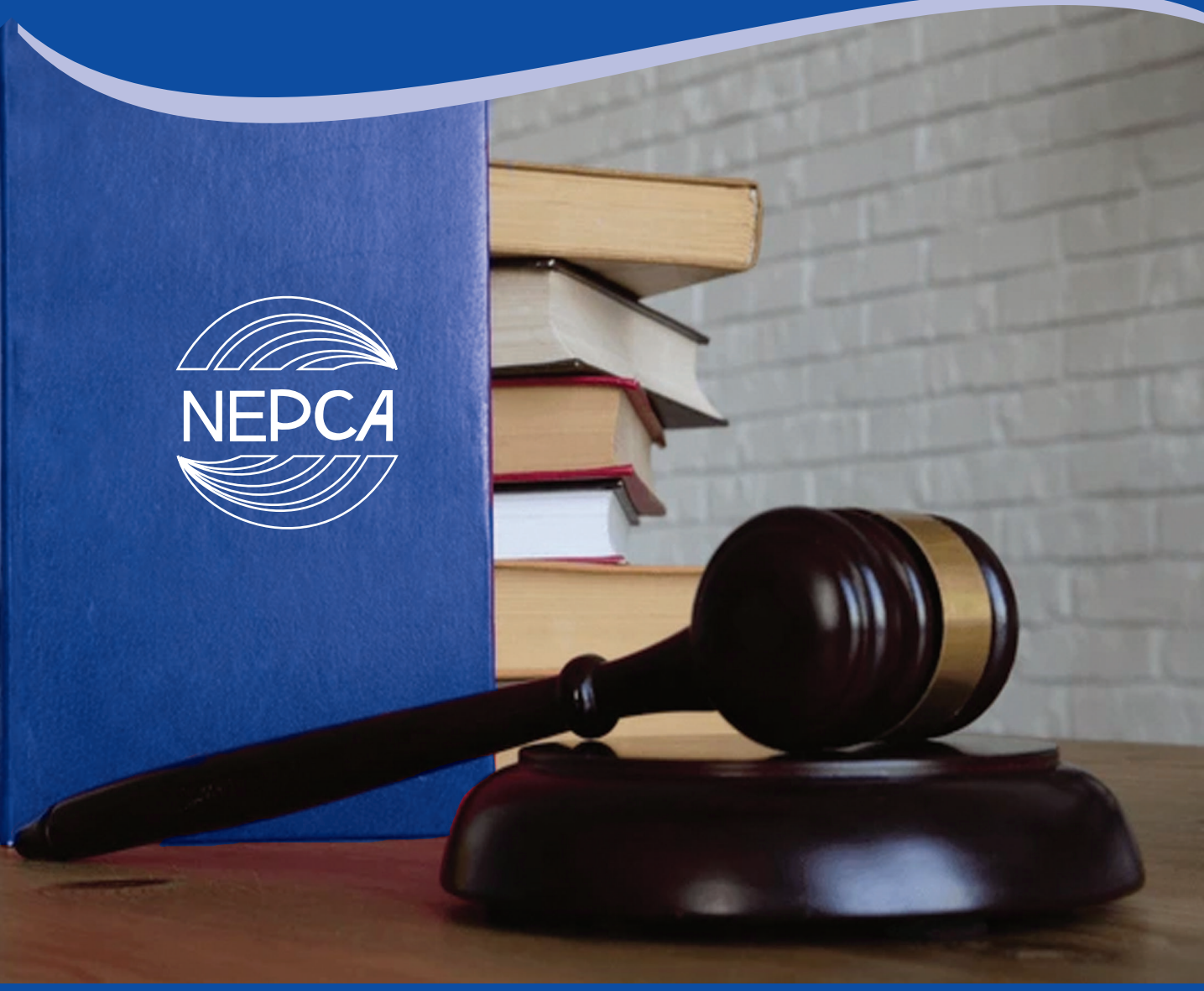
Volume: 34, January 2025 NEPCA Bi-Annual Magazine

NEPCA INSIGHTS

Resolving Disputes Alternatively



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NEPCA AT A GLANCE

Nepal Council of Arbitration "NEPCA" founded in 1991 is an autonomous and non-profitable organization, established to administer arbitration and other alternative methods of dispute resolution in an expeditious and less expensive manner by arranging co-operation from the concerned sector. Furthermore, it is committed for the institutional development of Acts and proceedings related thereto, for the settlement of national and international disputes of development, construction, industry, trade and other nature which are to be resolved through arbitration.

NEPCA provides administrative services for arbitrating different kinds of dispute at reasonable fees. The council is not involved in deciding cases but supplies lists of individuals from which the parties mutually select impartial arbitrators. Arbitration is conducted by specific rules and procedures, and the awards by arbitrators are legally binding and enforceable.

NEPCA provides arbitration facilities for settlement of all types of commercial and construction disputes between Nepalese parties or between Nepalese and foreign parties. Arbitration procedures of NEPCA are framed in accordance with international standards and it maintains comprehensive list of Panel of arbitrators.

Experts in various fields and professions renowned for their knowledge, integrity and dispute resolution skills are listed on the council's Panel of Arbitrators for referrals to parties involved in disputes.

Main objectives

- To initiate, promote, protect and to institutionally develop activities relating to arbitration including other alternative methods of dispute resolution in Nepal.
- To provide necessary suggestions to the concerned agencies for the periodical amendment and alteration to and development of prevailing laws and regulations relating to arbitration, by undertaking study, analysis and research on them, and to generate favourable public opinion for this purpose.
- To arrange and manage all kinds of services, facilities and instruments as required for the settlement of disputes, of national and international nature arising within the territory of Nepal, to be settled through arbitration and other alternative methods of dispute resolution with the assistance of the Council.
- To maintain relation with individuals and institutions involved in different professions and business for arbitration of disputes relating to various nature and subject matters, and to prepare the list of proper arbitrators.
- To prepare code of conduct of arbitrators and to create proper environment for its implementation.

- To maintain relation with individuals and institutions involved in different professions and business for arbitration of disputes relating to various nature and subject matters, and to prepare the list of proper arbitrators.
- To prepare code of conduct of arbitrators and to create proper environment for its implementation. As regards resolving disputes of national and international character occurring within the Nepalese territory that need to be decided by the Council through arbitration and other alternative means, to provide for and ensure all kinds of services, facilities and means, subject to prevailing laws, including framing internal work procedures concerning arbitration and internal rules for all kinds of proceedings including administrative, and to implement or cause to implement them.

Supplementary objectives

- To organize necessary training, instruction, symposium, workshop and talk programs for the development of skilled Nepalese manpower needed for the resolution of all kinds of disputes through arbitration and other alternative methods.
- To establish a well-equipped library having collected books, journals, and rules and regulations of national, international and regional institutions, on arbitration and other alternative methods.
- To acquire membership of other national, international and regional institutions having similar objectives, to provide its membership to them and to maintain relationship, cooperation, exchange experiences and views with such organizations and institutions.
- To receive, earn, acquire, possess and dispose of movable and immovable properties for the uplifting of the Council.
- To hire or give on rent land and building for the purpose of the Council.

Organization structure

The General Assembly is the main deliberative body of the Council which consists of the Members of NEPCA; Ordinary and Life, Individual and Institutional. This general body elects executive committee for a term of three years and provides suggestions/directions to the executive committee as required.The Executive Committee then elects the office bearers.

Membership

Any institution, individual, agency, law practitioner, engineer, jurist, judge, construction contractor etc., directly or indirectly engaged in the activities and proceedings relating to arbitration are eligible for the membership of the Council.

Types of membership

The Council has the following three types of members.

1. Individual Member

   a. Life Member

   b. Ordinary Member

2. Institutional Member

a. Ordinary member

Qualifications for membership

An Individual who is a graduate and has been involved in activities relating to arbitration shall be eligible for individual membership of the Council. Such individual shall be eligible for life membership once he/she has attained the age of 40 years.

Any institution established under the prevailing laws and associated directly or indirectly with the activities relating to arbitration shall be eligible for institutional membership.

Services offered

NEPCA provides administrative services for arbitrating different kinds of dispute at reasonable fees. The council is not involved in deciding cases but supplies lists of individuals from which the parties mutually select impartial arbitrators. Arbitration is conducted by specific rules and procedures, and the awards by arbitrators are legally binding and enforceable.

Arbitration Facilities

NEPCA provides arbitration facilities for settlement of all types of commercial and construction disputes between Nepalese parties or between Nepalese and foreign parties.

Arbitration procedures of NEPCA are framed in accordance with international standards and it maintains a comprehensive list of Panel of arbitrators.

Arbitrators panel

Experts in various fields and professions renowned for their knowledge, integrity and dispute resolution skills are listed on the Council's Panel of Arbitrators for referrals to parties involved in disputes.

Informational Services

NEPCA provides information and advice to interested parties concerning arbitration laws and facilities and maintains cooperative links with national and international bodies throughout the world.

Training

NEPCA conducts trainings, workshops, seminars, conferences, talk programs, skill development program, etc. regularly within the country to promote wider use and better understanding of arbitration, mediation, adjudication, dispute board decision and other conflict resolution processes. Programs can be specially designed as per the need of individual groups and member organizations.

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Price Adjustment in Nepalese Construction Contracts: Solutions to Minimize Disputes regarding Price Adjustment Issues

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Abstract

Price adjustment is very important in construction contracts to ensure financial fairness and early completion of the project. It protects the Contractor against the price escalation risks and also ensures the Employer for the successful completion of the project, especially in long-term construction projects. This article navigates the principles of price adjustment, overview of price indices fluctuation, linkages between the price adjustment and contractual claims, and the possible insights into how these price adjustment issues can be handled to mitigate disputes. By offering dispute-resilient solutions and effective strategies, this article aims to equip contract managers and engineers with the tools needed to handle price adjustments proactively, ensuring reduced risk of disputes.

Keywords: *Price adjustment, Price indices, Base year, Claims, Disputes, Linking factor, Correction factor*

Introduction

The price of different commodities in the market keeps fluctuating over time. Price fluctuation is an obvious tendency all over the world, but it has even more impacts in the developing countries due to the dependencies upon other countries(Mishra & Aithal, 2020). Price escalation is the upward movement of price of commodities, and can affect the Contractor's performance, if the prices go upwards beyond the expected range(Asian Development Bank, 2023). Similarly, if the prices go downwards, the Employer will have to pay for the costs beyond the market price. To address the adverse effects of price fluctuationsin Contract, the provision of price adjustment is introduced in most of the forms of Contracts having longer durations. Price Adjustment takes care of the price volatility of commodities that are used for the Contract, thus giving a sense of security to both the contracting parties(Sharma, 2016).

However, some challenges ariseregardingprice adjustment during the execution of construction contract. The lack of clarity in the contract documents, unforeseeable changes in the publication of price indices, lack of solutions to such problems in the contract documents and the market practices generally cause problems that lead to the arousal of disputes regarding price adjustment. Many studies have been conducted in developed and developing countries on the occurrence disputes and claims, and the claims aroused due to price adjustment issues stands outin top rankings;ranked after the variation

and delay claims (Neupane, 2022); (Al-Qershi & Kishore, 2017).

Literature Review

Concept of Price Adjustment

Price fluctuations are unforeseen occurrences during the contract execution that exposes the contracting parties to financial risks, affecting the contract works. To overcome such risks, price adjustments are practiced all around the world(Sharma, 2016). Price adjustment involves the process of modifying contract prices to reflect changes in market conditions, particularly inflation or deflation. It is essential in long-term construction contracts to maintain the economic balance between the Contractor and the Employer.If the prices go beyond what is expected, absence of provisions of price adjustment affects a Contractor's cash flow and lead to delays in construction project, and may lead to termination. The provisions of price adjustment also results in a more realistic, economic and competitive bids as the bidders will be well assured that any rise or fall in price of labor, materials or equipment will be taken care of. Otherwise, either the bidders will build in price contingencies to overcome the price escalation over the construction period, or the competitive bidding process will reward the bidder that takes the higher risk, which in time will result in non-performance of Contract. In case of a fixed-price contract, the bidder will factor in the risks of price escalation while bidding (Asian Development Bank, 2023). And, in case of a contract in which the price adjustment is applicable only after certain duration from the bid submission date, bidders will factor in the risk of price escalation for the period up to which the price adjustment is not applicable. Such inclusion of rates will lead to a gradual accumulation of price adjustment amounts during the execution of contract(Sharma, 2016).

The approach of price adjustment all around the world is rooted in fairness, aiming to protect the involved parties from unforeseen economic changes. The main principles of price adjustment based on previous research findingsare compiled as follows:

1. **Fair Risk Allocation** (Healey, Doe, & Minamikata, 2023).
2. **Transparency** (Asian Development Bank, 2023).
3. **Adaptability to Changing Market** (Sharma, 2016).
4. **Avoidance of Disputes** (Neupane, 2022).

Contractual Provisions Related to Price Adjustment in Nepal

In most of the forms of Contract, price adjustment provisions are incorporated to address the market price fluctuations.FIDIC forms of Contract (1999, 2010 MDB harmonized edition and 2017) provides such provisions under Clause 13 [Variation and Adjustments] Sub-Clause 13.8 [Adjustment for Changes in Cost]. Similarly, for ADB funded projects, FIDIC MDB 2010 Conditions of Contract is used for large works with Sub-Clause 13.8 for price adjustment and Sub-Clause 54.1 for small works.

For the public procurements in Nepal, the Public Procurement Monitoring Office (PPMO) has provisioned price adjustment in the Public Procurement Act 2063 Clause 55. Similarly, for

the National Competitive Bidding (NCB) contracts in which price adjustment provision is not applicable, then the Contract is subject to price adjustment only for the construction materials for unexpected increase or decrease in the cost of construction materials beyond 10% from base price of the same material.

Application of Price Adjustment: Timing and Criteria

The works such as civil construction works and delivery of goods/ works/ consulting services with longer delivery periods, commodities with high price fluctuations over short span of time, and price changes due to unusual circumstances in the market needs to be subjected to price adjustment. Longer the duration of contracts, more will be the financial risks due to market price fluctuation. Since the cost of works is directly dependent upon the market prices, it will also affect the cost of overall contract(Asian Development Bank, 2023).

