(2010)." *Cardozo Journal of Conflict Resolution* 11: 479-485.

[68] Ed Bergman & John Bickerman eds., "Florida's Court-Connected State Mediation Program," in Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs 57, Sharon Press, (1998).

implemented.[69]In many private organizations, and multinational corporations marked mediation as the proper way to settle their disputes instead of going to court.[70]

Moreover, the ADR mechanisms are considered as the top method to resolve corporate disputes, for example, arbitration and mediation, open door to the contracting parties facing business dispute to think about and resolve all aspects of the disputes, including lawful, monetary and enthusiastic angles, in a private, low cost and secret atmosphere.[71]

Corporate dispute is a sensitive issue which needs to be resolved as quick as possible and the corporation wants to settle the disputes confidentially to keep their business relationship. The privacy managed by arbitration and mediation are appealing in determining corporate disputes. Moreover, when corporate disputes emerge, the greatest result for those included is to have the debate determined rapidly and to keep up a working business friendship with the other contracting parties.[72]

However, corporate disputes inexorably appear and when they do, corporate patrons will need them determined and concluded in a way that is quick and as financially savvy as could be expected under the circumstances. The rapid determination of disputes is an enormous motivating force for business clients, never more intensely than as of late, and mediation has been demonstrated useable in the largest share of

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[69] FLA. R. CIV. P. 1.710(b). See also Earnestine Reshard ed., "Florida's Court-Connected ADR History, in FLORIDA Mediation & Arbitration Programs," A Compendium 94 (19th ed. 2005-2006), accessed June 29, 2014 http://www.flcourts.org.

[70] C Moore, "The Mediation Process: Practical Strategies for Resolving Conflicts," San Francisco, Jossey-Bass, (1996)

[71] Conway "Recent Developments in Irish Commercial Mediation" Part I (2009) 27ILT 43.

[72] LRC, CP 50-2008 at 7.02, Accessed April 23, 2014, http://www.lawreform.ie/ .

corporate disputes, regardless of how unpredictable a case may appear or what numbers of parties are involved.[73]

The principal ADR technique to increase acknowledgement is arbitration, which has imparted a significant number of its practices and systems with the legal framework, including the judge (or arbitrator) choosing the conclusion of the disputes. ADR has developed and created, and mediation is, no doubt accepted as a preferential mechanism to settle corporate disputes and has ended up broadly acknowledged as a procedure giving more adaptability and less procedural many-sided quality.[74]

Arbitration and mediation mechanisms have been gaining popularity all over the world to settle corporate disputes confidently and privately avoiding court litigation. This scenario or trends of arbitration or mediation may be pioneering solution for the Bangladeshi corporations to follow.

1.8.4 Development of Arbitration and Mediation in Statutory Laws of Bangladesh

The ADR methods have been introduced in the Bangladesh legal justice system. When there are disputes in particular circumstances or lawful contract between the parties, Alternative Dispute Resolution (ADR) is utilized to settle their dispute without going to court. The ADR methods can minimize legal cost, settle disputes quickly and off the record so that parties might keep their relationship safe and

[73] Conway ,"Recent Developments in Irish Commercial Mediation" Part II (2009) 27ILT 58.
[74] Ibid

secure.[75] ADR is mainly used to settle corporate civil suits and transactions in Bangladesh rather than criminal cases. It has been mooted that the ADR methods could resolve criminal cases as well.[76]

The Constitution of Bangladesh guarantees equity to all citizens.[77] However, there are varieties of pending cases in the courts and is hard to guarantee fitting equity. It is argued that ADR could provide to reduce the backlog of cases to ensure right to justice. [78]

Alternative Dispute Resolution (ADR) has pulled in a lot of consideration as a system for lessening both the money related and passionate expenses of case. It creates the impression that basically moving cases from the courts, and far from the ill-disposed methodology, permits a few cases to be determined snappier and to the more stupendous fulfillment of the parties. Therefore, arbitration and mediation have been embedded in diverse statutes and laws in Bangladesh which are intricately examined in the following section.

1.8.4.1 The Code of Civil Procedure, 1908(Bangladesh):

Section 89A, 89B, 89C of the Code of Civil Procedure, 1908(CPC) of Bangladesh illustrate the procedural details of Alternative Dispute Resolution (ADR), particularly mediation, arbitration and conciliation applicable in Bangladeshi courts. The

[75] Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry.International commercial arbitration: an Asia-Pacific perspective. Cambridge University Press, 2010.
[76] Md Akhtaruzzaman , "Conflict Resolution: Introducing ADR in Criminal Justice Administration in Bangladesh," Journal of 10th Human Rights Summer School (ELCOP), 2009
[77] Article 27 of the Constitution of the People's Republic of Bangladesh
[78] Mahua Gulfam, "Introducing Alternative Dispute Resolution (ADR) in Criminal Justice System: Bangladesh Perspective," Dept. of Law, Dhaka International University, accessed January 1, 2014. http://www.bv-f.org/17.%20BV%20Final.-13.pdf .

provision of ADR has been inserted in 2003 through the 3rd amendment of the Code of Civil Procedure 1908.

Section 89A of CPC defines mediation as flexible, relaxed, non-binding, private, non-adversarial and consensual dispute resolution methods. The procedural law recognizes the use of mediation to settle legal dispute. The mediator can settle the disputes amicably and without imposing any term and condition to the parties.

According to section 89, after filling of complaint by the plaintiff and written statement by defendant at the District Court, the court may take an initiative to settle the dispute through Mediation. If the contesting parties agree to settle the dispute through mediation, the Court shall so mediate or refer to District Judge to establish a panel of mediators to settle the disputes.

The mediator can be selected from the District Judge himself, any retired judge, a lawyer nominated by the parties who are not linked to either party. When the court decides to mediate, it shall decide the process of the mediation and conduct of the court and the pleader. In terms of finance, their particular client and the mediator will mutually determine the mediation cost and the procedure.

If the application for mediation is filed, the court shall hear or mediate the case. In the event the mediation by the court fails, the same court cannot proceed to hear the case and such case shall be decided by a further court of experienced and capable jurisdiction.

If the mediation process is successful, the terms of such mediation shall be written down in the form of contracts and taken signatures or thumbs impressions of the parties as executants and pleaders and mediator as witness. Finally, the court will issue an order or decree based on the provision of Order 23 of the Code.[79]

The mediation shall be conducted within 60 days from the day on which the court is so informed. [80]However, the time of execution for further period shall not exceed 30 days.[81] After a successful mediation the parties will be reimbursed the court fees. No appeal shall lie against the order or decree passed by the court of mediation.

Section 89B has extended the opportunity to settle the dispute by alternative way through arbitration. Under this section, at any stage of the proceeding, parties can make an application to the dispute through arbitration and withdraw the suit in the court. The court has the power to mediate, allow the application to mediate and permit to withdraw the suit.

When mediation has been accomplished by contesting parties and the court passed an order, the contesting parties must submit to that order. The court cannot create any kind of pressure for the parties to seek mediation. The contesting parties can settle their dispute wholly or partly by mediation.

Former Justice of Bangladesh High Court and First Director of Judicial Administration Training Centre, Justice Md. Baruzzaman stated that, "under the

[79] The Codeof Civi procedure, amended Act IV of 2003, Accessed February30, 2014, http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=86
[80] Section 89A (4) of the Code of the Civil Procedure 1908
[81] Ibid

present provision of law it is not mandatory for the Judge himself to mediate or refer the dispute for mediation, but in doing so the Judge must exercise his discretion by taking into consideration the intention of the legislature and the cause of just, speedy and inexpensive justice."[82]

According to section 89A (12) of the Code of Civil Procedure 1908, no appeal or revision shall lie against any order or decree passed by the court in pursuance of settlement between the parties. It is because both parties have agreed to settle their dispute by subjecting to mediation and both parties have given their individual consent to reach a conclusion.[83]

The High Court has exercised ADR in civil suit according to the provision of Act III of 2003 (CPC), but there no equivalent in jurisdiction in appellate court. For that, So many cases were pending for settlement in the Appellate Court. Then, Act 8 of 2006(CPC) has been created to allow settlement of cases by using mediation. In mediation section 89A (1), the Appellate Court shall follow the provisions of mediation with necessary change as may expedient as far as possible.

Justice K. M. Hasan has given his opinion that "the supreme accomplishment of the mediation court is altering of psychological approach of the judges, lawyers, litigants and common community who were doubtful about mediation."[84] Nonetheless, the legal counsel and judges can play a strong role to resolve the dispute by way of

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[82]Akhtaruzzaman, Md., Concept and Laws on Alternative Dispute Resolution and Legal Aid, (70, University market, katabon, Dhaka, 2007), p.110

[83] See the speech in of Justice S.K. Sinha, Appellate Division, Supreme Court of Bangladesh , Enforcing Court-Sponsored Alternative Dispute Resolution(ADR) in Bangladesh,(2010), Accessed February11, 2014. http://www.supremecourt.gov.bd/scweb/contents/S.K.pdf.

[84] Md. Abdul Halim, , "*ADR in Bangladesh: Issue and Challenges*", CCB Foundation, Dhaka, Bangladesh. (2010)

mediation thorough inspiring disputed parties that the mediation mechanism can be the good alternative for the corporation to settle disputes.

The above discussion shows that the application of arbitration and mediation in civil court of Bangladesh is indispensable and time making decision. Furthermore, the corporations of Bangladesh are benefiting to a great extent by applying these mechanisms. The judges and appellate court get then relief from the cases which are filed year to year.

Conclusion

The foregoing discussion on ADR mechanisms in Bangladesh specifically arbitration and mediation shows that such ADR mechanisms have significant importance in settling disputes in particular corporate disputes and removing the backlog of the cases pending in the different courts of Bangladesh. Furthermore, Bangladesh legal system has embraced some fundamental doctrines, as for example (i) party sovereignty; (ii) minimal judicial intervention in arbitration and mediation; (iii) independence of the arbitral tribunal; (iv) fair, speedy and cheap resolution of disputes and (v) effectual implementation of awards.

The Bangladesh Arbitration Act 2001 is now being used for settling international corporate and business disputes. Positively, Bangladesh, being a potential target for increasing overseas investment in the future, has made a constructive walk in the right way by enacting the novel law on arbitration.

Furthermore, the use of arbitration and mediation as an alternative to litigation could be the high satisfaction for the disputed parties. Settling disputes by way of mediation and arbitration gives parties a fast, cheap way to work out their differences while undertaking parties' desire and happiness. Decisions reached in mediation and arbitration process are shaped by the parties who are in disputes, not forced on them by a moderator or arbitrator.

Therefore, arbitration and mediation persuades direct contact between the parties to assist or decide for themselves, permits for the appearance of sensation, resolve irritation, discovers imaginative means of settling disputes, encourages collaboration, conserves the power of an ongoing relationship, helps parties to believe the result of their own conclusions, and expands a representation for resolution of forthcoming disputes.

1.9 Outline of the Chapters

01	**Chapter One**	Background of the study, problem statement, research questions, research objectives, significance of the study, research methodology (research design, scope, data collection, data analysis), limitations of the study, literature review
02	**Chapter Two**	The role of arbitration mechanism in settling corporate disputes in Bangladesh
03	**Chapter Three**	The role of mediation mechanism in settling corporate disputes in Bangladesh
04	**Chapter Four**	The provisions of arbitration and mediation mechanisms in statutory laws of Bangladesh
05	**Chapter Five**	Conclusions and recommendations

CHAPTER TWO

THE ROLE OF ARBITRATION MECHANISM IN SETTLING CORPORATE DISPUTES IN BANGLADESH

2.1 Introduction

In this study, this chapter explains the role of arbitration in settling corporate disputes in Bangladesh. The discussion satisfied the first and second research questions and first objective of the study. This chapter also explains the theoretical advantages of arbitration against litigation to resolve corporate disputes.

2.2 Concept of Arbitration

Arbitration is another meaning of making the settlement of corporate disputes by third parties deprived of taking place to a court trial. That has been preferred as a vital means of resolving corporate matters to avoid the outflow, holdup, and unfriendliness of litigation. The following sections deal with the process of arbitration, institutional role in advocating arbitration process and the theoretical advantages and disadvantages of arbitration against litigation.

