LAW VISION

In quest for rules to be laid down under the Arbitration Act, 2001

The presence of rules with guidelines for both the parties and the appointing authority could have helped to avoid many unwanted situations that frequently arise in legal proceedings, including the appointment of arbitrator(s). This is one example which illustrates how the absence of rules under the 2001 Act creates scope for the misuse of the process of law and explains how the same can cause undue delay in completing the arbitration proceedings.

KAMAL HOSSAIN MEAHZI

In many instances, an Act of Parliament includes a provision allowing the government or the relevant authority to make rules for carrying out the provisions of the concerned Act. Under an Act of Parliament, the rules are framed as directives and/or instructions for the users of the legislation in question. If rules are framed as such, more clarity is brought about and confusion about many provisions of the relevant statute gets dispelled. It also helps to carry out the purpose of the legislation in line with the intention of the legislature.

In Bangladesh, the Arbitration Act, 2001 came into force on the 10th day of April 2001, which permits the government to make rules in exercising its powers conferred by section 57 of the Act. It was expected that the rules would be framed immediately to make the use of arbitration simpler, easier, and less cumbersome. However, although twenty years have elapsed since enactment of the Act, the government is yet to make rules.

Likewise, there exist no official rules for administering dispute resolution processes through mediation. Although the use of mediation or other ADR techniques is permissible, with consent of the parties, but under section 22 of the Act there are no rules that could be used and applied to guide the process. This article makes an attempt to argue that if rules were framed, they could have helped to ensure the due process in settling dispute through alternative means by using mediation, conciliation, and arbitration etc.

The importance of rules may be highlighted by stating an example. Section 12 of the Act deals with appointment of arbitrators. It has laid down the steps that may be taken by the parties when there arises disagreement regarding the appointment of an arbitrator. Upon application by a party, the District Judge has power to appoint an arbitrator when it is a domestic arbitration. In the case of international commercial arbitration, an application for appointment of an arbitrator is filed before the Chief Justice or any other Judge of the Supreme Court of Bangladesh so designated by the Chief Justice. However, the provisions of law do not explain or give any guidance as to how the appointing authority being the District Judge or any other Judge of the Supreme Court will carry out this task with consent and/or assistance of the disputing parties.

In this regard, reference may be made to the UNCITRAL Rules. Articles 8 and 9 of the said Rules deal with the appointment of sole arbitrator and presiding arbitrator (if it is a tribunal for three arbitrators) respectively. For appointing sole arbitrator or the presiding arbitrator, the appointing authority follows the same Rules as stated in Article 8. Article 8(2) of the said Rules being relevant here has been reproduced below:

"Article 8(2).....In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator."

It explains how an arbitrator will be appointed by the appointing authority with assistance of the parties. It states that the appointing authority shall communicate a list to the parties with names of three arbitrators. The parties are obliged to respond within a timeframe with suggestions about the proposed arbitrators. After expiry of the timeframe, the rules permit the appointing authority to proceed with the appointing process considering the preference of the parties, if any, or the appointing authority gives appointment applying its discretion. Thus, the said UNCITRAL Rules has laid down clear guidelines for the disputing parties as well as the appointing authority, which brings transparency and predictability to the process.

Since similar rules do not exist under the 2001 Act, the mischief-making party takes advantage of this loophole in law and tries to delay the appointment process with intention to frustrate the arbitration proceedings. It may be argued that the law obliges the courts to appoint arbitrator(s) within sixty days based on any application forwarded by a party. However, only in rare instances, is this timeframe respected.

The presence of rules with guidelines for both the parties and the appointing authority could have helped to avoid many unwanted situations that frequently arise in legal proceedings, including the appointment of arbitrator(s). This is one example which illustrates how the absence of rules under the 2001 Act creates scope for the misuse of the process of law and explains how the same can cause undue delay in completing the arbitration proceedings.

A set of well-defined rules could also reduce the expenses of arbitration. A standard could be set for fees and expenses required. Moreover, in an agreement with a multi-tier arbitration clause, the use of mediation is normally preferred by the parties as a first step prior to progressing with arbitration. In such situations, it becomes difficult to advance the mediation process due to the absence of rules. In the result, the use of mediation hardly results in success.

Since the 2001 Act permits the use of mediation and other methods during an arbitration proceeding, a set of comprehensive rules may be framed to make the processes faster, simpler, and efficient.

The writer is a Student of Advanced Masters in Compliance, University of Fribourg, Switzerland, and an Advocate, Supreme Court of Bangladesh.