For ADB funded projects, ithas provisions to include price adjustment clause in procurement contracts with duration longer than 18 months. But, for the price components whose price fluctuations occurs over short periods of time, it would be appropriate to include price adjustment clause irrespective of the contract duration(Asian Development Bank, 2023).Under FIDIC Conditions of Contract, such duration has not been specified(FIDIC, 1999). In case of Nepal, PPMO has provisions to include price adjustment provision for the contract duration more than 12 months(Public Procurement Monitoring Office, Public Procurement Act, 2007).

Price Adjustment Formula and itsApplication

A price adjustment formula contains a fixed or non-adjustable cost component and one or more adjustable cost components. Each cost component has its value based on its proportion within the unit cost of either individual item of work or overall cost estimate. Formulas typically used in the calculation of price adjustment in a construction contract are(Asian Development Bank, 2023):

Price adjustment amount (P_1) = P_0 (P_f-1) -------(1)

$P_f = a + b\ (L_C/L_B) + c\ (E_c/E_B) + d\ (M_C/M_B) + (n)$ -(2)

$P = P_0 + P_1$

where,

P_0 = Work value,

P1 = Price adjustment amount on work value,

P = Total Payable amount including price adjustment,

P_f = Price adjustment factor / multiplier,

a = non-adjustable portion coefficient (generally 0.1 to 0.2), dependent upon estimates of overhead cost, profit level, and price contingencies,

b,c,d,...= adjustable portions specified for different indices of labor, equipment, material, etc. breakdowns, which are generally filled by the bidder in the bidding forms during bidding. Sometimes however, a range of acceptable weights is specified by the Employer to avoid the abuse of price adjustment provisions,

L_c,E_c,M_c= current indices of breakdowns of labor, equipment/fuel, materials, etc.(28, 30 or 49 days prior to the last day of billing period of

each monthly statement). In case of FIDIC MDB harmonized edition, for small works, it is 28 days. In case of PPMO Nepal contracts, it is 30 days. And in case of FIDIC conditions of contracts, it is 49 days, and

L_B,E_B,M_B = base indices of breakdowns of labor, equipment, materials, etc.(28 or 30 days prior to the bid submission or bid opening date). In case of FIDIC MDB harmonized edition and FIDIC Conditions of Contract for construction, it is 28 days. In case of PPMO Nepal contracts, it is 30 days.

These indices are to be taken from indices published by the state statistics agency or relevant statistical body or international indices sourced from reputed organizations.

When a contract comprises one or more currencies of payment, at least one price adjustment formula for each currency of payment shall be given in the contract where price adjustment is applicable. Also, the source of indices as mentioned above must also be related to the source of foreign inputs and currencies of payment. For local portion, the adopted sources of indices should be publicly available for project site or neighboring areas. For foreign portion, the bidders needs to substantiate their source of indices, coefficients and indices prior to contract award. In case of non-availability of such local and international indices, comparable relevant indices from neighboring nations can be adopted.

It is to be noted that there is no single formula that encompasses every situation, every contract and every work item, for example concrete works and Gabion works needs different breakdowns of labor, equipment and material. For contracts including different nature of work in different sections of contract with difference in topography, ease of work, location, access, timing, etc., separate price adjustment formulas with distinct adjustable portions (i.e. value of a, b, c, d,…) can be applied(Asian Development Bank, 2023).

Price Adjustment in Construction Contract

Price adjustment in construction contract is a crucial mechanism that ensures fairness against economic fluctuations. Price adjustment is intricately linked with several other contract provisions, and these linkages help understand and carry out the process of price adjustment during contract management.

Linkages of Price Adjustment to Other Contract Clauses

In FIDIC Conditions of Contract for Construction(Red Book) (1999), price adjustment is calculated based on the sub-Clause 13.8 [Adjustments for Changes in Cost]. Other contract clauses having linkages with price adjustment are as follows(FIDIC, 1999):

Engineer's Determinations under Clause 3

If the cost indices or reference/base indices and their sources are in doubt or the bidder is unable to clarify the indices or the source, it seeks Engineer's Determination under Sub-Clause 3.5 for resolution.

Extension of Time for Completion under Clause 8

Contract durations and extensions as addressed in sub-clause 8.4 affects the price adjustment. As per the FIDIC sub-clause 13.8: *if the Contractor fails to complete the works within the Time for*

Completion, adjustment of prices thereafter shall be made using either (i) each index or price applicable on the date 49 days prior to the expiry of the Time for Completion of the works, or (ii) the current index or price: whichever is more favorable to the Employer. If the project timeline is extended, the impacts of price fluctuations in market will be more significant, requiring further adjustments.

Variations under Clause 13

Price adjustments are closely related to variations in the scope of work. The cost structure of the project and different currency portions in case of newly agreed rates/ new item of works alters from previously agreed ones. In such a case, Sub-Clause 13.4 [Payment in applicable currencies] shall be considered to get the portions of local and foreign currencies, so that Sub-Clause 13.8 [Adjustments for Changes in Cost] can be applied for different currency portions. The interplay between price adjustments and variations must be carefully managed to ensure that both the parties are compensated in a fair manner.

Contract Price and Payment under Clause 14

Contract clause 14 relates to the contract price and payment. The measurement and evaluation of work done value based on the clause 12 [Measurement and Evaluation], and the adjusted prices for the measured and evaluated works based on the Sub-Clause 13.8 must be reflected in the interim payment certificates outlined under this clause. Also, if the price indices are not published during certification of any interim payment certificate (IPC), provisional indices needs to be used during certification, which willneed reconciliations in succeeding IPCs. This clause governs the timing and methods of payment, and it ensures that the price adjustments are incorporated in payment to avoid cash-flow problems to the Contractor.

Also, Sub-Clause 14.15 [Currencies of payment] comes into action while applying sub-clause13.8 because of local and foreign portions of payment and their corresponding price adjustment formulas.

Contractor's Claims under Clause 20

Clause 20 [Claim, Disputes and Arbitration] provides a framework for resolving disputes arising due to disagreement over the method of price adjustment, sources of indices, indices used, change in base year of indices, etc. This emphasizes the importance of proper documentation, clear communication, and proactive issue resolution throughout the contract management.

Price Adjustment Practice in Nepal

Regulatory Framework and Current Practices of Price Adjustment in Nepal

In case of Nepal, the latest amendment (13th) of Public Procurement Regulation (PPR) published by PPMO Nepal states: *Unless otherwise provided in procurement contract, if price needs to be adjusted in the course of implementation of a procurement contract having duration exceeding 12 months the competent authority may adjust the price.*

Provided that where a procurement contract has been concluded to procure a public construction work following the invitation of national level bidding and the price of any construction materials is increased or decreased unexpectedly by more than 10 percent of the previous price, price shall be adjusted as prescribed by deducting 10% in the amount so increased or decreased.

Another paragraph further to this sub-clause is: *Price adjustment cannot be made where the work under the contract is not completed within the period prescribed in such contract and has taken more time due to the delay by the person who has obtained procurement contract or if procurement contract is concluded on the basis of lump sum contract or fixed budget*(Public Procurement Monitoring Office, Public Procurement Act, 2007).

Following the PPA 2007, Clause 55, Public Procurement Regulation states that the contract which has the provision of price adjustment shall include the condition of price adjustment, formula to calculate price adjustment, components of price to be used in the formula, relevant price indices to be used, method of measuring fluctuations of exchange rates between the currencies and the currency to be used for making payment, baseline date to be used for application of price adjustment, interval of time for application of price adjustment formula, minimum price escalation to be determined by price adjustment formula, and maximum amount of price adjustment. The maximum amount of price adjustment is limited up to 25% of the initial contract prices. PPR also states that if the price adjustment exceeds this limit, the public entity may terminate the procurement contract or negotiate with the service provider (supplier/ contractor/ consultant) in order to limit the contract price within the budget. Also, the public entity may pursue other measures to arrange for additional budget(Public Procurement Monitoring Office, Public Procurement Regulations, 2007).

Price adjustment formula doesn't have the correction factor in PPMO Nepal or the FIDIC formula;however, in World Bank's price adjustment formula and the guidelines provided by Islamic Development Bank, a correction factor is used.

Regarding the timing criteria in application of price adjustment, in construction contract practices in Nepal it is found that there are discrepancies from one project to another regarding the date of application of the price adjustment. In normal cases, many construction contracts mention that the date of application is to be considered from 12 months after the bid submission date. Butin some contracts, it is found that the date of application is considered 12 months from the date of contract agreement, and in such case, dispute has arisen. If the Contract doesn't specify date of application of price adjustment, it is considered as a practical and rational way of considering date of application of price adjustment from 12 months after the bid submission date. But, as mentioned earlier, none of the parties have control over the market price fluctuations. Thus, this duration need not be considered for price adjustment, and price adjustment needs to be provided from the very first payment certificate till the valid extension of time (EOT) or some days prior to EOT as mentioned in the Contract.

Problems Faced During Implementation of Price Adjustment

The problems encountered during the implementation of price adjustment in construction contracts are:

i. **Exceptional Fluctuation in Market Prices**: Sometimes, other than inflation, supply chain disruptions and geo-political events can

result in significant variations in the market price. This unpredictability makes it difficult to calculate price adjustments fairly and set accurate benchmarks for price adjustments. Since, the adjustment method is rigid and agreed during the contract agreement, they may not reflect real market conditions.

ii. **Inconsistent or Outdated Price Indices:** Since price adjustments rely on price indices published by government agencies or industry bodies, if they are not updated regularly or are inconsistent with the market conditions, it can lead to improper adjustments. In some cases, the heading of the indices itself may no longer reflect the current market goods or current market scenarios, creating difficulties in the calculation of fair price adjustment amount.

iii. **Resistance from Clients or Regulatory Bodies:** Clients, especially in government contracts, may resist price adjustments due to budget constraints. Regulatory Authorities also slow down approval process of price adjustments, especially if they use public finances. The process of reviewing and approving price adjustments can be slow when regulatory bodies are involved, resulting in disturbance in the contractor's cash flow, delay in the execution of works, and ultimately to disputes as contractors seek compensation for their losses.

iv. **Legal and Regulatory Challenges:** The local public procurement regulations may impose limits on the extent of which price changes can be adjusted, particularly in the government/public contracts. If the limits are not specified in the contract, or the criteria are not set to handle such scenario, it may lead to disputes.

v. **Contractual Ambiguity:** Poorly drafted contracts may lack clarity on when, how and which price indices should be applied. Ambiguities in contract language and source of indices, and lack of established method/guideline on the source of indices, frequency of calculation of price adjustment, or how to handle sharp market volatility and changes in base year of the used indices can lead to disputes between the parties.

vi. **Changes in the Base Year of Price Indices:** Over the time, some price indices may decline, some may be static or some may spike rapidly as per the market forces. The base year of price indices are changed by the regulatory bodies, andthe value of price indices are normally reset at 100 to make the indices comparable and to avoid distorted data.The base year may be changed by the regulatory authorities as per their requirement, which may happen simultaneously during the course of a project, particularly in long term contracts. When this happens, it causes discrepancies in price adjustment calculations, and the price adjustment multipliers can drastically drop when calculation is done based on the published data. Then, this change has to be addressed to make consistency in the payment and make fair payment of price adjustment.

The contract might not have provisions for addressing these changes, resulting in disputes over how to adapt the new indices. Contractors may find themselves

undercompensated if the price indices with new base year is applied, and the Clients may claim that the conversion of new indices with new base year to old base year overestimates price increases.

vii. Currency Fluctuations: In international contracts, where there are two or more currencies involved in the mode of payment, fluctuations in exchange rates can add another layer of complexity to price adjustment calculation. Contracts involving foreign currencies may not always account for sudden shifts in foreign exchange rates, especially when price adjustments are calculated based on local indices or indices of any other reference country. This can lead to disputes over which foreign currency exchange rates should be applied and whether adjustments should be made to account for significant currency depreciation or appreciation. The chart below gives the Dollar (USD) fluctuation over time (January 2019 to January 2024) in Nepalese currency(NRB, 2024).

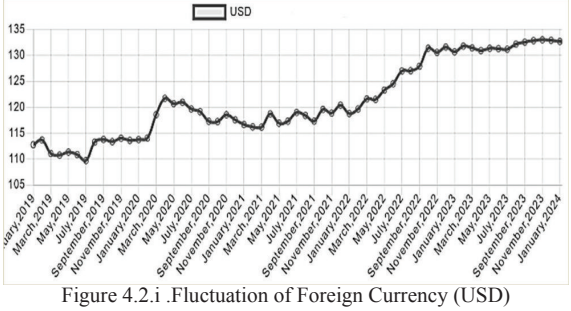

Figure 4.2.i .Fluctuation of Foreign Currency (USD)

Addressing the Problems

To overcome the above discussed challenges, contracts should be drafted with clear, flexible provisions for dealing with price adjustments, allowing for changes in market conditions, currency fluctuations, and updated price indices. It is essential that the Employer should consider on which price indices and formulas will be used, as well as the frequency and timing of such adjustments. Without such considerations, it is almost impossible to minimize the disputes in contracts in regard to price adjustment. Below is the detailed discussion on addressing the problems on price adjustment due to changes in base year of price indices and currency fluctuations:

Changes in Base Year of Price Indices

To address the issues arising from changes in base year of price indices, it is essential to include provisions in the tender document that anticipate and accommodate such adjustments. If the base year is updated by the regulatory authority during the contract execution, the parties shall adopt any one of the following strategies:

a. **Changing the Base Indices:** During the execution of the contract, if the base indices (i.e. L_B, M_B, E_B) with old base year and the base indices with new base year is also available or published by the relevant authority, then base indices must be changed. For example:At the time of contract agreement, base indices (L_B, M_B, E_B) were of the month October of the year 2019 with base year of indices as the year 2012=100; during the course of project execution, the base year of indices changed from year 2012=100 to the year 2020=100 from April 2022, and the price indices of base indices (L_B, M_B, E_B) at the month of October 2019 is available for both the base year 2012=100 and 2020=100. Then there should be a provision to calculate the price adjustment by changing the base indices at the month October 2019 (L_B, M_B, E_B) from April 2022 onwards by changing the base year of price indices of (L_B, M_B, E_B) from the base year 2012=100 to 2020=100.