Arbitration is a non court contractual written agreement through that the conflicting parties will provide their consent regarding necessary aspect concerning the

disputes. [85] Arbitration is considered a lot of acceptable follow within the corporate arena as a result of each the conflicting parties have a superior chance to be noticed. Moreover, this mechanism is taken into account a substitute to court area proceedings that save the time and overheads concerned within the method of court case. One the other hand, the method is informal and also the parties have the likelihood to debate their conflicted problems in informal approach and each of the conflicting parties stay in less anxiety concerning the resolution of the proceedings.

In theory, there is huge difference between adversarial process and arbitration, for filling a lawsuit to the court, there is no need to have consent from the defendant who is being sued but in arbitration the process will be mutually to sit together which is agreed before the dispute may arise.[86]

In addition, the practice of arbitration is quite alike to court proceedings, to present the evidence, opening statements all are same. The process of arbitration is more convenient and less procedural because the tribunals are not bound to follow the governing law of the country.[87] Arbitration is the good approach to settle corporate disputes. After a hearing, the arbitrator issues an award where some awards simply

[85] Margaret L Moses, The principles and practice of international commercial arbitration. Cambridge University Press, 2012. 21

[86] Barrister Tapas K. Baul & Umme Wara,"The Role of Domestic Court and International Arbitration in ensuring climate justice in Bangladesh" Human Rights & Climate Justice, ELCOP: December 2013, ISBN: 978-984-33-6133-2

[87], Margaret L Moses, The principles and practice of international commercial arbitration. Cambridge University Press, 2012.

proclaim the decision (a "bare bones"[88] award), and others offer reasons (a "reasoned award").[89] Finally the parties have to obey with the decision of the arbitrators'.

Arbitration uses rules of verification and course of action in an exceedingly less recognized approach than that area followed within the trial court that ends up in a less expensive and fast resolution of disputes.[90] There is no discovery and there are simplified rules of evidence in arbitration.

But to instigate arbitration, it is good to have an applicable clause while the agreement is signed between the parties stating if any dispute arises which is an arbitrable one must be determined by arbitration. Important things have to be done to make the contract enforceable which are, the description of the agreement of arbitration must be in written format.

An arbitration arrangement have to be prepared in writing when it is enclosed in a contracted documents with the consent of agreed parties; record of the signed agreement or interchanging the letters, telex, telegrams, fax, e-mail or in any other way of telecommunication system. It also could be the exchange of the statements for claiming and defense in where the allegation of the existing agreements through a party which is not deprived of the other parties.[91] Thus, it is very clear that arbitration

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[88] According to Oxford Dictionary, "Reduced to or comprising only the basic or essential elements of something" accessed January 2, 2015, http://www.oxforddictionaries.com/

[89] Nirmalandu Dhar, *Labour and Industrial Laws of Bangladesh,* (Dhaka: ReMisi Publisher, 2004) 1-19.

[90] See the Lawyers and Jurists website, accessed June 25, 2014, http://www.lawyersnjurists.com

[91] Under section 9(2) of Arbitration Act of 2001

is creature of the contract and has to maintain some procedural works before the dispute come out.

Arbitration is a mutual term agreed by both parties to an agreement. When the dispute arises, the rendered award will be binding as well as enforceable by the court and internationally recognized.[92]

2.2.1 International Recognition of Arbitration Award

Arbitration award is enforced in any of the 149 countries that are member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[93] The award can be rendered either through an adhoc arbitration or institutional.

Bangladesh has signed and entered into over 20 bilateral investment treaties (BITs) including the NEY Work Convention and the ICSID.[94] Since Bangladesh is a party to the New York Convention and the International Convention on the Settlement of Investment Dispute (ICSID) 1965, which contain specific provisions to resolve the corporate disputes internationally and ensures the enforcement of foreign arbitral awards,[95] thus, arbitration award is enforced worldwide which is bound and enforced by the country court as well. Therefore it may be top way to resolve corporate or commercial disputes broadly.

[92] Margaret L. Moses, The principles and practice of international commercial arbitration.(Cambridge University Press, 2012), 189-190
[93] Richard Garnett, "Australia's International and Domestic Arbitration Framework." In *Arbitration and Dispute Resolution in the Resources Sector*, pp. 7-21. Springer International Publishing, 2015.
[94] Bhuiya sharif & Jahan Karishma, "Global Arbitration Review," The International Journal of Public and Private Arbitration (2008): 15
[95] Ibid

2.2.2 Ad Hoc or Institutional Arbitration

The arbitral dispute can be determined by two established ways; ad hoc arbitration and institutional arbitration also called administrative arbitration.

2.2.2.1 Ad hoc Arbitration

Parties engaging in ad hoc arbitration are accountable for resolving and agreeing upon all particular arbitration procedures. In ad hoc arbitration the parties have a full fledged freedom to choose the required procedures which can be suitable for the dispute. [96] They have various options to set the arbitration rules; it may be UNCITRAL rules or their own compilation[97] as well as they have to fix the location of the arbitration, language(s) of the arbitration, the law applied to the dispute, number and selection of arbitrators, payment of the arbitrators, etc. [98] In ad hoc arbitration the parties can shape the arbitration in a manner which facilitates speedy and successful outcomes of the disputes. The parties may reduce the cost in many ways; they might negotiate with the arbitrators about their fees and also they might select the convenient place rather to hire, it may be the office of the arbitrators or anywhere agreed by the parties.[99]

[96] Born, Gary. International arbitration and forum selection agreements: drafting and enforcing. Kluwer Law International, 2010, 44
[97] Alan Redfern, Law & Practice of International Commercial Arbitration, (Sweet & Maxwell, 4th edition, 2004), p. 50
[98] Sundra Rajoo, "Institutional and Ad hoc Arbitrations: Advantages and Disadvantages" The Law Review (2010): 547, accessed September26, 2014. http://www.sundrarajoo.com/
[99] Julian D M Lew, Comparative International Commercial Arbitration, 2003, p.35

2.2.2.2 Institutional Arbitration

In institutional arbitration, everything is run by the institution with rules and procedures are much focused. They synchronize the straightforward arbitration proceedings for helping the parties without making any controversy. The party may choose the arbitrators from the arbitrator's panel of the institution based on their expertise and qualification.[100]

Once the parties have decided to settle their disputes through the institutional arbitration, they have to put the institutional name in the agreement which means they agreed to settle their disputes by the rules set out in the institution. This is the positive side for the parties to choose institutional arbitration because after choosing the institution, the parties are free from procedural complexities of arbitration.[101] The arbitration draft will be conducted by the institution as well as checked and approved by the arbitration specialist with the latest amendment of the arbitration act which means there will be no ambiguity in the contract.[102] The institution also provides the fees structure of the arbitrators and for their administrative activities including clerical services.[103]

In the competitive business world, corporations and their investors want straightforward mechanisms to breakdown the disputes. The adversarial process is

[100] Julian D M Lew, Comparative International Commercial Arbitration, (2003), 232
[101] Julian D M Lew, Comparative International Commercial Arbitration, (2003), 171
[102] Alan Redfern, Law & Practice of International Commercial Arbitration, (Sweet & Maxwell, 4th edition, 2004),48
[103] Sundra Rajoo, "Institutional and Ad hoc Arbitrations: Advantages and Disadvantages" The Law Review (2010)547

not that much straightforward which involves complication and not fit as a right institution to resolve business disputes.[104]

To increase corporate or commercial relationship between the parties institutional role is very much to be encouraged to provide unbiased, well-organized and dependable dispute resolution service in the rising disputes of the contract. In addition, the neutral and reputed institution is considered as fundamental characteristics of the arbitration procedure to be brought before the institution. Consequently the losing party will have faith and likely to obey with the decision of the arbitral tribunals.

In Bangladesh there is one internationally recognized organization named Bangladesh International Arbitration Centre (BIAC) providing arbitral services based on the rules of UNCITRAL Model Law and Arbitration Act 2001 of Bangladesh to settle national and international corporate and commercial disputes. [105]

2.3 Bangladesh International Arbitration Centre (BIAC)

To protect the needs of members and parties, the Bangladesh International Arbitration Centre (BIAC) was formed as a dispute resolution centre by the three well-known business chambers of Bangladesh, i.e., International Chamber of Commerce–Bangladesh (ICC-B), Dhaka Chamber of Commerce & Industry (DCCI), and the Metropolitan Chamber of Commerce & Industry (MCCI), Dhaka.[106] The BIAC operates as a nonprofit organization with the financial support of the above

[104] Alan Redfern, Law & Practice of International Commercial Arbitration, (Sweet & Maxwell, 4th edition, 2004), 45
[105] See BIAC website, accessed October 25, 2014, http://biac.org.bd/
[106] See BIAC website, accessed September 29, 2014

three prominent chambers got license from the Government in 2004. The BIAC centre was launched in 2011 with support from the Bangladesh Investment Climate Fund (BICF). The International Finance Corporation (IFC), with financial support from UK-Aid (DFID) and the European Union (EU), manages the BICF. BIAC formally started operation from 9th April 2011.[107]

Although BIAC is new but it has significant role in settling national and international corporate and commercial disputes in Bangladesh with high-quality reputation and client's satisfaction. Nonetheless, the corporations and their clients still are not interested to go for arbitration due to lack of proper knowledge and awareness on the effectiveness and efficacy of arbitration process to settle their disputes.

2.4 Theoretical Advantages of Arbitration against Litigation

Litigation is costly and time consuming. The quantity of cases pending in the different Bangladeshi courts - over 2.5 million cases at the start of the year 2014[108] - implies that disposal is slow, and day by day backlog of the cases will be higher if the Judiciary does not take any alternative action to resolve the pending cases.

International Financial Corporation (IFC) Advisory Services in South Asia has conducted a base line survey in 2012 and found that the average time of the first hearing by the court has taken around six months and also to resolve the disputes the normal time for corporate and commercial cases have taken minimum 3 years by the respected court.[109] The lawyer/attorney cost was very high which comprises around

[107] BIAC website Accessed August 10, 2014
[108] Ibid
[109] Ibid

986 USD as well as other cost varies 1to 5 percent of the claim value i.e., court fees, documentation fees, enforcement fees.[110]

However, if the court takes minimum of 3 years to resolve a single corporate case, how would the court ensure justice to the disputed parties apart from them becoming losers. Therefore, the corporation and their investors may have to find a good approach to resolve their disputes within a very short time and the likelihood of arbitration is very high.[111]

Conversely, arbitration provides diverse returns over adversarial process. In arbitration, parties have the absolute power to adapt the rules and can make the process short, as for example limit the number of witnesses each party will represent, types of evidence, time frame, set constrains on the amount and many more things can be done for the betterment to resolve disputes.[112]

In addition, it might be very hard to find an expert in the adversarial process who has particular expertise on the corporate and commercial issues to resolve the disputes. Sometime the presiding judge may not have sufficient knowledge, experience or expertise in matter of dispute which might be harmful for the parties to get proper justice. If we look into the arbitration process, the scenario would be different; there is no likelihood like adversarial court process. The parties may hire experienced arbitrators with prior conversation and communication.

[110] Ibid
[111] Ibid
[112] BIAC website accessed August 10, 2014, www.biac.org.bd

Furthermore, the lawyers and judges do not take any attention in screening out a false and frivolous case at the first hearing of the case under Order X of the Code of Civil Procedure 1908 [113] (in fact no such first hearing takes place), they rarely try to curtail the disputed questions of fact and law by application of Orders XI and XII of the Code of Civil Procedure 1908 and mostly pay no attention to the complicated procedure of finding, interrogatories, notice to produce etc. It is noted that judges actually try to reach a settlement dozen of cases together in a day, resulting in hearing of none.[114] On the other hand, in arbitration there is no likelihood to come up with a false and frivolous case to the arbitral tribunal because the process is mutual. The arbitral tribunal is generated to hear one particular case only so that they can come with satisfactory outcomes.

