

Alternative Dispute Resolution under Labour Laws of Bangladesh: A Critical Review

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Abstract: Conflict or difference of opinion inevitably results from human interaction. Huge potential for conflict exists in the industrial sectors and often the disputants feel a need for outside intrusion. There are two processes to settle a dispute, one is by Adversarial and another is by non-adversarial process. Non-adversarial system is a system by which the dispute is settled outside the court and it is called Alternative dispute resolution (ADR). This is a cheap and speedy remedy for the worker, where settlement of industrial dispute by the court is a costly and time consuming procedure. This article aims to define ADR, application of ADR in the field of Industrial dispute and why ADR system is important and necessary in the field of settlement of industrial dispute.

Keywords: Alternative dispute resolution, Settlement, Industrial dispute, Strike, lock-out, trade union, collective bargaining Agent.

I. INTRODUCTION

Section 210 of the labour act, 2006 introduces the alternative dispute resolution system for the settlement of industrial dispute between the worker and worker or the worker and employer or the employer and employer. Alternative dispute resolution (ADR; known in some countries, such as Australia, as external dispute resolution) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with or without the help of a third party.⁴ To settle the industrial disputes of the parties firstly they have to negotiate with each other which is called negotiation. In this step help of the third party is not required. The main purpose of the process is for sufficient communication about the case for each side to take place so that agreement can be reached. If negotiation is not fruitful than they shall refer the matter to the conciliator which is called conciliation proceeding and here help of the third party is required. In this case conciliator is a person who is appointed by the government and whose duty is to help the parties to reach an agreement. He just helps the parties without giving any binding decision. He shall make the parties understand that what will be the ultimate result, if they settle the matter between them; what will be their loss and what will be their gain, if they go to the court. This is a win-win process; there is no fair of loss from any party. If the parties fail to settle the dispute between them in conciliation proceeding than they may refer the dispute either to the arbitration or may call strike or lock-out. If they go to the arbitration the arbitrator shall give a binding decision and it shall be valid for sixty days. If they do not refer the matter to the arbitrator, one party giving required notice to the other party may start strike or lock-out which can be continued for thirty days and after thirty days the government shall ban the strike or lock-out and shall refer the matter to the labour court. Alternative dispute resolution (ADR), for instances negotiation, conciliation and arbitration, is often regarded as a better option than the more conventional mechanisms for the settlement of labour dispute, because of the lower cost and greater speed involved, it has the potential of presenting a more successful and sustainable solution to the labour dispute.

II. METHODOLOGY

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⁴ Australian Securities and Investments Commission Complaints Resolution Schemes. [Asic.gov.au](http://en.wikipedia.org/wiki/Alternative_dispute_resolution). Retrived on 2013-07-14. Available at: http://en.wikipedia.org/wiki/Alternative_dispute_resolution

This study based on secondary sources. The secondary sources which have been reviewed are: books, journals, reports, news papers and data from various official and unofficial sources. Internet sources have also used to collect information on the alternative dispute resolution system under labour law.

Concept of ADR:

“The concept of alternative dispute resolution (ADR) includes all dispute resolution mechanisms other than the formal process of adjudication in a court of law (Pretorius 1991:264). According to Zack (1997:95), ADR offers a means of bringing workplace justice to more people, at lower cost and with greater speed than conventional government channels. It also helps to clear the backlog of cases at statutory dispute resolution institutes and is thus assisting government agencies to meet their societal responsibilities more effectively. Wittenberg et al (1997:155) mentioned that more and more disputants, courts, public agencies and legislatures in the USA are embracing the use of ADR in employment disputes. Slate (1998:1) indicated that the American Arbitration Association is dedicated to the promotion of specifically the mediation process for dispute settlement. Mediation or conciliation is seen as a fast, cheap and effective way to resolve disputes. The settlement rate achieved through mediation was as high as 85% in the USA.”⁵ ADR is a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own problems. ⁶ So, ADR is an umbrella term for a variety of processes which differ in form and application. Differences include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator or conciliator) and the legal status of any agreement reached. ⁷ Despite these differentials, the Victorian Parliament Law Reform Committee suggests that it is possible to identify some common features relating to the acronym ‘ADR’. For Example:

- There is a wide range of ADR processes;
- ADR excludes litigation
- ADR is a structured process
- ADR normally involves the presence of an impartial and independent third party;
- Depending on the ADR process, the third party assists the other two parties to reach a decision, or to make a decision on their behalf; and
- A decision reached in ADR may be binding or non-binding.⁸

Concept of Industrial dispute

An industrial dispute may be defined as a conflict or difference of opinion between management and workers on the terms of employment. It is a disagreement between an employer and employees’ representative; usually a trade union, over pay and other working conditions can result in industrial actions. When an industrial dispute occurs, both the parties, that is the management and the workmen, try to pressurize each other. The management may resort to lockouts while the workers may resort to strikes, picketing or gherao.

Section 2(62) of the Bangladesh Labour Act, 2006 defines-“the industrial dispute means any dispute or difference between employers and employers or between employers and workers or between workers and workers which is connected with the employment or non-employment or the terms of employment or the conditions of work of any person.”

Causes of Industrial Dispute

⁵ <http://www.accord.org.za/ajcr-issues/%EF%BF%BCalternative-dispute-resolution-adr-in-the-workplace>.

⁶ LRC CP 50-2008 at 2.12.

⁷ Lewis and McCrimmon ‘The Role of ADR process in the criminal justice system: A view from Australia’. Paper presented ALRAESA Conference, Uganda, September 2005 at 2. Available at: <http://www.justice.gov.za>.

⁸ Discussion paper for the inquiry into Alternative Dispute Resolution (Victoria parliament Law Reform Committee, September 2007) ; p-6.

The causes of industrial dispute can be broadly classified into two categories: economic and non-economic causes. The economic causes will include issues relating to compensation like wages, bonus, allowances and conditions for work, working hours, leave and holidays without pay, unjust lay-offs and retrenchments. The non-economic factors will include victimization of workers, ill treatment by staff members, sympathetic strikes, political factors, indiscipline etc.

An industrial dispute can be raised only by a collective bargaining agent or an employer. Section 209 of the Bangladesh labour act, 2006 provides the provisions for raising an industrial dispute which lays down “no industrial dispute shall be deemed to exist unless it has been raised in the prescribed manner by a collective bargaining agent or an employer.”

Industrial dispute settlement procedure under labour law

Settlement means to arrive at a peaceful decision and it will be in writing as an agreement between the parties regarding the Industrial dispute. Section 2(xxv) defines Settlement as a settlement arrived at in the course of conciliation proceeding and includes an agreement between an employer and his worker arrived at otherwise than in the course of any conciliation proceedings, where such agreement is in writing, has been signed by the parties thereto and a copy thereof has been sent to the director of labour and the conciliator. Industrial dispute settlement procedure is divided into three steps⁹:

- (i) Negotiation
- (ii) Conciliation
- (iii) Arbitration

- (i) Negotiation: If, at any time, an employer or a collective bargaining agent finds that an industrial dispute is likely to arise between the employer and the workers or any of the workers and the employer, the collective bargaining agent shall communicate its view in writing to the other party. The party receiving the communication shall arrange a meeting for collective agent on the issue raised in the communication with a view to reaching an agreement within fifteen days from the date on which it was received. If the parties reach a settlement, it shall be recorded in writing and signed by both the parties and a copy shall be forwarded by the employer to the government, the director of labour and the conciliator.
- (ii) Conciliation: if the party receiving communication fails to arrange a meeting within fifteen days or if the parties fail to do a settlement through negotiation within one month from the date of the first meeting for negotiation, any of the parties can apply to the conciliator within fifteen days from the expiry of the said fifteen days. The conciliator shall proceed to conciliate the dispute within ten days from the receipt of such dispute. The conciliator shall be such a person who is appointed by the government by notification in the official gazette for a specific area or any industrial establishment. The conciliator shall call a meeting of the parties to the dispute for the purpose of bringing about a settlement. If the parties reach a settlement, it shall be recorded in writing and signed by both the parties and a copy shall be forwarded by the conciliator to the government. If the conciliator fails to settle the matter within thirty days from the date of the receipt of the dispute, it shall be deemed that the conciliation proceeding fails. If the conciliation proceeding fails, the conciliator shall try to persuade the parties to refer the dispute to the arbitrator. If the parties do not agree to refer the dispute to the arbitrator, the conciliator shall issue a certificate to the parties within three days that the proceedings have failed.
- (iii) Arbitration: arbitrator may be a person borne on a panel to be maintained by the government or any other person agreed upon by the parties. If the parties refer the dispute to the arbitrator than the arbitrator shall give award within a period of thirty days from the date on which it was referred to him. After giving an award, the arbitrator shall forward a copy to the parties and the government. This award shall be valid for two years and no appeal shall lie against it.