If there is no such situation of the availability of base indices with both the new and old base year, then use of linking factor or percentage change method can be used.

b. **Using Linking Factor:**The linking factor can be used to bridge the old index values with the new ones. This factor will allow for continuity in calculations ensuring that adjustments reflect the market cost fluctuations over time. A method for the conversion of price indices having updated base year to the previous base year is Arithmetic Conversion Method, which have also been used by the Office of Economic Advisor, India to address this problem when the base year of 2004-05 of the wholesale price indices (WPI)was revised to 2011-12 from April 2017 onwards (OEA, Office of Economic Adviser, 2017).

In arithmetic conversion method, a linking factor for an item/commodity is the ratio of the price index having old base index to the price index having new base index for a common period. It is then multiplied to convert the price indices with new base year to the price indices of outgoing base year.

The common period is generally the new base year. In case of wholesale price indices (WPI) of India, the new base year is the year 2011-12, and outgoing one is 2004-05. An example showing the calculation of Linking Factor for item "All commodities" using Arithmetic Conversion method is illustrated below:

- Linking Factor =
- Linking factor = = 1.561

Then, this linking factor will be used to link the newly published indices with new base year 2011-12 to old base year 2004-05. The conversion is illustrated as below:

- Price index of (month July 2024) All commodities with base year 2011-12=100 is 155.3
- With Linking factor for this item = 1.561
- Price index of (month July 2024) All commodities with base year changed to 2004-05 is= 155.3 * 1.561 = 242.423

In a similar way, the conversion can be made with every item/commodity from the year the base year is changed.

Also, another method using the same principle to calculate linking factor is Ratio method, in which the ratio of price indices of particular item is divided in a particular common period (generally last month of the published indices with the old base year) of publish of indices with both the base year.

For calculating the linking factor using ratio method, in case of all commodities of WPI ratio of the price index of last month with old base year is divided by the price index of the same month with new base year is calculated, example:

- Linking Factor =

$$\frac{\textit{Price Index of item} - \textit{old base year (2004-05) for the month (March 2017)}}{\textit{Price Index of item} - \textit{new base year (2011-12) for the month (March 2017)}}$$

$$= \frac{185.8}{113.2} = 1.641$$

In case of price indices published by Nepal Rastra Bank, the base year was changed from the year **1999/00=100** to **2017/18=100,** which resulted in similar scenario, i.e. causing breakage in the line of the index values if not linked. For illustration, the price indices of the commodity Construction Material is taken.

Firstly, a graph for the published data without using the use of linking factor is plotted as:

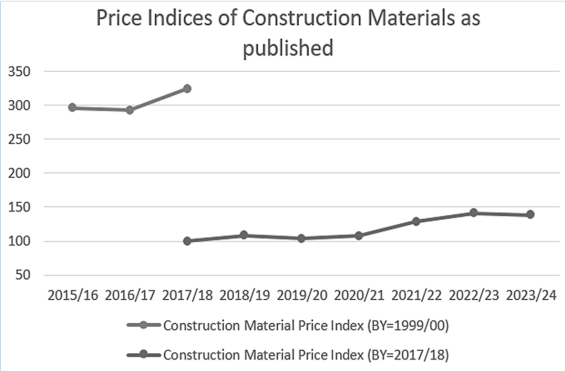

Figure 5.1.i Published price indices of construction materials

Here, we can see a huge fall in price index and a huge gap in the continuity of the series, which is not possible in normal scenarios. And, as the base year changed from the year 1999/00=100 to 2017/18=100, this is actually not a gap and not real economic scenario, so correction needs to be done. Thus, linking factor is calculated and the data is re-plotted as follows:*Table 5.1.i Price indices of Construction Material over recent years*

Construction Material			
Year	Price Index (BY=1999/00)	Price Index (BY=2017/18)	Linking Factor
2015/16	296.2		
2016/17	292.9		
2017/18	324.3	100	**3.243**
2018/19	*350.24*	108	
2019/20	*336.62*	103.8	
2020/21	*348.95*	107.6	
2021/22	*416.08*	128.3	
2022/23	*457.91*	141.2	
2023/24	*449.16*	138.5	

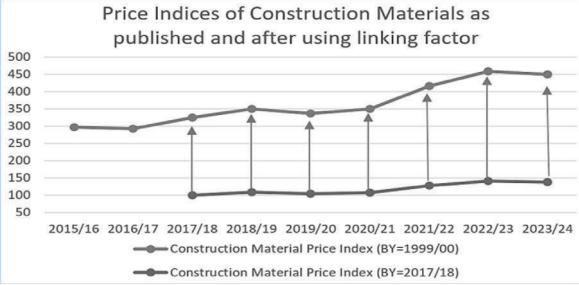

Figure 5.1.ii Price indices of Construction materials after use of Linking Factor

The advantage of using Linking factor is to bridge the gap between price indices with old and new base years. This approach ensures continuity, ensuring that price adjustments based on the indices remain fair and consistent. In addition to this, it is a very fast approach to link the newly published price indices with new base year with the preceding one.

However, one key limitation of using arithmetic conversion method is when items within the index are changed, renamed or redefined. This can disrupt the comparability of the index across different base years. This can lead to distorted adjustments because the new items may have different cost structure and products of different nature.For eg.,in the wholesale price indices published by Nepal Rastra Bank with base year 1999/00=100, the commodity 1.3.1 Petroleum Products and Coal was broken down to the commodities 1.1.3 Fuel and Power, 1.1.4 Fuel, and 1.1.5 Electricity in the indices published with base year 2017/18=100. In such a case, the linking factor cannot be used because the items to be linked are different.

c. **Using Percentage Change Method:**The percentage change method for price adjustment is based on the relative changes in the price of goods and services over time to provide accurate measure of inflation or change. In this method, when the base year of price indices is changed, the price index of item is calculated based on the relative percentage change from the last month of publish of price index in both old and new base year. For example, in the wholesale price indices published by Nepal Rastra Bank

with base year 1999/00=100, the commodity 1.3.1 Petroleum Products and Coal was broken down to the commodities 1.1.3 Fuel and Power, 1.1.4 Fuel, and 1.1.5 Electricity in the indices published with base year 2017/18=100. In such a case, the linking factor cannot be used because the items to be linked are different. But, month-wise percentage change for the most relevant item in the newly published data can be taken as a reference to calculate the price indices from the discontinuation.

The main advantage of using percentage change method in calculating price indices is more fair calculation of price indices over time. Also, it overcomes the limitations of the linking factor because the percentage change method uses relative measure of percent change of same or the most relevant item/commodity. Even if the same item is missing or removed while changing the base year, the percentage change of most relevant item can be easily calculated to calculate the price indices of each month with new base year from the previous base year price indices.This helps to calculate price indices of commodities over the span of the contract after the change in base year or even the item/commodity initially agreed in the contract.

Currency Fluctuations

In case of international contracts involving multiple currencies of payment, fluctuations in foreign exchange rates over the period can produce additional complexity in calculation of price adjustments. When payment is made in foreign currency, the impact of depreciation or appreciation of one currency over another can be significant in long run. Addressing currency fluctuations in price adjustment is thus critical to avoid disputes and ensure fair compensation. To ensure this, for payments resulting in currency other than currency of the source of price indices, currency correction factor is introduced(Islamic Development Bank, 2021). It can be calculated by:

Correction factor = Z_0/Z_1----------(3)

where,

Z_0= no. of units of currency of the origin of the indices which equals to one unit of the currency of the Contract Price on the Base date

Z_1= no. of units of currency of the origin of the indices which equals to one unit of the currency of the Contract Price on the Date of Adjustment

Arbitrary examples of application of correction factor in the cases of rise/fall in price indices as well as rise/fall in foreign exchange rate are described here, where the Contract Price is taken to be in Nepalese Currency (NPR), price indices are assumed to be as of published by Nepal Rastra Bank and the foreign payment is made in Dollars. The exchange rate at base date is considered as 1 Dollar = NPR 82. The Price Adjustment Multiplier (PAM) without correction factor is calculated by using the equation (2).The correction factor is calculated by using the equation (3). PAM with correction factor is calculated by multiplying the component-wise price adjustment coefficients by the correction factor.

Case-1: Rise in price indices, rise in dollar exchange rate

Coefficients:	fixed	Labor	Equipment	Materials	
	a	b	c	d	Sum
	0.15	0.15	0.2	0.5	1
Price indices:	Current	145	127	181	
	Base	120	105	150	
	Change:	20.83%	20.95%	20.67%	
Exchange rates:	Base (Z_0)	82	82	82	Change:
	Current (Z_1)	100	100	100	21.95%

PAM $_{componentwise}$	a	b	c	d	PAM
without correction	0.15	0.18	0.24	0.60	**1.18**
with correction (*Z_0/Z_1)	0.15	0.15	0.20	0.49	**0.99**

Case-2: Rise in price indices, fall in dollar exchange rate

Coefficients:	fixed	Labor	Equipment	Materials	
	a	b	c	d	Sum
	0.15	0.15	0.2	0.5	1
Price indices:	Current	145	127	181	
	Base	120	105	150	
	Change:	20.83%	20.95%	20.67%	
Exchange rates:	Base (Z_0)	82	82	82	Change:
	Current (Z_1)	64	64	64	-21.95%

PAM $_{componentwise}$	a	b	c	d	PAM
without correction	0.15	0.18	0.24	0.60	**1.18**
with correction (*Z_0/Z_1)	0.15	0.23	0.31	0.77	**1.47**

Case-3: Fall in price indices,rise in dollar exchange rate

Coefficients:	fixed	Labor	Equipment	Materials	
	a	b	c	d	Sum
	0.15	0.15	0.2	0.5	1
Price indices:	Current	95	83	119	
	Base	120	105	150	
	Change:	-20.83%	-20.95%	-20.67%	
Exchange rates:	Base (Z_0)	82	82	82	Change:
	Current (Z_1)	100	100	100	21.95%

PAM $_{componentwise}$	a	b	c	d	PAM
without correction	0.15	0.12	0.16	0.40	**0.82**
with correction (*Z_0/Z_1)	0.15	0.10	0.13	0.33	**0.70**

Case-4: Fall in price indices,fall in dollar exchange rate

Coefficients:	fixed	Labor	Equipment	Materials	
	a	b	c	d	Sum
	0.15	0.15	0.2	0.5	1
Price indices:	Current	95	83	119	
	Base	120	105	150	
	Change:	-20.83%	-20.95%	-20.67%	
Exchange rates:	Base (Z_0)	82	82	82	Change:
	Current (Z_1)	64	64	64	-21.95%

PAM $_{componentwise}$	a	b	c	d	PAM
without correction	0.15	0.12	0.16	0.40	**0.82**
with correction (*Z_0/Z_1)	0.15	0.15	0.20	0.51	**1.01**

Table 5.2.i Price indices Cooefficients

From case 1, it is seen that rise in both price indices and exchange rate causes PAM without correction to increase, and PAM with correction to decrease than that of without correction.

From case 2, it is seen that rise in price indices but fall in exchange rate causes PAM without correction to increase, and PAM with correction to further increase than that of without correction.

From case 3, it is seen that fall in price indices but rise in exchange rate causes PAM without correction to decrease, and PAM with correction to further decrease than that of without correction.

From case 4, it is seen that fall in both price indices and exchange rate causes PAM without correction to decrease, and PAM with correction to increase than that of without correction.

From the above cases, it is seen that the application of a correction factor in price adjustments for international contracts provides a nuanced approach to managing currency fluctuations, ensuring that contractors and clients share the impact of exchange rate volatility fairly. As seen in the different cases, the correction factor plays a stabilizing role by adjusting the PAM to account for changes in the relative values of the contract currency and price indices.

Conclusion and Recommendation

Price Adjustment in the construction contract is provided to take care of market price fluctuations in labor, equipment and materials. The bids submitted by the bidders depend on the coefficients and timing of the application of price

adjustment. The Client should provide table of coefficients along with minimum and maximum limit based on the proportion of the direct cost elements during estimation in order to prevent the bidders from misuse of these coefficients. The price adjustment should be applicable from the first bill taking bid submission as the base date which will help in making bid price more reasonable and economic.

There should be contractual provisions regarding the handling of the situations such as change in base year of the price indices, change in the name/category of the commodity, and the fluctuations in foreign exchange rates by using the techniques such as change in base indices, use of linking factor, use of percentage change, and application of correction factor as discussed in this article.

The price adjustment practices in Nepal require a regulatory overhaul that incorporates the techniques discussed in this article to align current practices of price adjustment in Nepalese construction contracts which will help to avoid issues related to price adjustment.

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Needs Analysis for Successful Procurement

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Arbitrator

Background

It is worth sharing a story related to the need analysis. I was asked once to prepare technical specifications for a "Dual Rotary Head Rig Machine". A dual rotary head rig machine is typically used in various industries, particularly in construction and mining, for drilling and excavation purposes. The two heads can operate independently or together, enabling complex drilling patterns and the ability to work in different geological conditions. This is ideal for various applications, such as deep foundation drilling, geotechnical investigations, and horizontal directional drilling (HDD). The machine was required for the foundation works of a bridge in the eastern region of Nepal. I raised few questions before working on the document. My questions were (1) has the organisation made a policy to construct bridges with the similar foundation in the future? (2) has the organisation thought of the usage of the machine after the end of the current project? (3) If it is for the current project only, has the organisation thought of the alternative source to avail the machine? I raised these questions because the machine itself is high costly and there are supporting equipment required for the operation of the machine in a river. The decision maker dropped the idea to procure, and the objective was fulfilled in an alternative way. This way, the organisation was secured from many post procurement complications and saved millions of rupees too.

Introduction

Procurement process is completed with series of activities to achieve its objective efficiently. Needs Analysis is one of the very important components of those activities for the success of a sustainable procurement. There may several issues arise, if it is not executed properly before the procurement process begins. The issues may be as follow but not limited to.

1. Misalignment with Actual Needs: Without understanding the specific requirements, the procured items or services may not effectively meet the organization's objectives, leading to waste of resources and underutilized assets.
2. Budget Overruns: Without proper needs analysis can result in purchasing unnecessary or overly expensive items, straining the budget and limiting funds for other critical areas.