In accordance with the statement of Former chief Justice of Bangladesh Mustafa Kamal:

The legal system of Bangladesh has thus been rendered uncaring, non-accountable and formalistic. That provides the formal justice as this is insensible of the sufferings and woos of litigants, wasting their financial effort, time and energy and of their involvement in such unfertile accomplishments, occasionally it could prolong for decades. In a situation, where they win a case, the results would be more worsen than winning it.[115]

[113] See The Code of Civil Procedure 1908 in Bangladesh.
[114] Justice Mustafa Kamal," Introducing ADR in Bangladesh."Delhi Mediation Centre, accessed September 29, 2014, http://delhimediationcentre.gov.in/articles.htm
[115] Justice Mustafa Kamal," Introducing ADR in Bangladesh."Delhi Mediation Centre, accessed September 29, 2014, http://delhimediationcentre.gov.in/articles.htm

In other way, while they are unable to win the case, they do not only lose the major and subject concern of the dispute, however, they also lose significant portion of their destiny. When internal difficulties are disclosed to the correspondent provisional courts, their major goals rely on no bounds and their sufferings are about to be prolonged for an uncertain period of time. In the trial court verdicts, appeals would extent towards the Appellate Division through this time the parties could be able to drench in depression thoroughly.[116]

In such situation, where the decrees are consequently acquired immediately later protracted litigation, it is not ending there. The proceedings in the execution, then attempt to start again with a fresh litigation with the involved parties or else with their beneficiaries that might prolong years or decades in order to derive a concluding mark and where the ending might be without any actual or positive benefited consolation in a favor of the decree-holder plaintiff.[117]

This is the experience of a common litigant in Bangladesh. Added to this inherent and in-built delay and expenses, corruption and often terrorism at almost each stage of litigation is eating into the vitals of the justice delivery system.[118] However, the arbitration process is totally different which provides unbiased, private and quick results.

[116] Justice Mustafa Kamal," Introducing ADR in Bangladesh."Delhi Mediation Centre, accessed September 29, 2014, http://delhimediationcentre.gov.in/articles.htm
[117] Ibid
[118] Ibid

Justice S.B Sinha, judge of the Supreme Court of India opines that –

> *"Despite an increase in the number of courts and tribunals all over the country not only in the traditional areas of civil and criminal litigation but also in other fields like corporate matters, consumer protection, service matters, etc., no solution for early resolution of dispute has been found out. But the increase in the number of courts and tribunals is not enough to deal with the increase in litigation by geometrical proportions. Often we find that not only there is no proportionate growth in the number of courts and judges, but even the existing vacancies remain vacant for a long time for one reason or the other."*[119]

Hence, in arbitration there is no point of vacancies. The parties may hire arbitrators based on their expertise and qualifications right after the dispute occurs and they do not have to suffer for the vacancies and proper expertise. The arbitrators may settle the disputes within very short time with depth analysis of the fact. Sometime the cost of the arbitrators may be high but comparing with time and others convenient issues it costs less than the court process. Any types of civil disputes can be arbitrated i.e.

[119] Justice S.B. Sinha, Judge, Supreme Court of India, "Courts and Alternatives," Delhi Mediation Centre, accessed October 25 , 2014 http://delhimediationcentre.gov.in/articles.htm

corporate disputes, commercial disputes and family disputes etc. However, in some countries particularly criminal cases are being resolved through alternative ways.[120]

Additionally arbitration is becoming admired and well established mechanism for national and international corporate and commercial transactions because the process is recognized by the international community and the award is binding and enforceable. The arbitration law is common and familiar to all because the law is based on UNCITRAL model law and this might be a reason to choose arbitration as a first priority. When parties make a cross boarder agreement they do not want to settle their disputes by the unacquainted laws of the particular countries. Nonetheless, because of the familiarity of arbitration, the process becomes easier for the parties to settle their cross border disputes smoothly and well organized ways as well as arbitrators play an incredible role to resolve the disputes speedily and privately.

Nonetheless, the apparent scenario is outlined as a diagram between arbitration and litigation by the 'Lawyers & Jurists' leading corporate law firm in Bangladesh. They have clearly pointed out the actual nature of arbitration and litigation, which are as follows:

[120] BIAC website accessed August 10, 2014, www.biac.org.bd

Table 2 The Difference between Arbitration and Litigation

Item	Arbitration	Litigation
Private/Public	Private – between the two parties	Public – in a courtroom
Type of Proceeding	Civil – private	Civil and criminal
Evidence allowed	Limited evidentiary process	Rules of evidence allowed
How arbitrator/judge selected	Parties select arbitrator	Court appoints judge – parties have limited input
Formality	Informal	Formal
Appeal available	Usually binding; no appeal possible	Appeal possible
Use of attorneys	At discretion of parties; limited	Extensive use of attorneys
Waiting time for case to be heard	As soon as arbitrator selected; short	Must wait for case to be scheduled; long
Costs	Fee for arbitrator, attorneys	Court costs, attorney fees; costly

Source: Lawyers & Jurists website[121]

The above diagram illustrates the critical characteristics of a fair dispute resolution process. The comparison between arbitration and litigation highlights the informal nature of arbitration and its user friendly procedures. Similar characteristics have been used in the study to gauge the view of the Bangladesh corporate practitioners and legal practitioners on the potential use of arbitration in settling corporate disputes. Discussion of this issue is found in the next section.

Under the above diagram, it is obvious that the adversarial system in Bangladesh is not working reasonably well. The confidence and trust on the courts of Bangladesh is going considerably down because of the massive cost, extreme holdup of the cases, unfriendly environment etc.[122] The quick remedial methods should be taken by the

[121] See the Lawyers & Jurists website, www.lawyersnjurists.com , accessed September 29, 2014

[122] BIAC website, www.biac.org.bd, Accessed March 25, 2015

judiciary of Bangladesh to develop the culture, environment and disputes resolving techniques of the adversarial system.[123] One alternative way to reduce the backlog of the cases is by implementing alternative dispute resolution mechanisms to move side by side with the current litigation system.

2.5 The Role of Arbitration Mechanism in settling Corporate Disputes in Bangladesh

Regardless of how hard companies attempt, disputes are inevitable. Whether between states or between corporations or among employees, how corporations attempt to determination such disputes uncover an incredible arrangement about the corporate environment and state they live in. To be able to settle disputes amicably and privately would help corporations to maintain their business operation and good name. Bringing actions to the court proves too burdensome, time consuming and possibly tarnishing corporation's good name and image. As an alternative, arbitration has been accepted globally as the efficient private resolution method to resolve the corporate disputes and reduce cases being tried in open court.

To establish healthy international business culture and to attract investors; trust, confidence and strong disputes determination mechanisms are the pre eminent factors. Bangladesh is an attractive destination for investors from across the world in various sectors including corporate sector.[124] Bangladesh provides a constant and creative environment to investors for the establishment or development of any legal business under the Foreign Private Investment Act of 1980. The cross boarder agreements are signed mutually by the parties and interestingly most of the

[123] Ibid

[124] Luc Mvono, "Laws that favor foreign investment in Bangladesh," Dhaka Tribune, August 28, 2014

contracting parties agreed to settle dispute by court alternative ways specially arbitration and inserted a specific clause in the agreements.[125]

Apparently, arbitration has turned into a more appreciated dispute determination mechanism on account of expense adequacy which is guaranteed by law.[126] Parties subject to arbitration have a level of freedom. After the close of the arbitral proceedings, an award is issued that takes the debate to the end. The award is final and parties are bound by the decision. Differing parties do not have to experience the delay of further procedures of appeal on the premise of the award. [127]

The Arbitration Act 2001 attempts to synchronize Bangladesh's existing arbitration laws with the 1985 UNCITRAL Model Law on International Commercial Arbitration. To that effect, provisions in the Act pertaining to the definition of arbitration agreements, number of arbitrators, time limits and party autonomy are similar, often verbatim, with the Model Law. The Act is still a work in progress and it is hoped that the legislature will make some changes in order to modernize the law even further and in line with the developed arbitral jurisdictions.[128]

Arbitration mechanism delivers neutral and binding results by impartial professional arbitrators. Arbitration has been considered as fair and efficient method to settle disputes by removing the imbalance power of the parties and make the relation

[125] BIAC website, Ibid
[126] See the Lawyers & Jurists website, www.lawyersnjurists.com, accessed July 23, 2014
[127] See the Lawyers & Jurists website, Ibid
[128] See BIAC website, accessed October 10, 2014.

stronger.[129] Some experts denote that the dependency on arbitration by the parties is increasing because of voluntary agreements and performance.[130]

Arbitration is a crucially vital alternative to adversarial court process in settling corporate or commercial disputes. *"If arbitration did not exist, it would have to be invented"* because the courts could not probably handle the sheer volume of disputes which arise in a complex modern society.[131]

Nonetheless, in Bangladesh arbitration system has to be more developed to create a healthy international business environment and attract international investors.[132] Interestingly the international investors have exposed noteworthy interest in particular sectors specially garments sector, agricultural, electrical power systems, engineering and construction etc.

According to Bangladesh Board of Investment, in 2009-2010 there were approximately 89 new international joint venture agreements signed in relation to the sectors mentioned above worth 590 million dollars.[133] However, arbitration clause was inserted in the most of the agreements. This is because it is a more favorable way

[129] Kochan, Thomas, David B. Lipsky, Mary Newhart, and Alan Benson. "The Long Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law."*Industrial & Labor Relations Review* 63, no. 4 (2010): 565-584.

[130] Anderson, John C. "The impact of arbitration: A methodological assessment."Industrial Relations: A Journal of Economy and Society 20, no. 2 (1981): 129-148.

[131] Lord Justice Donaldson, 'Foreword' in D. Stephenson Arbitration for Contractors (1987).

[132] Rajin Ahmed, "International commercial arbitration in Bangladesh," The financial Express, February 28, 2014, accessed October 20, 2014, http://www.thefinancialexpress-bd.com/2014/02/28/20933/print .

[133] Rajin Ahmed, "International commercial arbitration in Bangladesh," Ibid

to settle disputes than through courts in Bangladesh owing to the lengthy duration of litigation in civil matters.[134]

The use of arbitration mechanism in the private dispute resolution has been supported by the views of Bangladeshi corporate practitioners, legal counsels of the corporations on the relative potential between arbitration and litigation in settling corporate disputes.[135]

The following items have been considered as the key factors to settle corporate disputes by way of alternative mechanism such as, *reduce financial cost; flexible solution; confidentiality; ability to influence outcome; disputant's control; disputant's satisfaction; and speedy resolution.*[136]

The following discussion explains the items used above to compare between arbitration and litigation:

Reduced financial costs

Arbitration is less formal than a court. The cost of arbitration depends on the nature of the dispute and the rules of the arbitration agreement. The great philosopher Abraham Lincoln opines that "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser- in fees and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business

[134] Ibid

[135] See legal counsel division, icddr'b , accessed July25, 2015, http://www.icddrb.org/

[136]See Moses, Margaret L. *The principles and practice of international commercial arbitration.* Cambridge University Press, 2012, 1-197; Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry.*International commercial arbitration: an Asia-Pacific perspective.* Cambridge University Press, 2010, 1-503

enough."[137] Arbitration may cost less in terms of down time and attorneys fees. However, sometime arbitration is considered more pricy as more embedded and more qualified lawyers take up the cause.[138] Still, settling a dispute through arbitration is usually far less costly than proceeding through litigation because the process is faster and generally less convoluted than a court proceeding.[139]

Flexible solution

Arbitration offers a much greater flexibility.[140] Arbitration hearings can usually be scheduled around the needs and availabilities of those involved; it may be after normal business hours: evenings or weekends. Testimony of distant witnesses can be taken by video conference or by telephone. Flexibility of arbitration allows parties to save time and money.[141] A key benefit of this common approach is, the contracting parties have fully fledged freedom to put flexibility clause in the contract before the dispute has actually arisen. Moreover, procedural flexibility in litigation the parties hardly have any influence over the procedure or rules of the court system.

Actually, the court litigation system generates opposing, unfriendly, insulting and inflexible situation for the parties rather than to create a good atmosphere of settlement, trade off or mutual cooperation. This process creates clash after clash. At the end of an adversarial process, one party emerges as the victor and the other party is put to the position of the vanquished. Court litigation system does not end in

[137] Se BIAC website, accessed 25 January, 2015
[138] Marie Stoyanov, Olga Owczarek, 'Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?' (2015) 2 *BCDR International Arbitration Review*, Issue 1, pp. 171–199
[139] Moses, Margaret L. *The principles and practice of international commercial arbitration.* Cambridge University Press, 2012 . 53
[140] Ibid
[141] Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry.*International commercial arbitration: an Asia-Pacific perspective.* Cambridge University Press, 2010. 363

amicability. It makes parties aggrieved; consequently more suits come out between them including their successors.[142]

The flexibility of arbitration promotes a moderately comfortable environment unlike overcrowded courts atmosphere. In addition with the confidentiality of the arbitration proceeding, this provides to diminish the pressure on the witnesses and on what are often continuing business relationships between the parties.