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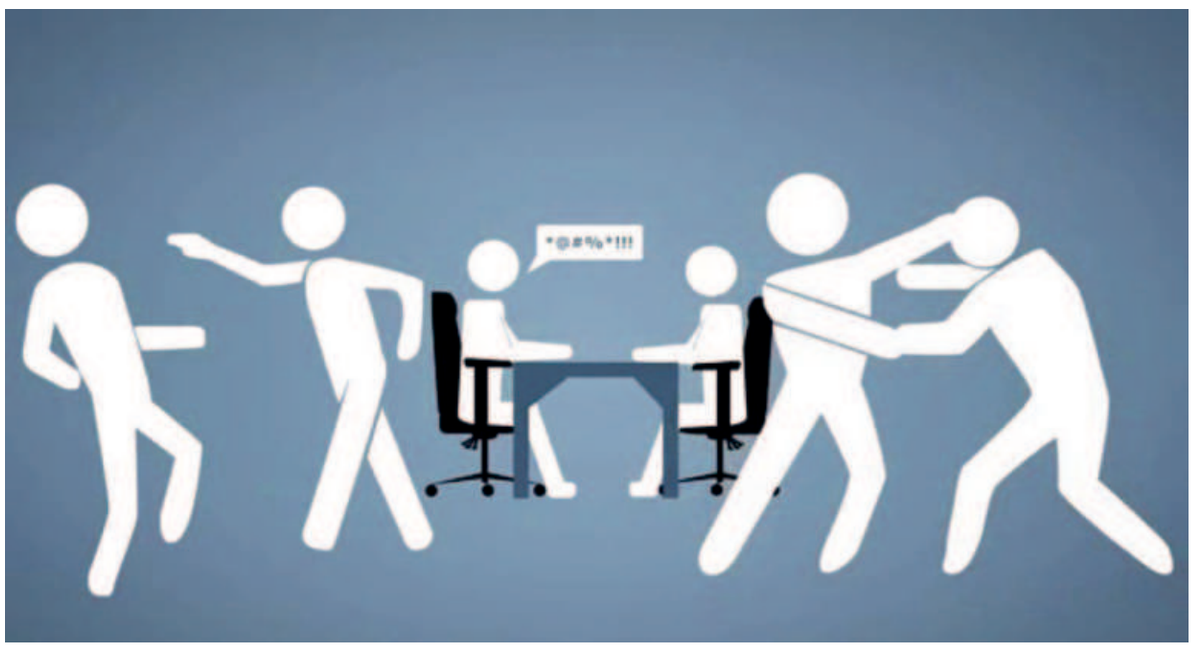
FOR YOUR INFORMATION

ILO Convention No. 190: A monumental development to address violence and harassment at workplace



LAW DESK

Until June 2019, various international instruments, norms, and practices were developed by both the International Labour Organisation (ILO) and the United Nations to deal with violence and harassment at workplace. All those instruments and norms focused on specific issues, targeted specific groups, and were developed in light of specific contexts. Thereafter, the Convention No. 190 concerning the elimination of violence and harassment in the world of work (Convention No. 190) was adopted with an inclusive and integrated approach and set out a fundamental set of principles for addressing violence and harassment in the places related to work. It is pertinent to mention that Bangladesh is yet to ratify the Convention.

In the international platform, the adoption of the Convention could not be timelier considering the pervasiveness of the occurrence of violence at workplaces across countries all over the world. The Convention is strong and practical and provides a clear overarching action-oriented framework as well as an opportunity to ensure decent work environment based on dignity and respect for human persons, free from violence and harassment. The Convention is a milestone that anticipated to shape future labour reforms globally. The instruments and ideas based on which the Convention came into existence gives the impression that all that had been spoken about workplace violence for more than 60 years were compiled and brought under a single instrument.

"Violence and harassment" have been broadly defined under the Convention as "a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment" (Article 1). Article 1(b) further defines "gender-based violence and harassment" as violence and harassment directed at persons because of their sex or gender or affecting persons of a particular sex or gender disproportionately. Thus, the Convention takes a pragmatic approach in defining "violence and harassment" which encompasses, among others, physical abuse, verbal abuse, bullying and mobbing, sexual harassment, threats, and stalking.

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The Convention applies to both private and public sectors, in both formal and informal economy; it protects everyone who works, irrespective of the contractual statuses – the trainees, interns and apprentices, including workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer (Article 2). Focusing on inclusivity, the Convention also is mindful of the fact that in the present world, work does not always take place at a specific workplace within a particular infrastructure, and therefore it extends its protection across other places, including work-related trips, travels, trainings, events, or social activities (Article 3). Taking into account the changing nature of jobs and a very large number of unorganised workers within the spectrum of labour all over the world, the Convention also addresses third party violence to ensure accountability.

The Convention also recognises an all-encompassing and wide range of state obligations, which contextualise the general obligation to "respect, promote and realise the fundamental rights and principles at work" in effectively addressing violence and harassment in the world of work. The obligations include: adoption of laws and regulations to define and prohibit violence and harassment at workplace; compliance with the definition provided in the Convention; adoption of "laws, regulations and policies for ensuring right to equality and non-discrimination in employment and occupation, including for women workers, as well as for workers and other persons belonging to one or more vulnerable groups" (Article 6); taking all appropriate measures to prevent workplace violence and effectively protecting workers and adopting an effective workplace policy on violence and harassment. The Convention further recognises the obligation of each member states to monitor and enforce national laws and regulations regarding violence and harassment at workplace ensuring easy access to appropriate and effective remedies characterised by safe, fair and effective reporting and dispute resolution mechanisms and procedures in cases of violence and harassment at workplace (Article 10).

The Convention acknowledges the pervasiveness and unacceptability of violence and harassment at work, and directs the course for preventing, prohibiting, and eliminating them altogether. The comprehensive account of the Convention is therefore rightly expected to change attitudes of workplaces across member states with regard to violence and harassment.

Ratification of the Convention by Bangladesh could bring forth significant positive changes in the realm of work for Bangladesh and could institutionalise the dealing of violence and harassment at workplace and thereby protect women and other vulnerable groups.