Right to strike and lock-out: After failing the conciliation proceeding, if the parties don't agree to refer the dispute to the arbitrator, in that case within three days the conciliator shall issue a certificate to the parties that the proceedings have failed. The party which raised the dispute may within fifteen days of the issue to it a certificate of failure, shall give to the other party a notice or make an application to the labour court for adjudication of the dispute. There is a condition that collective bargaining agent shall not serve any notice of strike, if three-fourths of its members give their consent to it through a secret ballot specially held for this purpose, under the supervision of the conciliator. If a strike or lock-out is commenced, either of the parties to the dispute may make an application to the labour court for adjudication of the dispute. A strike or lack-out may last

⁹ Bangladesh labour act,2006. Sectar 210

for thirty days. After thirty days the government may prohibit the strike or lock-out and refer the dispute to the labour court. The labour court, after hearing of both the parties, shall give an award within sixty days from the date on which the dispute was referred to it. This award shall be valid for not more than two years. This is the legal way to call strike or lock-out.¹⁰

Why ADR system is important and necessary to resolve industrial dispute:

Alternative dispute resolution (ADR) is a collection of processes used for the purpose of resolving conflict or disputes informally and confidentially. ADR provides alternatives to traditional processes, such as grievances and complaints; however, it does not displace those traditional processes. The legal system is adversarial and expensive. Most people feel the need to hire a lawyer to serve as a guide and interpreter of that system. Lawyers are expensive and many people fear that they cannot afford a lawyer to resolve their dispute. Furthermore, in an adversarial system in which a judge or a jury decides who wins and who loses, it is unlucky that all parties will feel that their interests or needs have been satisfied. In fact, sometimes, no party's interests or needs will be satisfied. Some reasons for using ADR are that it is faster, less costly, easier, less formality involved, less confrontational or adversarial, it encourages creativity and searching for practical solutions, it avoids the unpredictability involved when decisions are rendered as a result of the traditional dispute resolution mechanisms. There is a much wider range of outcomes with ADR than with courts. When it works, negotiation, conciliation or mediation can produce a solution that satisfies both sides.

In case of negotiation sitting back, smiling and making open and relaxed body movements can suggest confidence and might encourage negotiation. Psychological factors and non-verbal communication should not be ignored. Crossed arms and looking away can show hostility. Unfortunately the lack of a clear process, different strategies and tactics and factors such as stress can make communication difficult. This might prevent agreement, if the disputant does not avoid or address problems.

In case of conciliation, Conciliators encourage the people in dispute to have creative discussion about a range of options. Rather than just aiming for an acceptable compromise; they will try to end up with an agreement which reflects the best possible outcome for all involved. This can have an effect on what happens afterwards. It results in participants' satisfaction; solutions tend to be durable or long lasting, increases workplace morale and can make the disputants feel better about coming to work.

Now a days the courts are encouraging the use of ADR in general. However, in many cases, the courts have stressed the importance of mediation in particular, and the flexibility of the process provides for resolving the disputes. In *Dunnett vs Railtrack plc [2002] 1 WLR 2434 per Brooke LJ at [14]* said, skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of the lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences it may very well be that, the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the power of the court to provide.¹¹ In *Halsey vs Milton Keynes General NHS Trust [2004] 1 WLR 3002, Dyson LJ at [15]* said, we recognize that mediation has a number of advantages over the court process. It is usually less expensive than litigation which goes all the way to litigation.....mediation provides litigants apology ; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so.¹²