Confidentiality

Arbitration is conducted confidentially in the presence of one or more arbitrators. The proceedings are not open to the public unlike a court.[143] The confidentiality is the business safeguard of the corporation from disclosing private information, such as a company's client list, trade secrets, position in the marketplace as well as reputation. The arbitral institution's follow their own rules regarding the confidentially of the proceedings and awards. [144]

Disputant's control

Arbitration is a creature of contract. The contractual parties can design the total procedures at the time of contractual agreement. However, at the time of arbitration the parties may draw the outline how the arbitral process will be going on, as for example, the number of the witnesses, nature and scope of the discovery, manner of the hearing, time frame of the whole process etc.

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[142] Justice Mustafa Kamal," Introducing ADR in Bangladesh."Delhi Mediation Centre, accessed September 29, 2014, http://delhimediationcentre.gov.in/articles.htm

[143] Gary Born, International arbitration and forum selection agreements: drafting and enforcing. Kluwer Law International, 2010, 4-11.

[144] See the rules of Bangladesh International Arbitration Centre (BIAC) , BIAC website, Accessed March 23, 2015

Disputant's satisfaction

A great satisfaction in arbitration is that the parties can choose the best arbitrator or arbitrators with enough qualification, previous experience on arbitration and expertise on the subject matter of the disputes to settle quickly and conveniently.[145] On the other hand, the focal reason for the delay of disposal in court cases is that the presiding judges of the court are not stable. They are always transferred from one court to another but the cases left in the same court unless the parties transfer the case to another court. Sometime the situation of the case is like that a single case is heard by one or more presiding judges, examination of the witnesses may be heard by another judge, arguments are listened to may be by another judge and judgment may be rendered by a judge who had no relationship with the case ever before.[146]

Furthermore, disputants are likely to be more satisfied with the arbitration process than they are with litigation. In arbitration the arbitrator comes to conclusion when they have heard enough from the both sides completely and provide a fair and appropriate judgment.

Speedy resolution

Arbitration is a potentially faster process and arbitrators try to resolute the dispute in a more professional manner within a prescribed time set out in the contract.[147]Conversely, court cases generally require more counsel time and, thus, more expense for preparation and trial compared to the preparation for arbitration.

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[145]Vijay Kumar Bhatia, Christopher Candlin, and Maurizio Gotti, eds. Discourse and practice in international commercial arbitration: issues, challenges and prospects. Ashgate Publishing, Ltd., (2012),1 .

[146] Justice Mustafa Kamal," Introducing ADR in Bangladesh" Delhi Mediation Centre, accessed July 10, 2014, http://delhimediationcentre.gov.in/articles.htm.

[147]Vijay Kumar Bhatia, Christopher Candlin, and Maurizio Gotti, eds. Discourse and practice in international commercial arbitration: issues, challenges and prospects. Ashgate Publishing, Ltd., 2012. 1

For example, trial-related matters can consume time and money in court. For example, the following court procedures are not part of arbitration: extensive evidentiary issues, proposed findings of fact, endless authentication of documents, cumulative witnesses and, finally, appeals, which are far more limited in arbitration than in court.[148]

Finality

The corporate disputes are preferred to be resolved as quick as possible to keep the market position and reputation. The simple dispute may ruin and paralyze an established business of a company. However, arbitration provides faster, final, binding award[149] which is enforceable by the court with no further appeals under the arbitration Act 2001 of Bangladesh unless the issue of corruption, fraud and evident partiality etc have raised.

However, the Arbitration act 2001 has been analyzed in the following section for supporting the role of arbitration mechanism in settling corporate disputes in Bangladesh as discussed in the previous section.

2.6 The Arbitration Act, 2001

The Arbitration Act 2001(the Act) of Bangladesh which came into force on 10 April 2001 repealed the Arbitration (Protocal and Convention) Act 1937 and the Arbitration Act 1940. The Arbitration Act 2001 is primarily based on the

[148] Joanna Jemielniak, Legal interpretation in international commercial arbitration. Ashgate Publishing, Ltd., 2014. 21

[149] Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry.*International commercial arbitration: an Asia-Pacific perspective.* Cambridge University Press, 2010. 23

UNCITRAL Model Law on International Commercial Arbitration 1985.[150] The Act focuses on both local and international corporate arbitration.[151]

The Arbitration Act 2001 has been enacted by taking into account the provisions from different sources i.e. the English Arbitration Act 1996, the Indian Arbitration and Conciliation Act 1996 and the UNCITRAL Model law. Some vital provisions of UNCITRAL Model Law are adopted with minor modifications in the Arbitration Act 2001 of Bangladesh. For example, the following UNCITRAL Model Law provisions of: Article 5,[152] Article 8,[153] Article 10,[154] Articles 11, 13, 14,[155] Article 16,[156] Article 17[157] (as in the Indian Arbitration and Conciliation Act 1996 ("IACA"), section 9 (ii)), Article 18,[158] Article 34,[159] Articles 35 and 36.[160]

The Arbitration Act 2001 thus generates single and united legal rules for arbitration in Bangladesh which has also been the trend in recent years elsewhere.[161] However, in the circumstance of international corporate arbitration, the Act has specific prescriptions which are not applicable to domestic arbitration. In certain respects it

[150] Greenberg, Simon, Christopher Kee, and J. Romesh Weeramantry.International commercial arbitration: an Asia-Pacific perspective. Cambridge University Press, 2010.
[151] Maniruzzaman, A. F. M. "The new law of international commercial arbitration in Bangladesh: a comparative perspective." *American Review of International Arbitration* 14 (2003): 139.
[152] No court shall intervene except where so provided in this Law
[153] Enforcement of arbitration agreement
[154] Number of arbitrators
[155] The court should not intervene except in those instances relating to appointment, challenge and termination of the mandate of the arbitrators
[156] In relation to arbitration clause in a contract
[157] Empowers the tribunal to grant interim measures of protection over subject-matter in dispute, quite similar power is given in IACA Section 9 (ii), interim measures ordered by a tribunal under Article 17, are always appealable to the courts, section 37 (2) (b).
[158] Each party be given a full opportunity of presenting his case.
[159] Setting aside of the arbitral award.
[160] Recognition and enforcement of awards.
[161] The German Arbitration Act, "Incorporated in the German Code of Civil Procedure" (ZPO) (1998) Arts. 1025-1066; Indian Arbitration and Conciliation Act, 1996.

has drawn on the Indian Arbitration and Conciliation Act, 1996.[162] This is obviously in tune with the reality of the region as a growing popular destination for foreign investment.

The Arbitration Act 2001 signifies a noteworthy development over its ancestors, the Arbitration Act 1940, a legacy of the British Raj in the Indian subcontinent. Before 2001, the 1940 Act governed arbitration in India and Bangladesh, and it still does in Pakistan. Thus, the 1940 Act is the common heritage of all these countries. Experience had taught that a change in the arbitral legal regimes in these countries was a must. As the Supreme Court of India once noted:

> *"Wearisome, prolonged, complicated and unmanageable court methodology actuated legal scholars to scan for alternative mechanisms which are less formal, more viable and quick for determination of disputes keeping away from procedural hot air and this headed them to Arbitration Act of 1940."*[163]

In light of their common historical experience as such, both Bangladesh and India have recently modernized their arbitration laws along the lines of the UNCITRAL Model Law. The modernization of law relating to international commercial arbitration in Bangladesh by the Arbitration Act 2001 provides an alternative way to reduce international and national disputes relating to international employment, trade, business and investment.[164]

[162] Indian Arbitration and Conciliation Act (1996)
[163] Justice D.A. Desai ,The Gurunanak Foundation case, (AIR 1981 SC 2075),
[164] UNCITRAL Model Law on International Commercial Arbitration, U.N. GAOR, 40th Sess., Annex I, U.N. Doc. A/40/17, Annex 1 (1985), accessed February 10, 2014, http://www.uncitral.org/ en-index.htm.

As mentioned above, the Arbitration Act 2001 deals with both local and international corporate arbitration.[165] The international disputes awards will be handed by the High Court Division of the Supreme Court of Bangladesh under the Act whereas the local arbitrations would be measured by the District Judge in the District.

According to the Arbitration Act 2001, the Arbitration tribunal is not bound to pursue the Code of Civil Procedure 1908 (CPC) and the Evidence Act 1872.[166] The CPC is the codification of the procedural rules and the Evidence Act is a codification of the rules of evidence.

The relevant laws have to be inserted in the agreement by the contracting parties regarding the disputes[167] and if the relevant laws are not designed by the parties, then the arbitral tribunal will design the appropriate laws which may be standard for the disputes to be resolved.[168] The dispute should be justifiable in a civil action. Only such 'disputes' as are justifiable in a civil action under Bangladeshi law can be subject to arbitration. The position of India is the same. There are some Indian cases *Gaddipatti Laxminarayana v. Gangineni Venkatasubbaiah, AIR 1958 AP 679, Matru Udesingh v. Dhunnilal Sitaram, AIR 1951 Nag 287, Prem Nath L. Ganesh Dass v. Prem Nath L. Ramnath, AIR 1963 Punj 62*; which provides that the disputes must be in respect of civil rights in respect of which civil remedies can be sought or claimed.

Section 10 of the Arbitration Act 2001 also affirms the widely accepted standard that the right to seek for arbitration is a contractual civil right and agreement cannot be

[165] Section 2 (c) of the Arbitration Act 2001.
[166] S 24 of the Arbitration Act 2001of Bangladesh
[167] S 36 (1) ibid
[168] S 36 (2) ibid

unilaterally abrogated in order to bypass the arbitration clause. It is important to note here that the use of the term ***shall*** imply that the local court is under a positive obligation to refer the parties to arbitration and not merely discretion, which is to be exercised sparingly by the court. This positive obligation under section 10 of the Act reinforces the spirit and letter of the New York Convention.

Domestic cases have evinced the local court's intention to apply such principles strictly. For example, in the case of *Civil Engineering Company v Mahkuta Technology & Others,*[169] it has been held that the court shall not interfere with a matter covered by an arbitration agreement and those who agree to settle their disputes through arbitration must be encouraged to follow that route.

However, a limitation to this provision, as illustrated by *Seafarers Insurance Co v Province of East Pakistan,*[170] is that the party contending the suit must raise its objection with respect to the arbitration before the filing of the statement of defense. After that stage, there is no scope for submitting the dispute to arbitration and the local court becomes vested with the jurisdiction for adjudicating the dispute. This is because, once the written statement has been submitted, the local court infers that the contending parties have agreed to supersede or abandon the arbitration agreement.

Furthermore, a significant development in this respect is the amendment and the introduction of section 89B of the Code of Civil Procedure 1908. According to this

[169] 14 BLT (HCD) (2006) 103
[170] 20 DLR (SC)(1968)225 at 228

section, the parties may withdraw the suit at any stage of the proceeding to try the suit by arbitral proceeding. The respected court must allow the parties to withdraw their suit and will be resolved by the Arbitration Act 2001. This has been a recent welcome change by the legislature in order to promote the use of arbitration in Bangladesh.

2.6 Summary of the Chapter

In this chapter the role of arbitration mechanism in settling corporate disputes in Bangladesh has been analyzed with a final conclusion that arbitration is the good method in settling corporate disputes in Bangladesh, more quickly, more cheaply, by own empowerment and without some of the downsides that court proceedings can entail. In this study it is also found that the best utilization of arbitration will assist corporations to settle their disputes in private, harmoniously and win win solution to preserve their relationship to the conflict that inevitably arise. However, to get more fruitful outcomes, the Court and private body like Bangladesh International Arbitration Centre (BIAC) should conduct huge seminar and workshop to produce experts to create ADR friendly environment in Bangladesh. This above summary of findings have attended to answer the first and second research questions of the study and satisfied the first research objective of the study.

CHAPTER THREE

THE ROLE OF MEDIATION MECHANISM IN SETTLING CORPORATE DISPUTES IN BANGLADESH

3.1 Introduction

In this chapter, the study reviewed the role of mediation mechanism in settling corporate disputes in Bangladesh. Mediation is another alternative method and private dispute resolution mechanism that helps the disputing parties in new and innovative ways by way of smooth discussion when there is animosity between the parties. In general, mediation strives to steer the process away from negative outcomes and possible breakdown towards joint gains. This chapter observes the satisfactory answer of the first and second research questions and first research objective of the study.