3. Increased Risk of Stakeholder Dissatisfaction: Stakeholders may feel that their needs were not adequately considered, leading to dissatisfaction and potential conflicts.
4. Inefficient Use of Resources: Without a clear understanding of what's truly needed, resources may be allocated poorly, affecting operational efficiency.
5. Higher Risk of Procurement Delays: Lack of clear requirements often leads to extended timelines as issues are identified and corrected later in the procurement process.
6. Compliance and Regulatory Risks: Some sectors have strict requirements or regulations on procurement. Skipping a needs analysis can lead to non-compliance, resulting in fines or other penalties.

Its importance:

Need analysis is a critical component of the procurement system for several reasons:

1. Identifying Requirements: It helps organizations understand what products or services are necessary to meet their operational goals. By clearly defining needs, organizations can avoid unnecessary purchases and ensure they procure the right items.
2. Cost Efficiency: A thorough need analysis can lead to better budgeting and cost management. By analyzing needs, organizations can prioritize spending and reduce waste, ultimately leading to cost savings.
3. Supplier Selection: Understanding specific needs allows the procurement team to identify and evaluate potential suppliers more effectively. This ensures that selected vendors can meet the quality, quantity, and delivery requirements.
4. Risk Mitigation: Analyzing needs can uncover potential risks in the procurement process, such as supply chain vulnerabilities or compliance issues, enabling proactive measures to be taken.
5. Strategic Alignment: Need analysis aligns procurement activities with the broader strategic goals of the organization, ensuring that purchases support overall business objectives.
6. Improving Relationships: Clearly defined needs can enhance communication with suppliers, leading to stronger partnerships and improved service delivery.
7. Performance Measurement: By establishing clear requirements, organizations can more effectively measure the performance of suppliers and assess the success of procurement efforts.

Overall, need analysis lays the groundwork for effective procurement, ensuring that resources are utilized optimally to support the organization's goals.

How is it done?

To avoid these problems, it's essential to conduct a thorough needs analysis that involves all relevant stakeholders. This process ensures that the procurement strategy aligns with actual

requirements, supports budget efficiency, and improves satisfaction with the acquired products or services.

The process starts with putting up few queries and getting answers to them. These queries may vary upon the case to case. Few examples of queries are as follow

⇒ **What do you want to procure?**

This is to clarify the item. If an organization needs to buy a four-wheeler vehicle, it must be clear which type of 4-wheeler vehicle is required it may be a car or a SUV, if a car is needed, procuring entity must identify a sedan, or hatchback. This way the item must be clearly understood by the purchaser.

⇒ **When do you want to procure?**

Time to procure must be known to the purchaser. It is useless to invest too early or too late. The purchaser must be aware of the process time, delivery time and all other related time to acquire the goods on time.

⇒ **When are you going to use the procured items?**

The project management must be able to indicate the time of utilization of the item and the procurement team must act accordingly.

⇒ **When will resources beavailable?**

Availability of resources must be known to the procurement team to start the procurement process. The resources may be money, manpower or sometimes warehouse.

⇒ **How will timely procurement or failure affect the user(s) of the item(s) and procuring and disposing entity?**

The procurement team must be aware of the effects of failure or success of the procurement. If the item is critical, the failure of the procurement or untimely delivery of the item may affect other activities of the projectadversely.

⇒ **How well –what quality and standards apply?**

The quality requirement of the item must be discussed and decided during need assessment. The quality standards must be decided at this stage. It is advised to do before the preparation of technical specification.

⇒ **Do we really need to purchase?**

This is a very important question before any procuring entity. Sometimes, for a very short period project, assets are purchased which becomes useless after the completion of the project. In such cases the project management should go for alternative choice. If a vehicle is required for six months' project, is it worth buying it or can the requirement be fulfilled by having it on rental?

⇒ **Do we need it to this specification?**

Sometimes, it is seen that the procuring entity prefers to purchase equipment of high-end specification just because it has sufficient budget to invest in. Spending money on few of the elements of the project may not achieve the objective of the project.

⇒ **What happens to the product at the end-of-life?**

The answer to this question is very important for any procuring entity to think over the

requirement of any item. If a proper decision is not made on this point, the investment may be underutilized. Any item must be utilized to its full technical and economic life.

⇒ **How does this procurement impact upon our (environmental/social) objectives and policies?**

Sometimes, utilization of an item may affect the social or environmental sectors. For example, using construction equipment in the construction of village roads may affect the utilization of labour force. Similarly, procuring pesticides by any entity without having proper warehouse can affect the environment.

Conclusion

By setting a solid foundation for the procurement process, needs analysis helps manage stakeholder expectations, provides clear criteria for vendor selection, and establishes performance standards. Unfortunately, Nepalese organisations very seldom perform this activity to proceed with the procurement process resulting in misuse of resources. Sometimes, it has been seen that the procurement is done just to consume the allocated budgets resulting in unused procured items.

Needs analysis minimizes disputes in procurement by ensuring that all stakeholders' requirements and expectations are clearly identified, documented, and agreed upon before any purchase decisions are made. By thoroughly analysing and documenting needs, procurement teams and suppliers have a shared understanding of what is required. This reduces misunderstandings about specifications, quantities, quality and other key details that could lead to disputes.

Needs analysis involves input from all relevant stakeholders, including end-users, management, and procurement teams. This collaboration helps ensure everyone's needs are accounted for, minimizing surprises and disagreements later.

Needs analysis ensures that purchases align with the organization's budget and strategic goals. It reduces the risk of procuring items that exceed the budget or don't deliver the intended value, which can lead to disputes over cost justification.

When needs are clearly defined, it's easier to measure supplier performance against agreed-upon standards. This makes it easier to address any shortfalls in service or product quality objectively, rather than relying on subjective judgments that may lead to disputes.

Needs analysis helps in creating contracts with well-defined terms based on actual needs. This ensures that both parties (the buyer and the supplier) have aligned expectations, reducing potential grounds for disagreement on contract fulfilment.

Judicial Review, Finality of Arbitral Awards and Impact on Projects

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Finality of Arbitral Award: Principle and Practice

Fundamentally, an arbitral award is final and binding to the concerned parties. The award is set aside on certain limited legal grounds by high court as per Section 30 of Arbitration Act, 2055. Additionally, Section 39 of the Act provides that notwithstanding anything written in other prevailing laws, no other court will have jurisdiction in the matter after the high court gives its verdict in regard to an award and regularizes the dispute. The above legal provisions are in conformity with the basic features of arbitration viz. swift delivery of justice and an expeditious settlement of disputes between the parties, especially when they are eager to resolve the disputes so that they may continue with their trade, business or profession unhampered.

However, the arbitration process in Nepal has not been so effective in terms of award finality, and hence, award enforcement. Many times it becomes uncertain when an award will attain finality; and without finality, there will be no question of its enforcement. One of the factors rendering award finality a distant phenomenon and making its enforcement ineffective is the indefinite journey towards judicial review.

Indefinite journey of judicial review: aproduct of the landmark decision

In most of the cases, the party dissatisfied with the arbitral award files an application at high court as per Section 30 of the Arbitration Act, 2055. It typically takes one year from the date of application until getting verdict from the high court. If the verdict is not in its favor, the losing party further approaches the supreme court by way of writ petition to quash the verdict of the high court. Once the case enters the apex court it would typically take five years for the case to get decided.

It can thus be inferred that the judicial review alone of the arbitral award is taking about six years. Thus, there will be inordinate delay for a dispute to be finally settled, rendering the applicability of arbitration totally ineffective. If we add at least six months' period required by the first step of dispute settlement, i.e. Dispute Board (DB)/Dispute Adjudication Board (DAB) mechanisms, the scenario will become excruciatingly painful to accept.

If, after the passage of years of filing of a writ petition the apex court gives its verdict setting aside the arbitral award, then fresh arbitration process should have to be commenced. In the

case of fresh arbitration too, no one can guarantee that the parties would be satisfied with the second arbitral award. This means, there occurs unwarranted cycle of getting arbitral award, referring it to high court under Section 30 of Arbitration Act and getting its decision, again filing writ petition at the supreme court and getting its verdict (the cycle could go vicious!). In such a case we cannot imagine when the dispute will be settled; and there will be a lot of such disputes in projects. This situation will obviously have a serious negative impact on the work progress of the associated project/contract.

Why is this happening? The gateway to the above-mentionedlong judicial journey is a precedent established by supreme court in one of its decisions which is considered to be a landmark decision in the context of arbitration in Nepal.

The origin of the precedent

The precedent has been established by the Full Bench of the apex court while deciding on the case of Agricultural Development Corporation versus Sumit Prakash Asia (P.) Ltd. [1].

The background of the decision is that the two judges in a Division Bench of the supreme court had different opinions on how a party would approach the supreme court seeking to annul an arbitral award. One view argued that it should follow the Judicial Administration Act and refer to supreme court as appeal under ordinary jurisdiction of the court while the other view advocated for writ petition under extraordinary jurisdiction. Prior to this decision, both modes were being acceptable to the court depending upon the judges.

This very decision has delved a lot in favor of arbitration process, its origin & development, fundamental concept, and importance. It upheld that since the method of dispute resolution, i.e. arbitration, is freely chosen by the parties, the award passed by such tribunal will be final both in terms of fact and law except for certain limited conditions clearly provisioned in the law. The supreme court has further explained that even if the arbitral tribunal passes wrong decision, the court, except in limited condition, shall not be assumed to have vested with power to set aside such wrong decision (para 16 of the decision). However, the decision concludes by establishing the following precedent (para 21 of the decision):

"In absence of alternative remedy, writ petition can be filed in the apex court under its extraordinary jurisdiction should a party seek to quash the verdict of the High Court which had upheld an arbitral award."

Moreover, while setting the precedent the apex court has founded the following (para 11 of the decision):

"If an award is examined to see whether there exists a legal flaw or not and if it is found to contain legal flaw then in the absence of other alternative remedy, remedies including certiorari can be attainable."

From the analytical observation of the precedent, it can be inferred that writ petition can be filed at the supreme court against any decision of the high court related to arbitral award because the precedent has not spelled out any condition that the dissatisfied party needs to fulfill while filing the writ. The dissatisfied party merely needs to subjectively 'interpret' and claim that there is a legal flaw in the award,and he can easily file a writ petition at the apex court unhindered. The other party has no other option than to wait until the supreme court gives its verdict typically after five years.

Practical impact of the precedent:

The precedent unconditionally allows a disputing party as his/her right to file a writ petition after completing the course at the high court level. Because of this, it has been a general psychology of the losing party to refer the caseto the supreme court to linger the award finality by many years though there is no strong ground for it. Even if the losing party files writ petition with ill intention, merely to give trouble to the other party, the later must wait for long for the apex court's decision to get the ill intended writ quashed.

Even in the absence of strong basis, the trend of filing writ petition at the supreme court is more common in arbitration cases in which one of the disputing parties is a government agency. The reason for this is to safeguard the official involved from the accusation of not referring the case to the highest available level of judicial authority. The accusation would also be that the apex court might decide something favorable to the government agency had it followed the recourse to the easily available writ petition option.The ostensible reason for filing the writ petition is the 'legal question' or 'legal flaw' (kanoonitruti) in the arbitral award or the encroachment of the party's constitutional right. And it is the paradox that one must wait for the supreme court's hearing and decision to determine whether that'legal question' or 'legal flaw'really had existed, which would take many years.

The consequence of the above situation has been that many arbitration cases are being referred to the supreme court under extraordinary jurisdiction and in the guise of legal flaws,which is against the spirit of Section 39 of Arbitration Act,2055. This will cause inordinate delay in dispute resolution as well as overloading the apex court which contradicts with the basic philosophy of arbitration the expeditious resolution of commercial disputes thereby fostering private sector involvement in the development activities, creating a favorable environment for doing business in the country by attracting foreign investment, as well as reducing the load of courts of law.With this, the parties are declining or avoiding the arbitration process for dispute resolution.

Moreover, the indefinite journey in the judicial review process gives rise to a couple of questions such as: what would be the applicability of the commercial arbitration process if same amount or more time as in litigation is to be spent? What would be the meaning and usefulness of Section 39 of Arbitration Act? If in a contract, arbitration is the dispute resolution mechanism and in case the arbitral award is not implemented even after the fulfilment of provisions of Arbitration Act, will that be treated as breach of contract by the other party or not? Is it a mistake of the legislature not to draft the statute in such a way as to avoid additional judicial review after the dispute is regularized by the high court as specified in Section 39? What would be the meaning or importance of the constitutional provision of embracing Alternative Dispute Resolution (ADR) methods (including arbitration) for the resolution of disputes of general nature clearly stated under the sub-heading "policy of law and punishment" in Article 51 (State Policy)? and so on.

Practical experiences reveal that if any dispute arises in a turnkey construction contract one party (the employer) intends to commence arbitration process, tries to linger it as long as possible by (mis)utilizing the above-mentioned freedom of referring the case to the supreme court under the extraordinary jurisdiction, and at the same time

intends to get the project completed by the other party (the contractor) within this period. The core intention would be just to complete the project and become oblivious to the dispute settlement. The contractor, on the other hand, knowing the severe consequences of the prolonged legal review process associated with arbitration, tries to avoid the arbitration process at all and in an opportune moment imparts tremendous pressure on the employer to negotiate and settle the dispute in his favor else warning to severely delay or abandon the work at hand. The opportune moment is when the employer reaches the point of no return in the project implementation phase because further delay or termination of the contract of turnkey nature would be too costly or disastrous for the employer or the nation. Many projects are in limbo or dragged on in the snail's pace because of such strategic moves of the parties.

The root cause of delay and probable solution

Although the apex court gives much importance to the arbitration process, recognizes it as one of the ADR mechanisms and upheld many of the arbitral awards, the question then arises what exactly is happening?

The central point in the long delay in the award finality is that the arbitral award is undergoing judicial review twice, once at the high court level and then to the supreme court. This inordinate delay could be drastically reduced if the requirement for judicial review is made only once. This may be accomplished by amending the Arbitration Act in two ways.

First, amendment of Section 39 in such a way that no writ petition could be filed after the dispute is regularized as per Section 30. In fact, the apex court itself has upheld that contractual rights are not the fundamental rights[2],meaning extraordinary jurisdiction is not attracted in arbitration case.

Second, making arrangement in the Act such that the supervisory role is assumed by the apex court instead of high court.