Under labour law we can see that to settle the industrial dispute ADR (negotiation, conciliation) is an effective and overall a statutory mechanism. If it cannot be resolved by ADR then they can refer the matter to the labour court or may call strike or lock-out legally. When the disputants not following the steps of the procedure of settlement of industrial dispute, call the strike or lock-out, then it will be termed as illegal strike or lock-out. In the event of an illegal strike by any section or department of any establishment, the employer may close down wholly or partly such section or department and the workers participated in the illegal strike shall not be paid any wages for such closure.¹³

Reason behind illegal strike and non observance of ADR:

¹⁰ Bangladesh labour act,2006. Section 211

¹¹ Blake susan, Browne Julie and Sime Stuart, A practical approach to alternative dispute resolution(OXFORD University press), p.203

¹² Ibid, p.203

¹³ Bangladesh labour act, 2006. Section 13

It is the statutory provision of the labour act is that industrial dispute shall be raised by a collective bargaining agent or the employer. Most of the cases it is to be seen that employers do not allow the workers to form trade union in an industry or where there is trade union in an industry, the collective bargaining agent(CBA) is not strong there. If CBA leaders raise their voice on behalf of the workers, they are threatened by the employer. There is a risk of lost of job, sometimes it is likely to cause death. It is to be said that, Aminul Islam, a CBA leader has to leave this earth, only for raising voice on behalf of the workers. So, there is no one on behalf of the workers to reach their demands to the employers. For this if any dispute arises regarding wages, bonus, allowances, and conditions for work, working hours, leave and holidays without pay , unjust lay offs and retrenchments, they cannot negotiate with the employer or the employer do not want to negotiate with the workers. As a result the workers become aggrieved and most of the times it causes strike. The workers thinking are that strike is the way to fulfill their demands. This strike is illegal strike, because of not following the procedure of settlement of industrial dispute. In this circumstance the employer shall close down the establishment. The employers not only refrain from fulfilling the demands of the workers but also close down the establishment. So the ultimate losers are the workers. On the creation of a movement by the workers of a ready made garment factory named *Goldtex in Ashulia* for overtime and increasing the allowance for lunch, the authority close down the factory.¹⁴

To protest the movement of the worker eight readymade garment industries in Gazipur closed down sine die.¹⁵ So, most of the cases it is to be seen that workers took the way to go on a movement to fulfill their demands and the employers always ignore the demands of the worker. As a result illegal strike took places which are defined in labour law and the employers get the scope lawfully to closure of the establishments.

To improve this situation the following measures should be taken:

- A strong and stable trade union in each industry is essential to represent the majority of the workers, to maintain good industrial relation and negotiate with the management about the terms and conditions of service.
- Trade unions should persuade their members to work for the common objectives of the organization. Both the management and the labour unions should have faith in collective bargaining and other peaceful methods of settling dispute.
- Both the management and the labour should help in the development of an atmosphere of mutual co operation, confidence and respect.
- The participation of the workers in the management of the industry shall improve communication between managers and workers, increase productivity and lead to greater effectiveness.
- The employers must recognize the right of collective bargaining of the trade unions. Their approach must be of mutual “give and take” rather than “take and leave”.
- The management should sincerely implement the settlements reached with the trade union as any agreement.
- The government should play an active role for promoting industrial relations. It should make law for the compulsory recognition of the trade union and the CBA in each industry, where CBA is necessary to raise voice relating to any industrial dispute.

III. Conclusion

A large number of workers are not aware of their rights. They do not know that, they have a right to form trade union, collective bargaining agent should be present in the industrial sectors, whose duty is to raise the voice regarding any industrial dispute and maintain the other formalities of the dispute settlement procedure. In this regard initiatives should be taken to improve the knowledge of the worker about their rights, liabilities and their duties; as well as they should have loyalty to the employers. These initiatives can be taken by preparing a motivational programme in the television, radio or other media which is easily accessible to the worker. Our government should come forward with strong motivation and this can be done by the compulsory observance of the laws relating to Alternative Dispute Resolution.

Soabarin Siddiqua. "Alternative Dispute Resolution under Labour Laws of Bangladesh: A Critical Review." *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* 22.7 (2017): 09-13.

¹⁴ Prothomalo, 2011, 26th December. Available in: <http://epaper.prothom-alo.com/view/Dhaka/2011-12-26/4>

¹⁵ Prothomalo, 2013, 27th February. Available in: <http://epaper.prothom-alo.com/view/dhaka/2013-02-27/5>