3.2 Theory of Mediation

The following discussion provides the definition and basic concept of mediation for better understanding of the research questions and objectives. This section also explains about the convenient environment and flexible language in the mediation process.

3.2.1 Definition and Concept

Mediation is a process that utilizes an unbiased or unprejudiced person or persons to encourage negotiation between the parties to a dispute with an end goal to achieve a commonly acknowledged resolution.[171] Mediation is a private method supported and facilitated by the third party.[172]

As mentioned above, mediation is a private mechanism where an impartial third person, called a mediator, helps the parties to examine and attempt to determine the dispute. The parties have the chance to depict the issues, talk about their interests, understandings, emotions, furnish one another with information and explore thoughts for the determination of the dispute. The mediator does not have the ability to settle on a choice for the parties, however can help the parties to reach a fruitful mutual solution. The parties have full control over the outcomes.[173]

It is absolutely clear that the mediators, who are selected, appointed, or volunteer to help in dealing with the dispute, ought to have no direct enthusiasm in the dispute and its result, and no power to render a decision. The mediators could have control over the process, yet not over its result. Power is vested in the parties, who have control over the result; they are the architects of the solution.[174]

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[171] Goldberg, S. B.; Sander, F. E. A.; and Rogers, N. H., *Dispute Resolution: Negotiation, Mediation, and other Processes: Supplement*. Boston, Toronto, London, Aspen. 1995

[172] Strong, S. I, "New Directions in Global Dispute Resolution: Beyond International Commercial Arbitration? The Promise of International Commercial Mediation." *Wash. UJL & Pol'y* 45 (2014): 11-293.

[173] Nirmalandu Dhar, *Labour and Industrial Laws of Bangladesh,* (Dhaka: ReMisi Publisher, 2004) 1-19.

[174] Lord David Hacking, What has history taught us in ADR, Paper presented to the Chartered Institute of Arbitrators Birmingham Centenary Conference, January 2015, Panel 1.

Finally, Mediation has turned into an essential and feasible alternative method to adjudication in the legitimate framework of corporate area in resolving corporate dispute. Some countries and states have laws of mandatory mediation, as an approach to urge the parties to the dispute to utilize the mediation mechanism as a favored approach to determine corporate dispute.[175]

3.2.2 Flexible Language and Convenient Environment

Compared to litigation, the parties involved in mediation are free to use flexible language that is comfortable to them. Furthermore, mediation provides a convenient environment for the disputing parties. A mediation room is more private than a court room.

The conduct of the parties in litigation is not the same as mediation. The important thing is on the way the judge, or mediator treats a distressed party who is confronted with the lawful issue. There are circumstances where one of the parties endures an emotional breakdown on the stand or during the trial or behaves in an angry, aggressive manner. Interestingly, the feelings of the parties are not the concern of the judge unless they interrupt the trial.

The mediator then again is empathic and sympathetic and is cautious with the feelings of parties and uses proper dialect to deal with sensitivities and sentiments. In correlation, the judges are not emotionless but instead they are required to be impartial and not take sides or seem to bolster one party. This is because the judge

[175] Julian Sidoli del Ceno, Case Comment: Costs, mediation and the judiciary, Arbitration 2015, 81(1), 105-108

will need to make a reasonable fair decision at the end while the mediator helps the parties arrive at their own decision with no involvement in the final settlement.

In conflict resolution, the scene in the court is unfriendly. The Judge decides the matter in an open place by the visible evidence and from the contention of the lawyers presented before the judge. There is no likelihood for the parties to discuss mutually in front of the judge. However, mediation again is an excellent alternative, where the mediators draw the picture to make issue clear and help the parties to think critically to lead them towards settlement.

3.3 The Mediation Mechanism and its Role in Settling Corporate Disputes in Bangladesh

The following section describes the consequence, advantages of mediation against the court based litigation system. This section also provides the role of mediators and lawyers to settle corporate disputes.

Mediation is a prevalent method for determining everything from neighborhood disputes to disagreements under multi-million dollar corporate and business contracts. An independent and impartial mediator helps the corporations, shareholders, creditors, employees to work out the issues in disputes and concoct an answer which both sides acknowledge. It depends upon the disputant parties to reach an agreement and choose what is incorporated in that agreement subsequently holding control of the outcome. During the mediation process individual

contemplations may be considered and if desired, there can be an accentuation on keeping up a working relationship between the parties.

Additionally, it is faster and simpler to go to mediation than to court. This implies the corporation or its representative can utilize mediation at an early stage in the disputes to save a lot of legal costs and both disputant parties of the company can maintain their business positions and reputations. [176] An effective mediation will dependably be more financially savvy than going to court. [177]

To settle disputes, corporation needs a strong and convenient mechanism. Mediation can be one of the prior mechanisms to get the satisfactory outcome.[178] For instance, a court can just translate what an agreement implies and cannot help the parties renegotiate the agreement if both sides conclude that is fundamental. In mediation, parties can accommodate corporate or business contemplation and come up with an effective solution for all concerned.[179]

In mediation, the lawyers may play incredibly key roles to settle corporate disputes applying alternative resolution methods. The use of mediation has been increasing among the lawyers and their corporate clients now a day. International Finance Corporation (IFC) has reported a seventy five (75) percent success rate in settling

[176] Stipanowich, Thomas, and J. Ryan Lamare. "Living with'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations." *Arbitration and Conflict Management in Fortune* 1 (2013).
[177] See the website of Queensland Law Society, http://www.qls.com.au/, accessed November 29 2014
[178] Stipanowich, Thomas, and J. Ryan Lamare, "Living with'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations." *Arbitration and Conflict Management in Fortune* 1 (2013).
[179] See the website of Queensland Law Society, http://www.qls.com.au/, accessed November 29 2014

corporate or commercial disputes in countries where IFC has supported ADR reforms including Bangladesh.[180]

To settle disputes efficiently corporations are gradually calling for the use of viable alternative mechanisms and skillful lawyers. In addition, corporate practitioners and legal professionals are trying to be mediation specialists to get the better opportunity and career. According to IFC report 2013, legal professionals are looking to find out that mediation offers as a prospect to expand their specialized services and to provide some opportunities to reveal refined advocacy and precise skills to solve the problem.[181]

The knowledge in mediation can provide a career advantage for a corporate lawyer. As corporation laws are complex, corporate disputing is generally fact-intensive. A blending of these factors could be added as uncertain aspect concerning the incorrect explanation and understanding of present issues in dispute. In the way, mediation or process of negotiating would allow the parties to search for a creative solution that will be able to accomplish the requirements of both disputants. Due to this fact, lawyers specializing in a particular area and practicing of corporate law is a vital tool to success of completing the commercial and corporate disputes mediation.

Mediation process can be initiated to reduce the backlogs of corporate cases pending in the courts. Resolving corporate disputes through mediation provides an alternative to remove the burden of backlogs from the judiciary of Bangladesh.

[180] IM-Mediate Resolution,"The Role of the Lawyer in Out-of-Court Dispute Resolution,"(April 2013), www.wbginvestmentclimate.org, Accessed February 14, 2015
[181] Ibid

Additionally, mediation mechanism can be useful tool for any corporations, large or small, that are facing many disputes which need the kinds of sensible, practical and interest-oriented solutions to settle the disputes quickly and privately.

Advancement of mediation in different nations of the world, particularly in developing counties is a step towards the appropriate approach to establish justice for all similarly. It has effectively brought the rich and poor in same footing which has failed to do so in adversarial system.[182] Through mediation mechanism both parties are liable for the outcomes chosen by them which opposed to win- lose situation.[183]

Generally, the win lose circumstance always turns into absolute barrier in the way for future relationship between the parties. On the other hand, win win circumstance which settle dispute as well as brings peace and mending that protect the future relationship between the parties. In mediation process the parties have the power to select and control the procedure of it for smooth, right, successful and viable outcome and they are under the freedom to select any mediator to settle their disputes.[184]

Apart from guaranteeing the above advantages, mediation can also ensure social and psychological returns to the parties. A large number of disputes can be settled

[182] Justice Jitendra N Bhatt, "A Round Table Justice through Lok Adalat (Peoples Court) A vibrant – ADR- in India" 1SCC(Jour) (2002) 11
[183] Ibid
[184] Mohammad Saidul Islam, "Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh." IIUC Studies 8 (2014): 95-112.

through mediation which gigantically decreases the enormous stress on the current backlogs from the Judiciary of Bangladesh. On the other hand, essential constructive sides of mediation are keeping up highest confidentiality and privacy. Privacy and confidentiality are the key esteem which supports human value and both constitute the fundamental human right and the sensible desire of each individual.[185]

Another focal point of mediation is the freedom of the parties, for instance in Bangladesh, to withdraw the suit whenever, in any phase of the suit, from the formal court and to send for the settlement through ADR to get the quick resolution of the dispute.[186]

Table 3 provides a comparison between mediation and court procedures from the perspective of corporations and their clients relating to the benefits of mediation and court litigation.

Table 3 Comparison between Mediation and Court Procedures

	Mediation	**Litigation**	**Benefits of Mediation**
Time	Days or Weeks	Months or Years	Resolve issues quickly
Money	Less	High	Can save more
Feelings	Minimum distress	Hostility, depression, anxiety, misery	Less need for therapy , maintain relationship
Power	Parties will decide	Judge will decide	Win win outcome

Source: Colin family mediation group

[185] Ishrat Azim Ahmad And Md Ershadul Karim, Principles of civil litigation: Bangladesh perspective, first edition: Law Lyceum, (2006) 222

[186] Dr. Rana Sattar, , Existing ADR framework and practices in Bangladesh: A Rapid Assessment-CIDA BLRP-B/MLJPA-Gob/ (2006) 54

It is very clear that role of mediation in settling corporate or commercial disputes are very high and satisfactory. On the other hand, the court procedures are day by day degrading their level to satisfy the disputant's goals.

However, the mediation mechanism is not very popular in the corporate sector of Bangladesh. The shareholders, creditors, employees, employers of the corporations are not fully aware of the positive effects of the corporate mediation.[187]

Furthermore, in support of the table 3 the following discussion outlines the views of the corporate professionals and legal practitioners on the practical scenarios of mediation process as compared to litigation.

The Scenarios of Corporate Cases in the Courts Litigation

- Throughout a much complex process, in terms of the rules those administer them and the necessities are being implemented as obligatory on the parties;
- Lengthier in duration,
- Increasing of delaying;
- Excessive cost;
- Resulting for the mandatory determination, expanding the risks for underprivileged and less income employees, mainly while they are not signified;

[187] BIAC website, Accessed September 14, 2014

- The court process is win lose situation. Usually the win lose situation becomes a rigorous obstacle in the way of future relationship between the parties.

The scenarios of mediation in settling corporate disputes

- Simple and easy complaint processes.
- Corporate or commercial mediation could be planned and effectively mark a conclusion in a counted days. The disputant parties' i.e. the corporations or clients would be able to reach the settlement faster, minimizing company interruption and saving significant time.
- Mediation mechanism can help to resolve dispute between disputed parities in a mutual way with very limited cost.
- Corporate or commercialized mediation depend on the confidentiality and nondisclosure for exchanging information, where it would be helpful for controlling undesirable publicity of the businesses through preventing the exposures of company errors, internal issues, and confidentialities of the company.
- Corporate or commercialized mediation would allow the parties in order to recognize and specify the problem areas towards business relations and identifying on how they would maintain the appropriateness of these problems to move into upgraded position of their business forward in their business transactions.

- Specialist knowledge of the relevant corporations and the codes and regulations under which it operates are exceedingly vital issue to settle corporate disputes.

- To settle corporate dispute expert understanding is the vital issue on the relevant corporation, their codes and regulation, which is possible in mediation.

- The non-adversarial environment of mediation allows establishments and their staffs to become more engaged throughout the disputed resolution development and permitting the employees to comprehend more of complex and legal matters which are important to the organization. For instance, disputing perspectives those are having relation with the debt, the intrinsic characteristics of these types of disputes are considered as greatly accommodated through few mechanisms which are consists of enough flexibility and creativity towards adequate resolution of complicated issues those rise between debtors and creditors.