A third option would be to correct the above 'landmark' precedent, if possible. Because the court decisions,after all, are made by keeping justice in mind and to make the life of society easy. If the above decision/precedent is contradicting with the very notion that contractual rights are not the fundamental rights or that the decision is rendering commercial arbitration patently ineffective and inefficient then we should find ways to correct it instead of adopting itblindly for the sake of process and undermining the essence of arbitration.

Further, it is important to note that the supreme court itself has already ordered the government in 2065 to make necessary legal arrangements to reduce the stages of judicial review of arbitral awards [3]. It's only the non-enforcement of this court order for unknown reasons.

Therefore, it has become imperative for all the parties concerned, including Nepal Councial of Arbitration (NEPCA) to take steps to implement this court order and make the arbitration process more efficient,more effective and more useful.

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Online Dispute Resolution in Nepal: Feasibility and Benefits of Virtual Arbitration

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Abstract

Online Dispute Resolution (ODR) is transforming dispute resolution by leveraging technology outside traditional legal frameworks. This article explores virtual arbitration within the ODR context in Nepal, focusing on the benefits and challenges of shifting from conventional to virtual arbitration. It examines Nepal's legal infrastructure, technological capabilities, and socio-cultural factors. Key legislative provisions, such as video conferencing for witness examination and electronic notice service, support virtual arbitration's potential. However, regulatory gaps, infrastructure limitations, and cultural resistance present challenges. The article highlights virtual arbitration's advantages—enhanced accessibility, reduced costs, and greater efficiency—and outlines necessary steps for its integration into Nepal's legal system.

Keywords: *Online Dispute Resolution (ODR), Virtual Arbitration, Video Conferencing, Regulatory Gap.*

1. Introduction

Online Dispute Resolution (ODR) refers to the use of technology to resolve disputes outside the traditional courtroom setting. It typically involves online communication tools, such as video conferencing, email, and automated systems, to facilitate arbitration, mediation, and negotiation between disputing parties. Generally, Online Dispute Resolution (ODR) refers to any method in which parties seek to settle disputes through online platforms. One perspective views ODR as a digital adaptation of traditional Alternative Dispute Resolution (ADR) methods, retaining the core elements of these processes but offering enhanced convenience and effectiveness. Another viewpoint regards ODR as a transformative tool—a new system that utilizes the Internet to help businesses save time, money, and reduce frustration, offering a more efficient and cost-effective alternative to traditional dispute resolution methods.[1]

ODR is characterized by several key features. It is typically **voluntary**, allowing parties to choose whether to use it or pursue other dispute resolution methods, with the option to withdraw at any time. The process is **informal**, offering flexibility and time for reflection, especially in asynchronous formats. It is also **confidential**, though this may be subject to legal exceptions,

1 Maria Mercedes Albornoz & Nuria Gonzalez Martin, 'Feasibility Analysis of Online Dispute Resolution in Developing Countries', 'University of Miami Inter-American Law Review p.1, volume 44, 2012, pp. 45-46. Available at: https://repository.law.miami.edu/cgi/viewcontent.cgi?article.1110 & context.umialr. Accessed on 5th November 2024.

such as when government entities are involved. Additionally, ODR may be **assisted**, with a neutral third party helping to facilitate mediation or arbitration, though this is not always the case.[2]

Online Dispute Resolution (ODR) is rapidly emerging as a transformative approach to resolving disputes, particularly in the context of Nepal, where traditional arbitration methods are being challenged by the need for efficiency and accessibility. Nepal, a nation embracing technological advancements, presents an intriguing landscape for exploring the feasibility and benefits of virtual arbitration. This article delves into the potential of ODR in Nepal, with a particular focus on virtual arbitration as a transformative approach to dispute resolution. By examining the legal framework, technological infrastructure, and cultural nuances, this analysis aims to shed light on the opportunities and challenges associated with virtual arbitration in the Nepalese context.

2. Concept of Virtual Arbitration

Arbitration, a form of ADR, is one of the key methods of dispute resolution that is increasingly moving online. The word arbitration is etymologically derived from the Latin word arbitari, which means to judge.[3] Arbitration is defined as "arbitration, the act of arbitrating, the putting an end to a difference by the means of arbitration." "Arbitration, in other words, is defined as the process by which parties sort the dispute between them to the third person, known as an arbitrator, who is neutral and impartial and lacks any interest in the dispute. In most cases, the person is chosen by themselves. The decision given by the arbitrator is binding to them as they accept the decision of the Arbitrator, which is awarded to be binding and final".[4]

In the context of Online Dispute Resolution (ODR), the role of technology is vital to the success of the process. ODR systems can be categorized based on the type of communication they utilize: synchronous or asynchronous. Synchronous communication allows real-time interaction between parties, using tools like Messenger or Skype. In contrast, asynchronous communication occurs at different times, such as through email exchanges. Electronic arbitration, which involves resolving disputes online, can also take either synchronous (e.g., Smartsettle) or asynchronous (e.g., Settle Today) forms. ODR methods offer various levels of integration into the dispute resolution process, allowing for flexibility in their application.[5]

Virtual Arbitration refers to the process of resolving disputes through arbitration using digital technology and online platforms, as opposed to traditional, in-person hearings. The broad definition of a virtual, or remote hearing is outlined in the IBA Rules on the Taking of Evidence in International Arbitration:

2 Enas Qutieshat, 'Online Dispute Resolution', 2017, pp. 5-6. Available at: https://www.researchgate.net/publication/339018325_Online_Dispute_Resolution_Online_Dispute_Resolution. Accessed on 5th November 2024.

3 Arbitration, Etymology is available at: arbitration | Etymology of arbitration by etymonline. Accessed on 5th November 2024.

4 Anil Kumar Shrestha, 'Revisiting the Core Ideas of Arbitration through Functional and Practical Measures', '*Kathmandu School of Law Review p.1*, Volume 12, Issue 1, 2023, p.1. available at: https://kslreview.org/index.php/kslr/article/view/2229#:~:text=This%20paper%20tries%20to%20oversee,an%20alternative%20dispute%20resolution%20mechanism. Accessed on 5th November 2024.

5 Karolina Mania, 'Online dispute resolution: The future of justice', *International Comparative Jurisprudence*, pp. 78-79. Available at: https://www.sciencedirect.com/science/article/pii/S2351667415000074. Accessed on 5th November 2024.

"Remote Hearing' means a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate".[6]

2.1 Types of Virtual Arbitration

Online arbitration can be categorized into two main types: **totally online arbitration** and **partly online arbitration**.[7]

1. **Totally Online Arbitration**: In this form, the entire arbitration process is conducted online through digital communication methods such as email, video conferencing, and web-based platforms. All hearings, evidence submission, and communications between the parties and the arbitrators take place remotely without any in-person meetings.

2. **Partly Online Arbitration**: This approach combines online and offline methods. While much of the process, including communication, evidence submission, and deliberations, may occur through email, video conferencing, or web platforms, certain aspects, such as live in-person hearings or the use of fax and post for evidence submission, are still incorporated into the proceedings. This hybrid model allows flexibility in how the arbitration process is carried out.

3. **Emergence of Virtual Arbitration**

Virtual arbitration has gained significant traction, particularly following the COVID-19 pandemic, which accelerated the adoption of remote dispute resolution methods. This shift has transformed traditional arbitration practices, leading to the development of various technologies and platforms designed to facilitate virtual hearings. As a result of the pandemic, the term "virtual hearing" became commonplace in the arbitration and legal community. What was once considered an unconventional method of dispute resolution quickly became the norm.

The COVID-19 pandemic has caused unprecedented global economic and social challenges, highlighting the urgent need for greater integration of technology into arbitration practices. The pandemic's resulting uncertainties, along with social distancing measures and travel restrictions, have made traditional in-person arbitration hearings typically involving the physical presence of tribunals, parties, representatives, and witnesses impractical. While virtual arbitration may seem like a recent development, it is not a new concept. Advances in technology, particularly in the 21st century, have reshaped how people communicate and interact, which has naturally extended to the field of dispute resolution. In virtual arbitration, parties interact with the arbitrator and submit evidence, documents, and other materials electronically, through methods like email and video conferences. This approach can streamline the arbitration process, making it faster and more cost-effective by eliminating the need for travel and the physical submission of extensive documentation.[8]

6 2020 IBA Rules on the Taking of Evidence in International Arbitration available at: https://www.amt-law.com/asset/pdf/bulletins3_pdf/210419_2.pdf accessed on 6th November 2024.

7 Farzaneh Badiei, ' Online Arbitration Definition and Its Distinctive Features', P.95. Available at: https://ceur-ws.org/Vol-684/paper8.pdf. Accessed on November 6, 2024.

8 Kariuki Muigua, 'Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for best practices', Chartered Institute

In reaction to the COVID-19 pandemic, virtual trials are being implemented in multiple jurisdictions, including the English Commercial Court, which conducted its first successful virtual trial in the case of NBK and RoK v Bank of New York Mellon and the Stati Parties. [9] Similarly, the pandemic significantly impacted the Nepalese judiciary, where courts offered limited services, resulting in restrictions on court proceedings across all types of cases. To ensure the constitutional right to justice was upheld, the judiciary introduced a video conference directive (2078), enabling virtual hearings to be conducted in most regions.[10]

The emergence of virtual trials, accelerated by the COVID-19 pandemic, has reshaped dispute resolution practices by integrating technology into traditional arbitration processes. Virtual hearings, once considered unconventional, have become the new standard, offering flexibility, efficiency, and cost savings. This shift has not only been pivotal in overcoming the challenges posed by the pandemic but has also led to the development of robust platforms and frameworks, such as video conferencing directives, ensuring continued access to justice across jurisdictions. As technology continues to evolve, virtual arbitration is set to play an increasingly central role in the future of dispute resolution.

Virtual arbitration has gained significant traction, particularly due to recent global events like the COVID-19 pandemic, which prompted a shift to online platforms. This form of arbitration allows parties to resolve disputes remotely, using technology to facilitate proceedings. Beyond being a reaction to external factors, it represents a fundamental shift in how arbitration can be more efficient and effective. A key advantage of virtual arbitration is its ability to increase accessibility and reduce costs by eliminating the need for travel and overcoming geographical barriers. Platforms like Zoom or Microsoft Teams enable real-time or asynchronous communication, making participation more flexible and inclusive. Therfore, online arbitration, especially in the form of virtual and electronic dispute resolution, enhances accessibility, efficiency, and cost-effectiveness, making it a valuable tool for resolving disputes in a rapidly evolving digital world.

4. Feasibility of Virtual Arbitration in Nepal

The feasibility of virtual arbitration in Nepal depends on several key factors that must align to create a functional and effective system for resolving disputes remotely. These factors include technological infrastructure**,** legal frameworks**,** stakeholder acceptance, and the socio-economic context within which arbitration operates in Nepal.

4.1 Legal and Regulatory Framework

Nepal has a relatively well-established legal framework for arbitration, primarily governed by the **Arbitration Act, 1999**. This Act aligns with international arbitration standards, facilitating a framework that is both flexible and adaptive to global practices.

of Arbitrators Kenya Branch, 2020, pp. 3-4. Available at: https://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf Accessed on 6th November 2024.

9 Linklaters, Drafting For Virtual Hearings In Arbitration: Helping To Keep Matters Moving In Light Of COVID-19, available at https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/april/drafting-for-virtualhearings. Accessed on 6th 2024.

10 Sabin Shrestha & Sagar Pathak, 'Exploring The E-Justic in Nepal: Current Status and Future Prospects ', 2023, p.2. Available at: https://fwld.org/wp-content/uploads/2023/05/Exploring-the-E-Justice-System-in-Nepal-2.pdf accessed on November 6, 2024.

Furthermore, recent legislative developments in Nepal have laid the groundwork for the potential incorporation of virtual arbitration. The **National Civil Code, 2017** (Section 182) contains provisions that permit witness examinations via video conferencing when a witness is unable to appear in person due to age, illness, or geographical distance. This provision can serve as a model for virtual arbitration, enabling remote participation in hearings, which is a key feature of virtual arbitration.[11] Rule 15 (13) of **NIAC Arbitration Rules, 2077** mentions if the arbitrator or tribunal deems appropriate, the arbitrator or tribunal may hear dispute through video conferencing or any other electronic means upon consent of the parties. Such hearing shall be performed on the basis of Rules of Seoul Protocol on Video Conferencing.[12] Additionally, **Section 20 of the Arbitration Act, 1999** provides for the service of notices and summons through electronic means, such as email, telex, fax, or other communication methods, if the relevant contact details are shared in the arbitration agreement or later provided by the parties. This provision underscores the legal acceptability of electronic communication in arbitration processes, further facilitating virtual proceedings.[13] The **Supreme Court Rules, 2017**, **High Court Rules, 2016**, and **District Court Rules, 2018** further reinforce the integration of information technology into Nepal's judicial processes. These rules enable the use of digital platforms for filing documents, communicating with parties, setting deadlines, and conducting various procedural functions. More importantly, they allow for the use of video conferencing in witness examinations and expert testimonies, with legally recognized digital responses. These developments in the judicial system create a supportive environment for the wider acceptance of virtual arbitration in Nepal.[14]

On the international front, the **International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration** (Article 8.2) provide a procedural framework for conducting evidentiary hearings remotely, allowing tribunals to order that hearings be held through virtual means[15]. Similarly, while the **UNCITRAL Model Law** (Article 20(2)) does not specifically mention remote hearings, it grants tribunals flexibility in determining the "place of arbitration," allowing them to consider factors such as convenience and the circumstances of the case.[16] This flexibility can be extended to virtual arbitration in Nepal, aligning with international norms.

Although Nepal's legal framework is generally supportive of arbitration and allows for remote proceedings in some instances (such as witness testimony via video conferencing), there are no explicit provisions for **fully remote or virtual arbitration** within the Arbitration Act itself. The Act does not address key issues that may arise in virtual arbitration, such as the validity of virtual hearings, procedural challenges, or the handling of electronic evidence. As a result, stakeholders may be uncertain about the legal standing of virtual arbitration, particularly in more complex or high-stakes cases. To address this, specific amendments to the Arbitration Act would be needed to clearly define the procedures and protections for virtual arbitration.

4.2 Technological Infrastructure

According to the **Nepal Electricity Authority's**

11 National Civil Code 2017, sec 182
12 NIAC Arbitration Rules, 2077, Rule 15(13)
13 Arbitration Act, 1999, sec. 20
14 Supreme Court Rules, 2017, rule 124, High Court Rules, 2016, rule 164, District Court Rules, 2018, rule 108
15 IBA Rules on the Taking of Evidence in International Arbitration, Art.8.2
16 UNCITRAL Model Law on International Commercial Arbitration, Art. 20(2)

(NEA) A Year Book Fiscal Year 2022/23, approximately 98% of the population in Nepal has access to electricity, either through the NEA grid or isolated solar and micro-hydropower plants. Of this, 95.03% are connected to the NEA grid, with the distribution network extending to 14 additional local levels. In total, 505 out of 753 local levels are substantially electrified, while 227 local levels are significantly electrified by the NEA grid, and the remaining 21 local levels rely on isolated solar and micro-hydropower systems.[17] The success of virtual arbitration in Nepal depends on reliable technology and internet access. While urban areas are seeing improvements, rural regions still face challenges. Widespread access to high-speed internet and secure digital platforms is essential, requiring infrastructure investment, especially in less-developed areas, to ensure equal access for all parties.

3.3 **Cultural Resistance**

Nepal has a deep-rooted tradition of **in-person dispute resolution**, and the legal culture surrounding arbitration remains relatively conservative. Many stakeholders, including arbitrators, lawyers, and businesses, may still be hesitant to fully embrace virtual arbitration due to concerns about its reliability, transparency, and effectiveness in replicating the rigor of traditional face-to-face hearings.

5. **Advantages of Adopting Virtual Arbitration**[18]

Virtual arbitration offers a wide range of advantages, which are particularly evident in today's fast-evolving legal landscape. Several key benefits of this increasingly popular method of dispute resolution can be discussed below, highlighting how virtual arbitration enhances accessibility, reduces costs, and improves overall efficiency. By examining these advantages, we can better understand how virtual arbitration is reshaping the future of dispute resolution in a more globalized and technology-driven world.

Breaking Geographical Barriers: The traditional limitations imposed by geographic location are increasingly being eliminated through Online Dispute Resolution (ODR) platforms, which enable parties to resolve disputes with the assistance of legal professionals, regardless of their physical distance. This transformation allows arbitration to become more flexible and inclusive, as it removes the need for all parties to be present in a single location. Even in complex cases, such as divorce or international commercial disputes, the entire process can proceed seamlessly through digital platforms, allowing hearings, evidence submission, and communication between the parties and arbitrators to take place remotely. This shift not only facilitates the resolution of disputes that might otherwise be delayed or hindered by travel restrictions or logistical challenges but also ensures that arbitration remains accessible to a broader range of individuals and organizations, irrespective of their geographical location.

Affordable and Accessible: The digital era, driven by rapid advancements in information technology, has led to the development of platforms like 'Immediation,' which simplify and expedite the arbitration process. These platforms, with their user-friendly interfaces, significantly reduce the time and resources traditionally required for resolving employment and commercial disputes. By streamlining the process, they make arbitration more affordable by cutting down on the costs associated with travel, venue hire, and prolonged legal proceedings. Additionally, these platforms often operate with transparent pricing models,

17 Distribution & Consumer Services Directorate of the Nepal Electricity Authority (NEA). Available at: https://www.nea.org.np/admin/assets/uploads/annual_publications/DCSD_Final_Book_2080.pdf. Accessed on November 6, 2024

18 Davy Karkason, 'How ODR Platforms Revolutionize Global Arbitration', 2024. Available at: https://www.transnationalmatters.com/how-online-dispute-resolution-platforms-transform-arbitration/ Accessed on November 6, 2024.

helping parties to better anticipate and manage the financial aspects of their disputes. As a result, the judicial system becomes more accessible to a broader range of individuals and organizations, including small businesses and individuals who might have previously been excluded due to high costs or logistical barriers.

Streamlining the Process for All Parties Involved: As advancements in computer technology continue to evolve, so too do the platforms supporting international dispute resolution, significantly improving efficiency for both legal practitioners and their clients. These digital platforms streamline the entire arbitration process by consolidating key functions into a single interface. Parties can now submit essential documents, such as PDFs, through secure channels directly within the platform, simplifying the submission of evidence and communication between parties, arbitrators, and legal representatives. This digital integration reduces the administrative burden and accelerates the exchange of information, facilitating a smoother and more efficient process. Features like direct emailing within the dispute resolution platform allow parties to communicate and share updates in real-time, without the need to disclose personal email addresses, thus preserving privacy. This not only safeguards sensitive information but also contributes to faster communication and more streamlined arbitration proceedings, ultimately leading to quicker resolutions and enhanced overall efficiency.

Reducing Administrative and Procedural Delays: Online Dispute Resolution (ODR) platforms bring significant innovations to alternative dispute resolution by addressing long-standing administrative delays. Through the use of data analytics and automation, these platforms simplify complex processes, accelerating case resolution. Key to this improvement is the integration of streamlined payment systems within ODR platforms, which enable prompt and transparent transactions, eliminating delays in the settlement of arbitration fees and financial disputes.

Enhancing Case Management Efficiency: Online Dispute Resolution (ODR) platforms play a crucial role in modernizing international arbitration, significantly improving case management by simplifying complex processes. These platforms not only ensure that the rights of all parties are rigorously protected but also automate key aspects of dispute resolution, creating a more seamless flow of negotiation and decision-making.

By leveraging ODR technology, arbitration becomes a more efficient and less intimidating process. Essential tasks such as document exchange, scheduling, and communication are handled with greater accuracy and speed. This shift marks a transformation in case management, moving away from a traditionally cumbersome system towards a highly organized, efficient, and transparent process that promotes timely resolutions and enhances overall clarity for all parties involved.

6. Conclusion

Virtual arbitration in Nepal holds significant promise as an efficient, accessible, and cost-effective method for dispute resolution. With a legal framework that largely supports digital communication and remote proceedings, Nepal is well-positioned to embrace virtual arbitration, particularly as technological infrastructure continues to improve. However, the lack of specific provisions for fully remote arbitration in the Arbitration Act, as well as infrastructural challenges in rural areas, pose substantial hurdles. Furthermore, cultural resistance to online dispute resolution methods and concerns regarding the reliability and transparency of virtual proceedings need to be addressed to foster wider acceptance. For virtual arbitration to thrive in Nepal, legal reforms are necessary to clarify the

procedures and protections for virtual hearings, while significant investments in infrastructure and capacity building are crucial to overcome the existing technological and procedural challenges. If these barriers are overcome, virtual arbitration could play a pivotal role in transforming Nepal's dispute resolution landscape, offering a modern, efficient alternative to traditional methods.

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11. National Civil Code 2017, sec 182
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A Brief Analysis on Incorporation of Principle of Arbitration in Arbitration Act of Nepal

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Abstract

This paper examines the extent of incorporation of principles of arbitration in arbitration act of Nepal. This paper identifies various principles of arbitration such as arbitration is consensual, arbitration is a confidential procedure, arbitration is Neutral, parties to choose the arbitrator, the decision of the arbitral tribunal is final and easy to enforce, hearing from separate arbitration tribunal and not intervention of Court in the arbitration act of Nepal. Similarly, this paper has explored the internationally recognized principles and from the 'The Arbitration Act 1996 of UK'. This paper encircled around the brief analysis of situation of incorporation of principles of arbitration under the arbitration act of Nepal. Ultimately this paper concludes by stating that the whole law of arbitration in Arbitration act of Nepal is based on the basically the principles of arbitration and has injected international standards.

Breaking the Ice

Trends of settlement of disputes through the process of arbitration has been upgrading day by day due to its unique nature from formal settlement of disputes. The whole process of settlement of dispute is based on the certain fundamental principles of the arbitration through which the law of arbitration must be compiled. Article 127(2) of Constitution of Nepal has incorporated the provision regarding other bodies as required may be formed to pursue alternative dispute settlement methods except the formal courts. Arbitration is one of the methods of ADR. The process of resolving disputes through arbitration is simply an informal and alternative procedure within the broader judicial process.[1] "Arbitration is the settlement of a dispute by the decision not of a court of law but of one or more persons called arbitrators which is executable as a decree of the court."[2]"Arbitrator" means an arbitrator appointed for the settlement of a dispute and the term also includes a panel of arbitrators.[3]"Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[4]Arbitration in Nepal has roots in the

1 Nepal Government v.Damodar Ropeways and Construction Company and others,NKP 2067, Volume 5,Decision no.8368.
2 Rajkumar S. Adukia, A PRACTICAL GUIDE ON THE CONCEPT AND PRACTICE OF ARBITRATION, Rishabh Academy Private Limited, India, 1st edition, 2016,P. 3.
3 Madhyasthata Ain 2055 (Arbitration Act 1999), Nepal, s.2(h).
4 Bryan A. Garner, *BLACK'S LAW DICTIONARY*, Thomson West, 2005.

traditional *Panchayat* system, which existed long before the establishment of a formal judicial framework. The *Panchayat* was an informal tribunal made up of five respected villagers who were selected to resolve disputes impartially.[5] The decisions made by these *Panchayats* were widely accepted and binding on the involved parties.[6]

However, the practice of modern notion of arbitration in Nepal is very short. Before the enactment of general legislation on commercial arbitration in 1981, Arbitration Act, 2038 B.S., was the first legislation that provided comprehensive provisions governing the entire arbitration process for voluntary arbitrations.[7] Before, this act provisions regarding arbitration were scattered around in different legislations. Finally, Arbitration Act, 2055 was authenticated and published on 15 April 1999 with incorporation of various standards and principles of arbitration which is current existing legal provision regarding the law of arbitration. Arbitration Act, 2055 is the major law dealing with process of arbitration in Nepal. To be a better law, it must have incorporated the accepted principles and standards of arbitration. This paper aims study about the situation of incorporation of principles of Arbitration under the Arbitration Act,2055. This paper is limited to study about the incorporation of principles of Arbitration in Arbitration Act, 2055 only.

Principles of arbitration and incorporation

Principle I: Arbitration is consensual

Arbitration is consensual means arbitration can only take place if both parties have agreed to resolve the dispute through the process of arbitration.

Arbitration is grounded in the principle of party autonomy, allowing the parties to retain control over their dispute and determine the specifics of how the resolution process unfolds.[8]Arbitration is a consensual process that requires agreement from both parties. It can only begin, if the parties have mutually agreed to initiate it. Parties can include an arbitration clause, if applicable, through a submission agreement. Additionally, neither party is permitted to withdraw from the arbitration process, unilaterally.[9]A contract is also central to the success of party autonomy in the arbitration procedure. The consent of the parties limits an arbitrator's power because an arbitrator can only decide issues within the scope of the parties agreement.[10]Arbitrators appointed to resolve disputes under an agreement cannot make decisions on matters beyond the scope of those disputes without the consent of the concerned parties.[11]Including this, arbitrators are expected to

5 Bed Prasad Uprety, Evolution of Commercial Arbitration in Nepal: Issues and Challenges, *NJA Law Journal*,2:1, 2008, p. 208.

6 Ibid.

7 Susan Dahal, An Analytical Study on Commercial Arbitration Law : a Nepalese Perspective, *Nepal Council of Arbitration (NEPCA)*, pearly Bulletin, 2022/2023, P.2, Available at https://www.nepca.org.np/wp-content/uploads/2023/06/Bulletin30-compressed.pdf, accessed on 10th October 2024.

8 Anil Kumar Shrestha, Revisiting the Core Ideas of Arbitration through Functional and Practical Measures, *Kathmandu School of Law Review p.1*, 12:1, 2023, P. 165.

9 Riya Ranjan, 'Important principles of Arbitration Law', *ipleaders*, 25 February 2021, available at https://blog.ipleaders.in/important-principles-arbitration-law, accessed on 15November 2024.

10 Margaret L. Moses, *The principles and Practice of International Commercial Arbitration*, Cambridge University press, Singapore, 1st edition, 2008, p.2.

11 *Agricultural Materials Company Limited Head Office, Kathmandu v. Appellate Court, Patan Lalitpur and others*, NKP 2064, Volume 11, Decision no.7905.

apply the rules, procedures, and law chosen by the parties. The authority of an arbitrator is limited to the terms of the agreement. If the arbitrator issues an award that goes beyond the terms and provisions of the agreement, it is considered an excess of jurisdiction.[12]

Regarding the incorporation of this principle under arbitration act, 2055, in case any agreement provides for the settlement of disputes through arbitration, the disputes connected with that agreement or with issues coming under that agreement shall be settled through arbitration according to the procedure prescribed in that agreement.[13]Including this in case of concerned parties to a civil suit of a commercial nature which has been filed in a court and which may be settled through arbitration according to prevailing laws, file an application for its settlement through arbitration, such dispute shall also be settled through arbitration.[14] Further, the language to be used by the arbitrators in the proceedings shall be as specified in the agreement, if any. But they shall use the language determined by them through mutual consultations. In case the arbitrators fail to determine the language to be used by them, the language used in the agreement shall be the language to be used by the arbitrators.[15]In addition to this, regarding the adoption of procedure for the dispute settlement, the procedure to be adopted by the arbitrator while taking a decision on a dispute shall be as mentioned in the agreement or the procedure not laid down in the Act shall be as prescribed by the arbitrator with the consent of the parties.[16]These legal provisions are based on the principle of consensual.