- Explain clearly the information those are used to have complexity and as well as technical information into easy English to the disputant's parties for settling their disputes successfully.

- Mediation provides authentic discussions regarding the complexity of the fact and helps to maintain the focus on current and specific issues, and welcoming the business entities for future collaboration in order to create long-term relationships.
- Mediation process is win win situation which not only settle disputes but also brings peace and healing that preserve the future relationship between the parties.

3.3.1 Expansion of Mediation in Different Countries

This study explains the expansion of mediation in different countries for getting better outcomes of the results;

United Kingdom has prompted the foundation of the Civil Mediation Council (CMC) under Sir Brian Neill's Chair. This body involves independent mediators, corporate practitioners, professionals, and academicians. CMC is specially promoting mediation to settle civil, corporate and commercial litigation together with experts and scholars opinion. In 2001, the key role was played by the Government and the former Lord Chancellor to foster the ADR mechanism in the United Kingdom.[188] In corporate and commercial cases, the U.K Government provided appropriate mediation clauses to resolve corporate and commercial disputes amicably. In U.K the use of mediation has been increased 1200 percent in recent year.[189]

[188] Mediation, How to Win Clients and Influence People, "New Law Journal September," (2003) 1419.
[189] Ibid

In China, mediation is entrenched in history and culture. The corporations are not interested to settle their disputes by ordinary court litigation. *"The Confucian view was that the duty of every citizen to avoid court proceedings, which are seen as harmful to the natural social order."* As a consequence that view the Chinese and other Asian countries are considering adversarial system as the last alternative. Argument and negotiation are favored as part of a philosophy which emphasis agreement, tranquility and cooperation.[190]

Singapore can be the standard example for the developing countries, where ADR has been introduced with remarkable success. The Chief of Singapore states on the advancement of their judicial system:-

> *"The legal system of Singapore introduced mediation primarily because of the understanding that litigation system is not always the most appropriate to settle corporate or commercial disputes. The courts should be able to offer the most efficient, receptive and suitable methods for resolving dispute corporate disputes. They should be competent to recommend alternatives way to resolve the disputes rather than adversarial system. With a diversity of dispute resolution mechanisms accessible, disputants can then find the proper methods to settle their disputes rather than being required to fit their dispute to the adversarial forum."*[191]

[190] Justice Tassaduq Hussain Jillani, "Delayed Justice & the Role of ADR." Accessed October 12, 2014. http://supremecourt.gov.pk/ijc/Articles/7/1.pdf.

[191] Singapore Subordinate Courts of leading justice , Annual Report , (1999) 27

3.3.2 The Role of Mediators and Lawyers in settling Corporate Disputes in Bangladesh

Conciliation and mediation is the favored technique and as a matter of fact, is mandatory as a first step.[192] The judge should always refer the disputes to be settled by the way of mediation to reduce the pressure from the court. The judges and the lawyers are the key role player to settle disputes by refereeing mediation as a good mechanism.

Mediation is the successful and preferred mechanism in the current era which was also established methods at the time of Prophet Mohammad SM (Peach Be upon Him). In the Holy Quran, in Sura "Hujrat", Sura "Nisa" and Sura 5"Namal", there are many injunctions indicating such a preference. Stephen York makes a particular cite in his book on ADR and says that "Mediation and Conciliation are the methods preferred by the Prophet (Peace Be upon Him) and thus are superior methods in the Arab world."[193]

In addition, the mediation mechanism was initially introduced by the Madaripur Legal Aid Association (MLAA) to resolve small types of disputes in the local area of Bangladesh especially family disputes. At present many NGO's of Bangladesh are working to improve mediation mechanism to settle small types of family disputes but they are not strongly dealing with corporate issues. The local courts of Bangladesh are encouraging disputed parties to settle their disputes outside the courts, though we do not have any codified mediation Act similar to Arbitration Act 2001.

[192] Presentation at Lex mundi College of Mediators, accessed March 29, 2014, http.www.hg.org/1354.txt.

[193] Saleh, "The Settlement of Disputes in the Arab World: Arbitration and other Methods". 4 International Tax & Business Law280. (1986), 16.

The private sectors are trying to improve mediation mechanism, especially NGO's who are working very hard to resolve family disputes and they are quite successful as well. MLAA is following good strategy to resolve disputes. Every year they are mediating approximately five thousands (5000) disputes and roughly two thirds of them are resolved with strong satisfaction.

The famous five cases on NGO supported community mediation in the developing countries including Bangladesh was studied by the Centre for Democracy and Governance Bureau for Global Programmes, Field Support and Research U.S. Agency for International Development Washington, D.C. According to their report the court systems of Bangladesh is impassive to the needs of the parties. Conversely, Alternative Dispute Resolution i.e. mediation methods to the parties have been rather victorious and the satisfactions of the parties are high.

Finally, it is very much necessary to train the lawyers and judges about the importance and success of the mediation to resolve the disputes quickly and conveniently. The lawyers are always trustworthy to the clients, if they advice them to settle their dispute through mediation certainly corporations and disputed parties will follow that advice without getting any hesitation. It is undoubtedly clear that the role of the lawyers to settle the disputes through mediation is not only useful but also helping the judiciary to reduce the backlog of cases to establish justice to the corporations and their disputed parties.

However, with the above discussion it is clear that mediation may be a good option for the Bangladeshi corporation to resolve their disputes rather go to adversarial process to make delay the justice.

Yet, the corporations and disputed parties are always recommended to settle their disputes through mediation mechanism to continue business with good reputation. For lack of proper knowledge, positive idea about legal issues, time and cost, the corporations and disputed parties mainly are not feel interested to settle their disputes through ADR. They mainly think go to the lawyer and file a law suit is very easy rather to go for mediation to handle disputes individually are more complex.

Mediation mechanism, if it is properly designed and applied; would be the excellent approach for the disputed parties to settle their dispute with informal, less cost and friendly environment. Nonetheless, for Bangladesh mediation may be considered the significant and feasible alternative to litigation to settle corporate disputes, commercial disputes, family disputes and so on.

3.4 Summary of the Chapter

In this chapter, this study concluded that corporate or commercial business environment wants a fair, private environment and expert opinion to settle their dispute. Therefore, mediation is the alternative to traditional justice system, more speedy, competent, private and above all, less expensive.

Finally it is concluded that the mediation mechanism is strongly needed for the corporations to resolve their disputes privately and confidentially with very low cost but there are some issues need to be improved which are, training of the lawyers and judges, enact mediation Act , produce huge trained mediators and spread them out in every local courts of Bangladesh. This above summary of findings have attended to answer the first and second research questions of the study and satisfied the first research objective of the study.

CHAPTER FOUR

THE PROVISIONS OF ARBITRATION AND MEDIATION MECHANISMS IN STATUTORY LAWS OF BANGLADESH

4.1 Introduction

This chapter explains the provisions of arbitration and mediation mechanisms in statutory laws of Bangladesh. It provides a reasonable analysis of the Arbitration Act 2001 and some relevant provisions of mediation in Code of Civil Procedure 1908. This chapter provides a scrutiny of the laws and access to justice to satisfy the second and third research questions and second research objective of the study.

4.2 The role of Laws, Access to Justice and ADR

According to former Chief Justice Mustafa, ADR is perceived as a non formal settlement mechanism that assists the disputants to solve their disputes quickly and inexpensively.[194] Other than litigation, ADR provides a welcome alternative to access to justice for commercial and corporate disputes.

In any state, access to justice is deemed to be a most desirable objective which is treated as essential factor of human rights because "injustice anywhere is a threat to

[194] The Daily Star, 29 April, (2007), 2.

justice everywhere." [195]The concept of access to justice includes the whole range of laws, procedures and institutional arrangement through which justice can be delivered to the people in efficient and effective manner and it denotes the instrumentalities by which citizens can approach the courts, lawyers, legislatures, judges and administrative agencies for both substantive and procedural justice.[196] In terms of commercial and corporate disputes, access to justice means all parties involved must have equal opportunity to be protected by the law. This is in line with Constitution of the People's Republic of Bangladesh that guarantees equality before law to every citizen and to be protected and treated in accordance with law.[197]

Within the Bangladeshi court system, the legal maxim *ubi jus ibi remedium*[198] is a principle that is indicated in Section 9 of the Code of Civil Procedure, 1908. The court shall try all civil cases unless it is barred by specific laws. Disputes may arise at any stage of life; it can be related to corporate matter, family matter, and personal matter and so on which can be determined by adjudicative process or other alternative tribunals. Conversely, in Bangladesh all sorts of civil disputes are brought before the courts, consequently, the civil courts are becoming overburden and delivery of justice is delayed by the judiciary without any wrong intention as well as lack of expertise and judges.[199]

[195] Dr. Faruque-Al-Abdullah "Promoting access to justice through Judicial Mediation." The Bangladesh Experience, Commonwealth Legal Education Conference. (2006) 46
[196] Dr. Faruque-Al-Abdullah "Promoting access to justice through Judicial Mediation." Ibid
[197] The Constitution of the Peoples Republic of Bangladesh (adopted 4th November 1972, entered into force 16 December 1972) art. 27, 28 and 31

[198] Ubi Jus Ibi Remedium means "where there is a right there is a remedy". This Latin maxim illustrates that the rights will be protected everywhere , where there is violation, there will be an equitable remedy by the law and all courts are bound to follow this well established maxim.
[199] BIAC website, Accessed January 25, 2015

The courts in Bangladesh are not alone. Other common law practicing countries have already experienced the same problem of backlog of cases, excessive delay and high cost to reduce the pressure of civil cases.[200] Few decades ago developed countries like the U.S.A., Australia and Canada had same problem as Bangladesh is witnessing now.[201] However, the above developed countries are reducing their backlog of civil cases by way of mandatory alternative mechanisms to ensure access to justice.[202]

As mentioned above, the Constitution of Peoples Republic of Bangladesh provides a legal system in Bangladesh that guarantees access to justice for each and every citizen of the country. However, in practice the scenario is totally different for the critically disadvantaged section of the people.[203] This scenario may also affect parties to commercial and corporate disputes.[204] In most of the civil cases brought before the court, power, money, good connection with judges are going to be the key factors which may violate the right to access to justice.[205]

In order to reduce the problem of access to justice by way of litigation, ADR can provide a more accessible system of dispute resolution to the citizens. As ADR is a voluntary and consensual system, it helps the parties to engage in an informal negotiation and give the parties opportunities to participate fully in the process.

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[200] Dr. Faruque-Al-Abdullah "Promoting access to justice through Judicial Mediation." The Bangladesh Experience, Commonwealth Legal Education Conference. (2006) 46

[201] Ibid

[202] Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program'(2010)." *Cardozo Journal of Conflict Resolution* 11: 479-485.

[203] Mostafa Mahmud Naser, The Role of clinical legal education in increasing access to justice: The context of Bangladesh , commonwealth legal education conference, (2006) 54

[204] For instance disputes involving employees who are made redundant by their employers or small companies being denied equal share of a market segment by big companies.

[205] Mostafa Mahmud Naser, The Role of clinical legal education in increasing access to justice: The context of Bangladesh , commonwealth legal education conference, (2006) 54

4.3 Critical Analysis of Bangladeshi Laws Relating to Arbitration and Mediation

This section critically analyzes primary principles of arbitration based on Arbitration Act 2001. These principles are preliminary relief and interim measures, evidentiary matter, arbitration award and its effect, courts power to intervene in arbitration award and a case analysis on court intervention in the arbitration award. The discussion also examines important provisions relating to mediation under the Code of Civil Procedure 1908.

4.3.1 Arbitration

Arbitration is private justice born out of the parties' determination. With the inclusion of an arbitration clause throughout a specific contract, the involved parties make a choice to make the settlements of their disputes, in the place of even to outside of the courts. These disputes would be offered to arbitrators.

In the context of Bangladesh, arbitration is administered by the Arbitration Act 2001. Section 9 of that Act sets out the essential fundamentals and principles to be enclosed in particular arbitration agreement, as describes that it would be in the arrangement of an arbitration clause in an agreement, else in the form of a different agreement. The arbitration agreement must contain all the ingredients of a valid and enforceable agreement i.e. ambiguity must not exist in the writings and descriptions of the agreement. The governing law has to be included for disputed resolution.

The Arbitration Act 2001 is applicable as commercialized arbitration for both, domestic and international. The matters are linked to international commercialized arbitration award have to be arranged directly with the High Court Division of the

Supreme Court of Bangladesh under the Act. The arbitration contracts are dealing within the country will be approved by the District Judge in the particular district or place wherever the arbitration is pending.

4.3.2 Preliminary Relief and Interim Measures

The arbitral tribunal has been vested with vast authority to order interim measure unless the parties have agreed otherwise. Moreover, until a final award is delivered, the arbitral tribunal has the power to protect parties' right whatever is required. The tribunal may grant any necessary measures accessible according to the procedural rules appropriate to the arbitration proceedings, under the appropriate law of the country mentioned in the contract. The order of the arbitral tribunal is binding for the parties and enforceable by the court. However, if the party does not want to comply with order of the interim measures, the tribunal may request the respected court in enforcing the order of the interim measure.

According to section 21 of the Arbitration Act 2001, the arbitral tribunal may order any interim measure at the request of a party, as the arbitral tribunal may think obligatory in respect of the dispute and such an order is not appealable. The tribunal also has the power to allow specific performance of part of a contract or injunction.[206] Yet, the interim orders shall be in respect of subject matter of dispute.

4.3.3 Evidentiary Matters

Evidentiary matters are not rigorously applied in arbitral proceedings but in court this rules are strictly employed. Sometime arbitral tribunal does not allow certain

[206] See the website of SAARC Arbitration Council, A specializes body of south Asian association for regional cooperation, Accessed January 20, 2015, http://sarco.org.pk/bangladesh.html.

evidence that might be unreliable or misleading. The evidentiary matters or rules of privileges are considered based on the grounds that, in order to further certain interests, secrecy, privacy or non disclosure is more vital than value of the evidence.[207] In addition, it does not mean that the arbitral tribunal is providing privileges for hiding the truth. In fact, the tribunal may call upon any evidentiary matters (agreed by parties) if they find relevant for the trial. Under section 34 of the Arbitration Act 2001, by administering an oath with the consent of the parties the evidence may be presented before the arbitral tribunal orally or in writing or by affidavit.

However, arbitral tribunal has some limit as well to call upon the evidentiary matters or ordering parties to answer any question which they are not capable to do so due to some incapacity or confidentiality. Section 33(2) of the Arbitration Act 2001 provides that a person must not be compelled or forced to produce the evidence or documents which belongs to him. However, if the evidences or documents are agreed by the parties to be produced and he/she failed to produce before the court after issuing summons, the responsible person will be subject to punishments by order of the court.

4.3.4 Arbitral Award by the Arbitral Tribunal

Finality and binding are the basic attribute of arbitration and key elements that draws in numerous parties to pick arbitration to resolve corporate disputes. This is because the capacity to authorize an arbitral award before a national court which minimize the risk of a challenge or appeal against arbitral award before local court. Consequently

[207] Richard M Mosk and Tom Ginsburg. "Evidentiary Privileges in International Arbitration." International and Comparative Law Quarterly 50, no. 02 (2001): 345-385.

this could save the parties time and cost. According to section 39(1) of the Arbitration Act 2001, the arbitral award rendered by the arbitral tribunal is final and binding for both contracting parties. However, under section 39(2) of the Act, any of the contracting party may challenge or appeal against that arbitral award based on specific grounds which shall not be affected by the provision of section 39(1) of the Act.

Section 42 (1) and (2) of the Arbitration Act 2001 provides for an application for setting aside arbitral award. According to section 42(1), Domestic arbitral award can be set aside by the District Court of Bangladesh on the application of a party within sixty days from the receipt of the award. On the other hand, the High Court Division of the Supreme Court may set aside any arbitral award on the application of the party relating to international commercial arbitration held in any place of Bangladesh and the application has to be filed within sixty days from the award under section 42(2) of the Arbitration Act 2001.

According to section 43 of the arbitration Act 2001, an arbitral award may be set aside based on the following grounds if the party furnishes sufficient proof that a contracting party was under some incapacity; arbitration agreement was not valid; the party making application was not notified properly; arbitral award deals with a dispute not falling within the scope of the arbitration agreement; constitution of the tribunal was not in conformity with the arbitration agreement; dispute was not arbitrable, award was conflicting with laws or public policy of Bangladesh; award was induced or affected by fraud or corruption.

4.3.5 Court's Power to Intervene in Arbitration

The court's power to intervene in arbitral proceedings may lead to unnecessary delay and frustrate the parties from getting positive outcomes. Section 7 of the Arbitration Act 2001, puts a bar for the court if the matter is concerned with the arbitration and the parties are willingly and want to settle their disputes through arbitration. The court is bound to stop the commenced proceeding if there is any arbitral clause found in the contract.[208]

The case of *Bangladesh Jute Mills Corporation v Maico Jute and Bag Corporation & Others*[209] held that the court cannot trial suit which is already pending to arbitration tribunal for resolving the dispute.

Section 10 of the Arbitration Act 2001 complements section 7 which is closely modeled on article II (3) of the the New York Convention 1958 which is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. According to section 10, no Bangladeshi court ***shall*** interfere with an issue that focuses on arbitration contract between the contending parties. If a party to an arbitration agreement commences litigation in a Bangladeshi court over a certain matter and the other party objects to this before the filing of the statement of defense, then the Bangladeshi court shall, unless convinced that the contract is void, out of

[208] *Brexco Bremer Export ContorBrand, West Germany & others Vs M/s. Popular Biscuit Ltd. 6 MLR (HC) 281*

[209] Bangladesh Legal Decisions, 22 BLD (HCD), (2002), 320. Accessed Novebmer 15, 2014, http://www.blast.org.bd/judgements.

action or unable of determination, stay the proceedings and pass on the parties to arbitration.

However, the disputed matter can be decided by the High Court Division of the Supreme Court of Bangladesh if the court finds that the disputed issues will be convenient to try by the court as well as saving of cost rather than by arbitration and also there is sufficient cause why the disputed issue should be decided by the court.[210] This shows that the law allows to certain extent, interference by the court (based on specific grounds) in the proceedings of arbitration tribunals. A famous case was analyzed below on court intervention in the arbitration award by the courts of Bangladesh.

Saipem S.p.A. v. The People's Republic of Bangladesh[211] *("Saipem v. Bangladesh")*

Background and the ICC Arbitration

Saipem S.p.A., an Italian oil & gas company, and Petrobangla (Bangladesh Oil, Gas & Mineral Corporation), a Bangladeshi state owned entity, entered into an agreement on February 14, 1990, to construct a pipeline to carry condensate and gas to diverse location within Bangladesh. The contract was to be governed by the laws of Arbitration of Bangladesh and it was also provided in the contract that if any dispute arises between the parties it will be resolved by the arbitration under International Chamber of Commerce (ICC) Rules to be held in Dhaka, Bangladesh. However, the completion of the total project was considerably delayed because of massive hostility by the local population. Even though the parties determined to expand the date for

[210] S 20 (2) of the Arbitration Act 2001

[211] *Saipem v Bangladesh* (ICSID Case No.ARB/05/7) Unreported award June 20, 2009.

completion of the project but they were unable to do that because of the infinite damages and supplementary expenditures due to the delay.[212] Eventually, Saipem referred the dispute to ICC arbitration tribunal seeking the payments owed under the contract.

During the ICC arbitration, ICC tribunal denied several of Petrobangla's procedural requests[213] consequently Petrobangla sought the assistance of the First Court of the Subordinate Judge of Dhaka seeking the revocation of the authority of the ICC Tribunal's for the misconduct of the arbitrators and denial of the party's procedural rights.[214]

Following application by the Petrobangla, the High Court Division of the Supreme Court of Bangladesh first stayed the arbitration proceedings. Thereafter, on April 5, 2000 the First Court of the Subordinate Judge of Dhaka revoked the authority of the ICC arbitral tribunal based on the allegation that the tribunal had committed misconduct by denying the procedural rights of Petrobangla.[215]

Despite the order of the Bangladeshi courts revoking the authority of the ICC tribunals to precede further, ICC tribunal's determined to continue with the proceedings. Nevertheless, on May 9, 2003, The ICC arbitral tribunal made an award holding *inter alia*[216] that Petrobangla had violated its contractual obligations to compensate Saipem for the delays on the project. Subsequently, Petrobangla filed a

[212] *Saipem v Bangladesh* (ICSID Case No.ARB/05/7) Unreported award June 20, 2009.
[213] Ibid
[214] *Saipem v Bangladesh* Unreported June 20, 2009, at 31
[215] *Saipem v Bangladesh* Unreported June 20, 2009, at 43.
[216] Inter alia: (Latin, among other things). Used when quoting only a portion of a statute or regulation, or part of a judge's opinion, or a document or writing.

petition under sections 42[217] and 43[218] of the Arbitration Act 2001 before the High Court Division of the Supreme Court of Bangladesh to set aside the arbitral award made by the ICC arbitral tribunal.

Consequently, the High Court Division of the Supreme Court of Bangladesh held that the award was a nullity because the authority of the ICC arbitral tribunal had been revoked earlier by the First Court of the Subordinate Judge of Dhaka. According to the High Court Division decision, the ICC award was rendered non-existent and was unenforceable in Bangladesh. Nonetheless, Saipem did not appeal this decision.

The ICSID Arbitration

Saipem, filed a request to International Centre for Settlement of Investment Disputes (ICSID) on October 5, 2004, for arbitration between Saipem and Bangladesh. The claims were based on the violation of the Bilateral Investment Treaty (BIT) between the People's Republic of Bangladesh and the People's Republic of Italy on 20 March 1990 and entered into force 20 September 1994.

The Saipem claims were based on the undue interference by the courts of Bangladesh in the ICC arbitration proceeding and revocation of the tribunal's authority which consequently deprived Saipem from any compensation. Thus, Saipem made a request

[217] Under section 42 of the Arbitration Act 2001, the High Court Division of the Supreme Court may set aside any arbitral award on the application of the party relating to international commercial arbitration held in any place of Bangladesh and application has to be filed within sixty days from the award.

[218] An arbitral award may be set aside based on the following grounds if the party furnishes sufficient proof that A contracting party was under some incapacity; arbitration agreement was not valid; the party making application was not notified properly; arbitral award deals with a dispute not falling within the scope of the arbitration agreement; constitution of the tribunal was not in conformity with the arbitration agreement; dispute was not arbitrable, award was conflicting with laws or public policy of Bangladesh; award was induced or affected by fraud or corruption.

to ICSID for arbitration that Bangladesh breached its obligations under the BIT and sought *inter alia* a declaration that Bangladesh expropriated Saipem of its investments without compensation.

The ICSID Tribunal rendered the final award on June 30, 2009, considering that the expropriated "property" consisted of "Saipem's residual contractual rights under the investment as crystallized in the ICC Award of 2003."[219]

These actions by the Bangladeshi courts deprived Saipem from the benefit of the ICC tribunal's award.[220] The decision of the High Court Division of the Supreme Court of Bangladesh that the ICC arbitral tribunal's Award was a nullity "is tantamount to a taking of the residual contractual rights arising from the investments as crystallized in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT".[221]

However, the courts of Bangladesh have the discretionary power to repeal the authority of the arbitral tribunal's if they find any misconduct or violation of the terms and conditions. But in this case, the Bangladeshi courts abused their authority when exercising supervisory jurisdiction over the ICC arbitration process based on

[219] *Saipem v Bangladesh* Unreported June 20, 2009, at 128.
[220] *Saipem v Bangladesh* Unreported June 20, 2009, at 129.
[221] Article 5 of the BIT defines expropriation as follows: "(1) The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction. (2) Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures."The treaty entered into force on 20 September 1994between Bangladesh and Italy.

the reasons wholly unrelated to such misconduct. The revocation of the ICC arbitral tribunal's authority by the courts of Bangladesh was contrary to the international law, particularly the New York Convention. Hence, such revocation of the arbitration process by the local courts of Bangladesh constituted an expropriation according to the meaning of article 5 of the bilateral investment treaty (BIT). [222]

According to the decision of the ICSID Tribunal, the Bangladeshi courts were partial and their actions were against the New York Convention, where article II (1)[223] clearly mentioned that each contracting states shall follow and honor the arbitration agreements properly. Furthermore, the ICSID Tribunal considered that "the expropriation of the right to arbitrate the dispute in Bangladesh ... corresponds to the value of the award rendered without the undue intervention of the court of Bangladesh."[224] Therefore, the ICSID Tribunal rendered the decision that Bangladesh will pay the equivalent amount plus interest to Saipem which was awarded by the ICC Tribunal.