Principle II: Arbitration is a confidential procedure

One of the key benefits of arbitration is the confidential nature of the process. The general rule of arbitration is that parties to the dispute should not publish, disclose, or communicate about any information related with arbitral proceedings under the agreement or to an award made in those proceedings.[17]English courts view arbitration as a private method of dispute resolution and typically infer an obligation of confidentiality within the arbitration agreement between the parties.[18] Many companies want confidential procedures for resolving the dispute arising between them because they donot want to information disclosed about their company and its business operations, or the types of disputes it is engaged in, nor do they want a potentially negative outcome of a dispute to become public.[19] The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.[20] In certain cases, parties are permitted to limit access to trade secrets and other confidential information presented to the arbitration tribunal.[21] Regarding the exception

12 *Krishnachandra Jha v. Dinesh Bhakta Shrestha and others*, NKP 2066, volume 4, Decision no.8128.
13 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal, s. 3(1).
14 Ibid, s. 3(2).
15 Ibid, s. 13.
16 Ibid, s. 17 (1).
17 Kenneth Kaoma Mwenda, *Principle of Arbitration Law*, BrownWalker Pres, Parkland, 2003, P. 91.
18 Anil Kumar Shrestha, Revisiting the Core Ideas of Arbitration through Functional and Practical Measures, *Kathmandu School of Law Review*, 12:1, 2023, P. 166.
19 Margaret L. Moses, *The principles and Practice of International Commercial Arbitration*, Cambridge University press, Singapore, 1st edition, 2008, p.4.
20 *The Arbitration Act 1996*, UK, s.1(b).
21 Anil Kumar Shrestha, Revisiting the Core Ideas of Arbitration

of the principle, one exception is that the parties can, if they so wish, choose to agree otherwise, stipulating that any information relating to the arbitration can be shared with public or third-parties and second exception to the general rule or principle of confidentiality is that the publication, disclosure, or communication of information is permissible only in cases where dissemination is required by law.[22]

This principle has been adopted under the Arbitration Act, 2055of Nepal. Except when otherwise desired by the parties, arbitration proceedings shall be held in-camera.[23]

Principle III: Arbitration is Neutral

Neutrality of the forum is one of the significant reason for choosing the arbitration process for resolving the dispute. "Arbitration is a neutral process; hence, it provides equal opportunity to the parties such as Arbitrator, Arbitration Panel, applicable law, language, and venue of the arbitration. This also ensures that no parties should enjoy the home-court advantage."[24] The neutrality in the arbitration process is established due to its nature and selection process of arbitrators. The parties are obliging to select the neutral arbitrators.

Tribunal formed by comprising the arbitrators is one of the disputes adjudicating body for ensuring the justice to the parties to the dispute. One of the principles of justice incorporated under the constitution of Nepal as "Every person shall have the right to a fair trial by an independent, impartial and competent court or judicial body" is also applied here. [25]

This principle has been injected under the Arbitration Act, 2055. Parties are free to choose the arbitrators for the resolution of dispute which makes the arbitrator to be fair and impartial. Before starting the proceedings of arbitration, the arbitrator must affix his signature on two copies of a written oath as indicated in the schedule regarding impartiality and honesty and send one copy thereof to the Appellate Court and keep the other copy in the case-file. [26] Including this before taking oath, the arbitrator must make clear matters, if any, which raise a reasonable doubt about his /her impartiality or independence in respect to the dispute which he/she has to settle.[27] In case any arbitrator is clearly seen to have shown a bias toward or discriminated against any party instead of working in an impartial manner[28]or any arbitrator engages in improper conduct or commits fraud in the course of arbitration.[29]

Principle IV: Parties to choose the arbitrator

Party autonomy to choose the arbitrator is the Key principle that aligns with the concept of arbitration. Each party are free to select the Arbitrator whom they think will be fit to handle their case as per their own will. In case where the parties have chosen a three-member arbitration tribunal, then each party appoints one of the arbitrators. Then the two selected arbitration shall agree on the presiding arbitrator.[30] The agreement

through Functional and Practical Measures, *Kathmandu School of Law Review*, 12:1, 2023, P. 166.

22 Kenneth Kaoma Mwenda, *Principle of Arbitration Law*, BrownWalker Pres, Parkland, 2003, P. 91.

23 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal, s. 19.

24 Riya Ranjan, 'Important principles of Arbitration Law', *ipleaders*, 25 February 2021, available at https://blog.ipleaders.in/important-principles-arbitration-law, accessed on 15November 2024.

25 *NepalkoSambidhan* (Constitution of Nepal), Art. 20(9).

26 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal, s.9(1).

27 Ibid, s.9(2)

28 Ibid, s.11(2)(a).

29 Ibid, s.11(2)(b).

30 Riya Ranjan, 'Important principles of Arbitration Law',

between the parties to arbitrate can also suggest the potential Arbitrator with relevant expertise or may directly appoint members of the arbitration tribunal. [31]

This principle has been incorporated under Arbitration Act 2055 by stating that number of arbitrators is as specified in the agreement. In case the agreement does not specify the number of arbitrators, there shall ordinarily be three arbitrators.[32]Further Notwithstanding otherwise contained in the agreement, the process of appointing arbitrators must be started within 30 days from the date when the reason for the settlement of a dispute through arbitration arises.[33] In case the agreement mentions the names of arbitrators, they themselves shall be recognized as having been appointed as arbitrators.[34]In case the agreement has made any separate provision for the appointment of arbitrators, arbitrators shall be appointed accordingly.[35]Notwithstanding otherwise contained in the agreement, each party shall appoint one arbitrator each and the arbitrators shall appoint the third arbitrator who shall work as the chief arbitrator.[36]

Principe V: The decision of the arbitral tribunal is final and easy to enforce

The decision of the arbitral tribunal is final which is known as the Award. The arbitration tribunal's decision is final and binding on both parties. Arbitration awards can be easily enforced in other nations than court proceedings.[37]

When shedding the light upon the incorporation of this principle, the parties are obliged to accept the decision of the arbitral tribunal. In case there are three more arbitrators, the decision of the majority shall be deemed to be the decision of arbitration. [38] In case the arbitrators have dissenting opinions so that the majority (opinion) cannot be ascertained, the opinion of the chief arbitrator shall be deemed to be the decision of arbitration, except when otherwise provided for in the agreement.[39] Further, the arbitrator shall read out the decision in the presence of the concerned parties, hand over a copy of that decision to each party, and keep evidence thereof in the case file. In case any party is absent at the time fixed for reading out the decision or refuses to accept a copy of the decision even after being present at the time fixed for reading out the decision, a notice shall be furnished to him/her along with a copy of the decision after indicating the same.[40]

Except the Appellate Court has issued an order under Section 30, the arbitrator shall not take another decision on the matter referred to him/her for arbitration after once reading out his decision on the matter, except correcting arithmetic, printing, typing or similar other minor errors and inserting omitted particulars without prejudice to the substance of the decision.[41] So, the decision of the arbitral tribunal is final and binding. The concerned parties shall be under obligation to implement the award of the arbitrator within 45 days from the date when they

Ipleaders, 25 February 2021, available at https://blog.ipleaders.in/important-principles-arbitration-law, accessed on 15November 2024.

31 Anil Kumar Shrestha, Revisiting the Core Ideas of Arbitration through Functional and Practical Measures, *Kathmandu School of Law Review*, 12:1, 2023, P. 166.

32 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal, s. 5(1).

33 Ibid,s. 6(1).

34 Ibid,s. 6(2).

35 Ibid,s. 6(3).

36 Ibid, s. 6(4).

37 Anil Kumar Shrestha, Revisiting the Core Ideas of Arbitration through Functional and Practical Measures, *Kathmandu School of Law Review*, 12:1, 2023, P. 166.

38 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal, s.26(1).

39 Ibid, s.26(2).

40 Ibid,s. 28.

41 Ibid, s. 29(1).

receive a copy thereof.[42] If the party to the dispute is not satisfied with the decision of the arbitral tribunal, may appeal. Any party dissatisfied with the decision taken by the arbitrator may, if one wishes to invalidate the decision file a petition to the Appellate Court along with the related documents and a copy of the decision within 35 days from the date the decision heard or notice received thereof under this Act. Petition shall also supply a copy of that petition to the arbitrator and the other party.[43]"The arbitrator is the most competent decision-maker who examines the facts related to the dispute and makes a decision on the matter.Particularly when resolving disputes related to agreements or contracts of a technical nature, it is necessary to analyze the technical facts involved."[44] Due to which chances of getting justice to both parties in proper manner is high and enforce the decision of the arbitral tribunal easily without hindrances and disturbances.

Further, There is provision under Arbitration Act, 2055 that "in case a award cannot be implemented within the time limit prescribed in Section 31 of the Arbitration Act, 2055, the concerned party may file a petition to the District Court within 30 days from the date of expiry of the time limit prescribed for that purpose to implement the award In case such a petition is filed, the District Court shall implement the award ordinarily within 30 days as if it is its own judgment".[45] This legal provision has also assisted to enforce the decision of the arbitral tribunal easily.

"The provision allowing for an application to the appellate court to review the arbitration award and the provisions related to the enforcement of the award exist independently of each other and are not mutually exclusive. These two provisions are seen as interconnected and interrelated.The enforcement stage will not commence while a challenge to the decision is under consideration, and if enforcement takes place before the decision is final, it will hold no validity."[46]Section 30 of the Arbitration Act, 2055 provides for the right to challenge an arbitration award in the appellate court, granting the appellate court the authority to either annul the award or order a retrial. Consequently, when an arbitration award is challenged, it can no longer be considered final."[47]

Principle VI : Hearing from separate arbitration tribunal

The general rule of arbitration is that the disputes must be resolved through an arbitral tribunal. The Arbitration Act 1996 of UK states that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".[48]In each and every disputes separate tribunals are formed for the settlement of those disputes. Formation of separate tribunals begins when dispute arises and parties want to settle the dispute through the process of arbitration. Number of arbitrators, appointment of arbitrators and office of the arbitrators are specified in the agreement between the parties or upon the consent of the parties.

Regarding the incorporation of this principle under the Arbitration Act, 2055,Notwithstanding otherwise contained in the agreement, the

42 Ibid, Nepal,s.31.
43 Ibid, s. 30(1).
44 *Road Department and others v. Vaiva Construction Company Pvt. Ltd. and others,* NKP 2069, Volume 10,Decision no. 8479.
45 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal, s. 32.
46 *Anil Kumar Pokharel v. Kathmandu District court and others*, NKP 2064, Volume 4, Decision no.7836.
47 Ibid.
48 The Arbitration Act 1996, UK, s.1(a).

process of appointing arbitrators must be started within 30 days from the date when the reason for the settlement of a dispute through arbitration arises.[49]The number of arbitrators is as specified in the agreement. In case the agreement does not specify the number of arbitrators, there shall ordinarily be three arbitrators.[50]Further, the office of the arbitrator shall be located at the place specified in the agreement, if any.[51]If the agreement does not specify the location of the arbitrator's office, at the place selected by the concerned parties.[52]

Principle VII: Not intervention of Court

The court cannot intervene in the process of adjudication through arbitration except provided under the prevailing law. The Arbitration Act 1996 of UK also states that "in matters governed by this Part the court should not intervene except as provided by this Part."[53]This principle ensures the independency of arbitration process and arbitral tribunal. However, this principle is not absolute. The court may intervene as per prevailing laws in some circumstances.

Now if In case any agreement provides for the settlement of disputes through arbitration, the disputes connected with that agreement or with issues coming under that agreement shall be settled through arbitration according to the procedure prescribed in that agreement, if any, and if not, according to the Arbitration Act, 2055.[54] According to the provisions of Section 3, when both parties voluntarily agree in their contract to resolve disputes through arbitration, it is considered that they have willingly ousted the court's jurisdiction. In such cases, the court cannot assume jurisdiction to hear such contractual disputes arising under the agreement. Even if the contract specifies that disputes shall be resolved through arbitration, including details like the appointment process, the number of arbitrators, etc.

"The method of appointing a mediator, the number of mediators, and other details are clearly mentioned in the agreement. However, if a mediator cannot be appointed even after following the stated procedure and method, the appellate court must exercise its authority as the appointing authority under Section 7 of the Mediation Act, 2055, to appoint a mediator."[55] Any party may submit an application to the Appellate Court for the appointment of arbitrators in case no arbitrator can be appointed upon following the procedure contained in the agreement or does not mention anything about the appointment of arbitrators.[56]Similarly, when parties agree to submit a dispute to arbitration for resolution, the court should not intervene by addressing factual questions to resolve the dispute.[57] However, in cases where a person appointed to perform the role of arbitrator was appointed irregularly, was appointed by someone without jurisdiction, or was not appointed within the specified time limit, and where no alternative remedies are available for resolving such disputes, the extraordinary jurisdiction of this court may be invoked.[58]

49 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal ,s.6(1).
50 Ibid, s. 5(1).
51 Ibid, s. 12(1)(a).
52 Ibid, s. 12(1)(b).
53 The Arbitration Act 1966, UK, s.1(c).
54 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal ,s.3.
55 *National construction company Nepal v. Appellate court, Patan, Lalitpur and others*,NKP 2065, Volume 2, Decision no.7933.
56 *Madhyasthata Ain 2055* (Arbitration Act 1999), Nepal ,s.7(1).
57 *Agricultural Materials Company Limited Head Office, Kathmandu v. Appellate Court, Patan Lalitpur and others*, NKP 2064, Volume 11, Decision no.7905.
58 *Shri Ramkumar Lamsal v. Nepal Council of arbitration and others*, NKP 2067, Volume 11, Decision no.8513.

Concluding words

It can be hereby, concluded that the whole law of arbitration in Arbitration Act of Nepal is based on the basically the principles of arbitration such as arbitration is consensual, arbitration is a confidential procedure, arbitration is Neutral, parties to choose the arbitrator, the decision of the arbitral tribunal is final and easy to enforce, hearing from separate arbitration tribunal and not intervention of Court. This Act has injected international standards also. The ArbitrationAct, 2055 has not incorporated these principles absolutely. In many conditions there is intervention of court also. However these interventions are necessary for proper regulation of arbitration process and to ensure proper justice.

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The Future of Arbitration in the Metaverse and Virtual Environments

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Abstract

This articleexamines the future of arbitration in the metaverse and virtual environments, exploring its potential to address jurisdictional complexities, enforceability, and cultural nuances. It highlights the opportunities for integrating blockchain, enhancing privacy protocols, and developing specialized arbitration platforms. Key considerations include arbitrator expertise, ethical guidelines, and harmonized legal frameworks for enforceable awards. By addressing these challenges, arbitration can evolve as a reliable dispute resolution mechanism in the dynamic metaverse landscape. The articleunderscores the importance of a multidisciplinary approach to create efficient, inclusive, and secure arbitration systems.

Introduction

The rapid evolution of the digital landscape has given rise to the metaverse, a virtual environment where users interact through digital avatars. This immersive digital universe is transforming industries, commerce, and interpersonal interactions. With these advancements, disputes arising from activities in the metaverse are inevitable, creating a need for efficient and innovative dispute resolution mechanisms. Arbitration, a popular method of alternative dispute resolution (ADR), is poised to adapt to the unique challenges and opportunities presented by the metaverse. This article explores the potential of arbitration in virtual environments, examining the challenges, opportunities, and key considerations for its future.