In addition, the case of *Saipem v. Bangladesh* is exceptional which is expected not to happen again and the ICSID Tribunal's holding this case as a learning example so that in future no state courts can exercise their intervening power in unfair way.

Findings: Intervention by the court must be limited to ensure success of arbitral proceeding. Courts may intervene in arbitral proceeding if they find any irregularity,

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[222] Saipem v Bangladesh (ICSID Case No.ARB/05/7) Unreported award June 20, 2009.

[223] Under Article II (1) of the New York Convention, the arbitration agreement shall be writing under which the contracting states agree to submit to arbitration, any disputes which have already arisen or may arises by the agreement and the subject matter of the agreement must be capable of settlement by arbitration whether contractual or not. Each contracting states shall honor the arbitration agreement.

[224] *Saipem v Bangladesh* Unreported June 20, 2009, at 204.

fraud, *ultra vires* or other defect by the arbitral tribunal which has been already proved. Moreover, this case can be used as a good example of learning in terms of not to misuse any of the power ensured by the Arbitration Act as well as arbitration rules. If these rules and regulations are exercised with a *bona fide* intention to resolve a dispute between the parties especially from different countries within shortest possible time, arbitration is the best option for it.

4.3.6 Mediation

In Bangladesh, there is no single legislation regulating mediation. In 2003, the Code of Civil Procedure 1908 was amended and new provision was inserted dealing with mediation.

Section 89A of the Code of Civil Procedure (Amendment) Act, 2003 provides that: Mediation is applicable to all civil suits except suits under the Artha Rin Adalat Ain 2003.[225] According to section 89A the disputed parties, after filing the written statement, may apply to the court to withdraw the suit showing their interest to settle through mediation at any stage of the suit, the court may adjourn the hearing and refer the matter to the appointed pleaders/lawyers of the parties. Moreover, if there are no appointed lawyers/ pleaders, the district judge may appoint the panel in consultation with the president of the District Bar Association.

[225] According to the Artha Rin Adalat Ain 2003, the disputed parties have the authority to try their suits at the pre trial stage also post trial stage through the settlement conference. Under section 24 of the Artha Rin Adalat Ain 2003, if the disputed party wants to settle their disputes by the mediation mechanism, the Adalat is bound to stop the trial and refer the matter to the mediator or authorized lawyers of the parties. After settlement of the dispute the Artha Rin Adalat shall pass the necessary order according to such agreement and no appeal will be allowed based on that order.

The panels of the mediators have to be skilled or trained who have a background on mediation as a trainer or specialization about mediation. The person may be senior practicing lawyer, retired judge or any persons deemed to be appropriate for the disputed purpose. However, the person shall not be a mediator who has the benefit of the subject matter of the disputes in either side of the party as well as a person holding office of profit of the Government.[226]

Thus, in Bangladesh the mediation mechanism is not considered as a strong alternative to settle corporate disputes compared to the USA where pre-trial mediation is compulsory. The judges and lawyers also do not encourage the parties to settle their disputes by mediation in the early stage.[227] Disputed parties are preferred to go to the court because of lack of practice and knowledge on ADR which really harmful for the parties as well as for the judiciary.

In addition, the process of mediation should be compulsory for any types of corporate or commercial disputes to cut down the backlog of cases of the judiciary and the lawyers can play active role to encourage the party to try mediation before go to the court. As well as individual mediation institutions can be formed to familiarize the use of mediation in settling corporate or commercial disputes. The fees structure of the mediators can also be fixed by the Judiciary based on the nature of the suits.

In 2012, the legislature, feeling the need to enforce mandatory mediation in all civil cases, made a further amendment to the CPC. While the law has been passed, it is not

[226] See The Code of Civil Procedure, 1908(as amended in 2003 by Act 8 of 2003), Section 89-A (10)

[227] Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program'(2010)." *Cardozo Journal of Conflict Resolution* 11: 479-485.

yet in force, as it is awaiting a trained pool of mediators to run court-referred mediations. In light of the latest amendment a huge pool of trained mediators will be required. Alongside mediators, judges must be trained to refer cases to mediation, supervise them and then finally enforce the results. Likewise, lawyers need to be trained and made aware of all the intricacies of mediation so that they can provide correct advice in light of the law on mediation, guide justice-seekers through the mediation process and represent their best interests.

A working mediation system, with judges and lawyers trained in the trade, will firstly reduce backlogs in the formal courts and secondly, lay the platform for speedy, efficient and inexpensive delivery of justice, thereby automatically benefiting corporations and their shareholders, creditors, employees, who face particular complexity in getting suitable and reasonable justice.

Businesses and commerce will particularly benefit from the efficiency with which mediation has the potential to resolve legal conflicts. Besides, being a quicker way of dispute resolution, the benefits include savings on long-running legal expenses, the opportunity to bring in underlying business considerations into account and prevent animosity between the parties.

The legislation making mediation mandatory in all civil cases is certainly a step in the right direction. The potential of mandatory mediation in promoting commerce and foreign investment is immense. It must now be followed up with creating the

infrastructure and building the capacity of the justice system for facilitating mediation.

4.4 Summary of the Chapter

This chapter finally concludes that intervention by the court in the arbitral proceeding has to be limited to get the satisfactory outcomes from the arbitration. A new Act relating to mediation has to be enacted. This above summary of findings have strived to answer the second and third research questions of the study and satisfied the second research objective of the study.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

This study purports to undertake total review of arbitration and mediation as alternative dispute resolution mechanisms in settling corporate disputes in Bangladesh for the usages of corporations, shareholders, employees, creditors and other disputed parties in a corporate or commercial dispute.

This chapter recaps the findings of the research in view of its set of objectives; and recommendations have been made based on the perception of the crucial issues which need to be resolved for getting more satisfactory outcome for the corporations and disputed parties.

In Chapter Two, this study has analyzed the role of arbitration, current practice, advancement and the various aspects of arbitration in settling corporate disputes in Bangladesh between corporations, shareholders, creditors, employees and so on. Chapter two concludes that arbitration as an alternative method of dispute resolution recommends a high-quality prospect to the parties to get their disputes settled comfortably. Arbitration has been established as a cost effective, quicker and simple means to resolve corporate disputes harmoniously and confidentially.

This ADR mechanism is unique and significant process by which the company and disputed parties can settle their disputes effortlessly without any interference by the court.

Arbitration mechanism is accepted to be a consensual way to deal with the settlement of debate not taking after the uncontrollable customs of the litigation framework. It is portrayed as private, quick, compelling, shared participatory, expense and feeling successful, promoter of peace and social amicability by reducing huge backlog of cases pending to the different courts of Bangladesh.

In Chapter Three, this study has analyzed the role of mediation mechanism in settling corporate disputes. The study found that Mediation has an extremely critical role towards the improvement of access to justice maintaining a strategic distance from a wide range of procedural and different complexities. To ensure access to justice Mediation Act has to be enacted with some mandatory clauses that corporations must try to settle their dispute through mediation before coming to the court.

Understanding the immense accomplishment of Mediation, corporations of the world have embedded the provisions of mediation in their dispute resolution framework. In Bangladesh the Family Court, the Civil Court and Artha Rin Adalat have gained an incredible achievement in this field after the insertion of mediation clause in the Code of Civil Procedure 1908.[228]

[228] Islam, Mohammad Saidul. "Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh." IIUC Studies 8 (2014): 95-112.

Chapter Four has analyzed the provisions of arbitration and mediation mechanism in Statutory Laws of Bangladesh and their role in settling corporate disputes between corporations and disputed parties. Legislations relating to arbitration and mediation in Bangladesh have created a window of opportunity for the corporations and their disputed party who do not want to go to the court due to their business reputation and financial constraint or if they go to the court the matter will be public and media inspection consequently their name brand will be affected hugely. Conversely, the matter of arbitration and mediation can provide off the record results. However, continuous development of arbitration and mediation is highly required to ensure access to justice for all.

Nevertheless, arbitration and mediation mechanisms are not used frequently in Bangladesh as a court alternative. The disputed parties still prefer to settle their disputes by the traditional court procedure; they think the process is easy because of the lack of understanding and experts on ADR.

Based on the above discussion, it is now recognized that arbitration and mediation are more strong and prospective as against traditional court procedure where the parties have an ongoing business relationship, the parties have a very good standing on the market, where the dispute is factual or manages with settled legal issues, there the dispute would be openly humiliating or could be abused, and so forth. Nonetheless, arbitration and mediation are the best options for the computations as alternative resolution of dispute settlement because of the advantages of the mechanisms such as: confidentially, amicably, informally and mutually agreed way

of settling disputes and above all the enforceability by the court without any intervention.

5.2 Recommendations

Turning now to the recommendations, it has been observed that arbitration and mediation can be the alternative mechanism in settling corporate disputes between corporations and disputants in Bangladesh. However, there are few obstructers which need to be regulated and overcome in order to improve the use of arbitration and mediation in settling corporate disputes to ensure justice and to reduce backlog of cases from the judiciary.

It is significant to emphasize that there are some aspects for a blooming achievement of alternative dispute resolution identified in this study i.e., raising awareness on ADR, strong regulation and government's support, producing skilled mediator and arbitrator with training and facility, have been recognized as significant characteristics for the development of arbitration and mediation in Bangladesh.

It should be treasured that in order to make Bangladesh a gorgeous place for much-appreciated oversees deals, for economic process and advancement, ADR mechanisms have to be improved and implemented by laws and regulations as an alternative to court litigation. It is not enough merely to enact a brand new law on arbitration and mediation the Government has to implement the stated purpose of the Act as well as it should restrain the unauthorized interference by the court to get the satisfactory outcomes. The Government and therefore the judiciary should take initiatives and create continuous stabs towards the event of legal infrastructure

and establishment building within the field of different dispute resolution, as well as arbitration and mediation. In this respect the subsequent tentative propositions are also value considering:

- The preferable characteristics for choosing arbitration mechanism should be quicker, cost effective, less procedural, and enforceable by the court. However, the law may allow to a certain extent the court to exercise its power to ensure fair and equitable results for the disputing parties. On the other hand, mediation mechanism has to be compulsory in the early stage of the suits to ensure speedy justice.

- In due course, the matter of the international commercial and corporate arbitration should be handled more professionally, efficiently and successfully with the special bench of the High Court Division of the Supreme Court of Bangladesh. Such specialist bench may be comprised judges with the suitable expertise and background in the field of arbitration appointed from the High Court Division of the Supreme Court of Bangladesh. Article 95 of the Constitution of the People's Republic of Bangladesh may be a good example to choose the requisite qualification and experience for the appointment of judges in order to comprise the suitable people for the bench.[229] In order to develop the culture of arbitration in Bangladesh, the Government may consider sincerely these issues and make it a pretty place for corporate dispute resolution by arbitration.

[229] *See* Art. 95, The Constitution of the People's Republic of Bangladesh, 1972.

- In response to the use of mediation mechanism to resolve corporate disputes, the Government must take the initiatives to enact a Mediation Act resembling the Arbitration Act 2001. A statutory law governing mediation law and procedure would promote consistency and confidence in the corporate sector.

- Judges and lawyers should be conscious of the worth of alternative dispute resolution when the courts are heavily overburdened with caseloads. The Government, court and private bodies should come forward to develop the culture of arbitration and mediation as the good alternative to settle corporate disputes. On the other hand, seminars and workshops should be organized for judges, advocates, judicial officers and staffs, legal counsels, leading corporate firms, NGO's and so on to raise the voice of ADR to reduce the backlog of cases from the Judiciary of Bangladesh.

- To improve access to justice, a dedicated arbitration or mediation centre should be opened at every division/province of Bangladesh. These centers will resolve local corporate matters free from court intervention. The parties wanting to use the arbitration or mediation centre can be charged a nominal fee.

- This thesis has identified several stakeholders in relation to arbitration and mediation mechanisms in Bangladesh. The stakeholders are corporations/ corporate industrial players, arbitrator/ mediator, lawyers, judges and BIAC as the institutional stakeholders. Success of arbitration and mediation require

a motivation from all these stakeholders. Each of them must take positive steps to advance the desired application of arbitration and mediation mechanisms to settle corporate disputes in Bangladesh.

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