Understanding the Metaverse and Virtual Environments

The metaverse is a collective virtual shared space created by the convergence of virtually enhanced physical and digital realities. It is characterized by persistent virtual worlds, augmented reality, and decentralized technologies such as blockchain (Lee et al., 2021). Activities in the metaverse include social interactions, virtual real estate transactions, gaming, digital asset trading, and virtual services. The inherently borderless nature of the metaverse presents jurisdictional and legal complexities, necessitating dispute resolution mechanisms that transcend traditional frameworks (Graglia et al., 2020).

The Role of Arbitration in the Metaverse

Arbitration is well-suited for the metaverse due to its flexibility, neutrality, and ability to operate beyond national jurisdictions. Key benefits include:

1. **Cross-Border Applicability:** The metaverse transcends geographical boundaries, and arbitration provides a mechanism to resolve disputes without being confined by national legal systems (Schmitz, 2019).
2. **Customization:** Parties can tailor arbitration procedures to suit the specific needs of the virtual environment, ensuring relevance and efficiency (Graglia et al., 2020).
3. **Speed and Cost-Efficiency:** Arbitration can offer a faster and less expensive alternative to litigation, critical in the dynamic and fast-evolving metaverse (Devanesan, 2021).
4. **Expertise:** Arbitrators with expertise in digital technologies, blockchain, and virtual economies can ensure informed decision-making (Schmitz, 2019).

Challenges in Adopting Arbitration in the Metaverse

While arbitration holds significant potential, its adoption in the metaverse faces several challenges:

1. **Jurisdictional Issues:** Determining the applicable law and jurisdiction for disputes in the metaverse is complex due to its borderless nature (Lee et al., 2021).
2. **Enforceability of Awards:** Ensuring the enforceability of arbitral awards in virtual environments and physical jurisdictions is a significant challenge (Graglia et al., 2020).
3. **Privacy and Security:** The metaverse introduces new risks of data breaches and cyberattacks, necessitating robust privacy and security measures (Devanesan, 2021).
4. **Technological Infrastructure:** The success of arbitration in the metaverse relies on the development of secure and reliable digital platforms (Lee et al., 2021).
5. **Cultural and Ethical Considerations:** Disputes in the metaverse may involve parties from diverse cultural and legal backgrounds, requiring sensitivity and adaptability (Schmitz, 2019).

Opportunities for Arbitration in the Metaverse

Despite the challenges, the metaverse offers unique opportunities for arbitration:

1. **Smart Contracts and Blockchain Integration:** The use of blockchain technology in arbitration can enhance transparency and enforceability. Smart contracts can automatically execute arbitral awards, ensuring compliance (Graglia et al., 2020).
2. **Virtual Hearings:** Virtual environments allow for fully immersive arbitration hearings, reducing travel costs and increasing accessibility (Devanesan, 2021).
3. **Specialized Rules:** Institutions can develop arbitration rules tailored to the metaverse, addressing issues like digital assets, intellectual property, and virtual real estate (Schmitz, 2019).
4. **Decentralized Arbitration:** Decentralized arbitration platforms using blockchain technology can democratize dispute resolution, allowing peer-to-peer dispute settlement (Graglia et al., 2020).

5. **Increased Accessibility:** The metaverse can make arbitration accessible to individuals and small businesses, leveling the playing field in dispute resolution (Lee et al., 2021).

Key Considerations for Future Arbitration Frameworks

To effectively address disputes in the metaverse, arbitration frameworks must consider the following:

1. **Defining Jurisdiction:** Clear rules must be established to determine the applicable law and jurisdiction for metaverse-related disputes (Schmitz, 2019).
2. **Arbitrator Expertise:** Training programs and certification for arbitrators in virtual technologies and digital commerce should be developed (Graglia et al., 2020).
3. **Platform Design:** Secure, user-friendly platforms for conducting virtual arbitration proceedings are essential (Lee et al., 2021).
4. **Privacy and Security Protocols:** Robust cybersecurity measures must be integrated into arbitration platforms to protect sensitive data (Devanesan, 2021).

Ethical Standards: Ethical guidelines should address conflicts of interest, impartiality, and cultural sensitivity in virtual arbitration (Schmitz, 2019).

Key Considerations for Future Arbitration Frameworks

The evolution of arbitration frameworks to accommodate the complexities of the metaverse necessitates careful consideration of several critical factors. Firstly, defining jurisdiction remains a pivotal challenge. The metaverse's borderless nature complicates the determination of applicable laws and jurisdictions for disputes. Clear and standardized rules must be developed to address jurisdictional issues, ensuring predictability and consistency in arbitration outcomes. This requires collaborative efforts among international legal bodies, technology experts, and stakeholders in the metaverse ecosystem.

Another vital aspect is the expertise of arbitrators. The unique nature of disputes arising in virtual environments demands arbitrators with specialized knowledge in digital technologies, blockchain, virtual economies, and intellectual property rights. Developing comprehensive training programs and certification processes will be crucial in equipping arbitrators with the necessary skills to handle such disputes effectively. Expertise in understanding cultural nuances and ethical considerations will also play a significant role, given the diverse and global nature of participants in the metaverse.

The design and functionality of arbitration platforms are equally critical. Platforms must be user-friendly, secure, and capable of hosting virtual arbitration proceedings seamlessly. Advanced technological features such as encrypted communication, blockchain integration for transparency, and artificial intelligence for case management can enhance the efficiency and reliability of arbitration processes. Ensuring robust cybersecurity measures is imperative to protect sensitive data and maintain the integrity of arbitration proceedings.

Privacy and security protocols require particular attention. The metaverse introduces heightened risks of data breaches and cyberattacks, necessitating stringent data protection measures. Arbitrators and platform providers must comply

with global data protection standards, ensuring that sensitive information related to arbitration proceedings is adequately safeguarded. Transparency in the handling of data and communication during arbitration is essential to build trust among stakeholders.

Ethical standards also form a cornerstone of future arbitration frameworks. Clear guidelines must address conflicts of interest, impartiality, and accountability. Arbitrators must adhere to high ethical standards to maintain the credibility of arbitration processes. Additionally, ethical considerations should extend to the cultural and social dynamics of disputes in the metaverse, fostering inclusivity and respect for diverse perspectives.

Finally, ensuring the enforceability of arbitral awards is a fundamental consideration. Arbitration outcomes must be recognized and enforceable both within the virtual environment and in physical jurisdictions. This requires harmonization of legal frameworks across jurisdictions to bridge the gap between virtual and real-world legal systems. International treaties and agreements can play a significant role in achieving this harmonization, providing a solid foundation for enforceable arbitration in the metaverse.

Case Studies and Examples

Several initiatives and case studies highlight the evolving role of arbitration in virtual environments:

1. **Blockchain-Based Arbitration Platforms:** Platforms like Kleros and Aragon Court use decentralized arbitration to resolve disputes related to blockchain transactions and smart contracts (Graglia et al., 2020).
2. **Virtual Hearings During the Pandemic:** The COVID-19 pandemic accelerated the adoption of virtual arbitration hearings, demonstrating the feasibility of conducting proceedings in digital environments (Devanesan, 2021).
3. **Virtual Real Estate Disputes:** As virtual real estate markets grow, disputes over ownership and transactions highlight the need for specialized arbitration mechanisms (Lee et al., 2021).

Conclusion

The metaverse represents a new frontier for arbitration, offering both challenges and opportunities. By leveraging technology, arbitration can provide an efficient and accessible means of resolving disputes in virtual environments. However, its success depends on addressing jurisdictional complexities, ensuring enforceability, and developing secure and user-friendly platforms. As the metaverse continues to evolve, arbitration must adapt to meet the demands of this dynamic digital ecosystem, shaping the future of dispute resolution in unprecedented ways.

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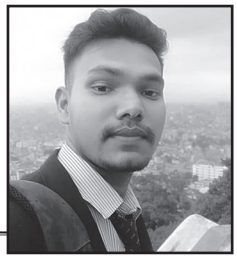
Alternative Dispute Resolution (ADR) in Nepal: Legal Framework, and Practices



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Abstract

In Nepal, dispute resolution has typically depended on a mix of traditional methods and modern legal structures. Alternative dispute resolution (ADR) techniques, including negotiation, arbitration, conciliation, and mediation, have grown in importance throughout time alongside traditional court proceedings, providing parties with more effective and flexible options for resolving disputes outside of the courtroom. Panchayats and Panchalis, two community-based systems, served as the foundation for Nepal's conflict resolution procedures in the past. However, ADR has developed into a more organized and approachable procedure as a result of the passing of legislation like the Arbitration Act of 2055. Since ADR may provide justice in a timely and economical manner, the judiciary actively encourages it. The legislative frameworks, which include the Foreign Investment and Technology Transfer Act and the Development Board Act, offer a methodical approach to resolving issues through alternative dispute resolution (ADR), guaranteeing that parties have access to options including arbitration and mediation for effective dispute resolution. A well-known cases like RajendramanSherchan v. Appellate Court and National Construction Company v. Appellate Court have helped to clarify ADR principles, especially in commercial disputes, supporting the legitimacy of ADR outcomes and encouraging the adoption of alternative dispute resolution practices.

Keywords: *Arbitration, Mediation, Conciliation, Negotiation*

Introduction

a. Background of Dispute Resolution in Nepal

The evolution of human beings and the establishment of society naturally gave rise to various issues. To maintain social harmony, its solution emerged over time. These solutions played a vital role in ensuring order and fostering mutual respect within communities. Its solution has also been taking place in various forms. According to traditional forms of dispute resolution, it is found that it is resolved through various means such as going to the elders and to the "kachahari". But in modern society, both formal and informal means are being practiced effectively for dispute resolution. Formal and informal dispute resolution processes are defined as alternative dispute resolution systems. In terms of dispute resolution, the system organized by the state is

called the formal process of dispute resolution. Alternative dispute resolution or ADR refers to a "procedure for settling a dispute by means other than litigation, such as arbitration or mediation." (Dictionary, 9th edition, 2009).Alternative dispute resolution is generally understood as a system of resolving disputes outside of court with the assistance of a neutral third party through a process different from formal judicial proceedings. The alternative method of dispute resolution is also known as the informal process, considering the formal procedure adopted by the court for dispute resolution(Aryal, First Edition 2020).In the same way, it is found that the method of dispute resolution done outside the court is considered as an alternative method based on the context provided by the prevailing law to the court, which is the main responsibility of dispute resolution. Therefore, there are different alternative forms of dispute resolution.Alternative dispute resolution forms are classified as Adjudicative, Evaluative, Meditative and Hybrid and Combined process. Arbitration in the form of decision-making, professional and expert evaluation in the form of evaluation, meditation in the form of reconciliation, reconciliation and consensus building and in the mixed process of reconciliation and mediation in the form of mixed process Med-Arb, negotiation, reconciliation Mixed forms of case evaluation include Mini-Trail etc.(Brunet, 5th ed., 2016).Thus, there are different processes within different formats for dispute resolution

b. **Evolution and Adoption of ADR**

ADR is not a new phenomenon, though it has been organized on more scientific lines expressed in more clear terms and employed more widely in dispute resolution in recent years than before. Long before there were Panchayat, panchali, Mukihiya, Guthi Naike were established in informal way to settle the dispute in gross-roots level.ADR can be traced back to the Panchayat system in Nepal(Bhandari).During the Malla period and the Rana regime, community-based justice systems were practiced, and local leaders were trusted to resolve conflicts.disputes were settled within communities through Panchayati systems or local gatherings where respected elders played the role of mediators. These informal systems were crucial for maintaining harmony in small, rural communities. Panchayat was an informal tribunal of five gentlemen chosen from among the villagers to render an impartial decision in the settlement of disputes between the members of Villagers. In the lichhavi period the panchali which was also known as panch- sabha was empowered to decide disputes at the local level.The practice of mediation/arbitration in Nepal has long history behind it(Shrestha, 2062). These two methods of dispute resolution were practiced in ancient Nepal which are still continuing but in an advanced form. Muluki Ain 2020, Development Board Act, 2013 B.S., Local self - governance Act 2055 B.S., Nepal petroleum Act, 2040 B.S., Foreign Investment and Technology Transfer Act 2049 B.S. Labour Act 2048 B.S., Contract Act 2056 B.S., Banks and Financial Institutions Act, 2063 B.S. are also come into force to address ADR.

Legal Framework of ADR in Nepal

Alternative Dispute Resolution (ADR) in Nepal is governed by a comprehensive legal framework. It is continually evolving, guided by statutory provisions. The most common methods of ADR

in Nepal include mediation, arbitration, and negotiation.

a. **Statutory Provisions and Legislative Framework**

In Development Board Act, 2013 of Section 9 states about settlement of disputes by Arbitration:

In cases where any agreement made with the Board contains a provision that any dispute arising in connection with the agreement and its implementation has to be referred to arbitration for settlement, the arbitrator appointed in accordance with the agreement shall settle the dispute, and no court shall have the power to try and settle such a dispute. The arbitrator shall have the authority to procure and examine witnesses and evidence, summon witnesses, and order the submission of documents in respect of the dispute referred to them under this provision. The arbitral award shall be final and binding upon both parties. However, upon a petition by the aggrieved party, the Court of Appeal may cancel the award in certain circumstances, such as if it clearly appears that the arbitrator indulged in misconduct, made a wrongful award with specific ulterior motives, acted subjectively, or if the award is directly contrary to law. In cases where the Court of Appeal cancels such an award, the dispute shall be referred to another arbitrator appointed by the Chief Judge of that Court for settlement. The Bailiff (Tahashil) or the office functioning as the Bailiff specified by the Government of Nepal shall implement the arbitral award as prescribed. Furthermore, the Government of Nepal may frame rules to carry out the objectives of this section 9.[1]

Privatization Act, 2050, According to Section 13,If any dispute arises in respect of any matter contained in the privatization agreement entered into between the Government of Nepal and the party participating in the privatization, such dispute shall be resolved through mutual consultation among the concerned parties. If the dispute is not resolved through such consultation, it may, with the consent of both parties, be referred to arbitration. The arbitration shall be conducted in accordance with the existing laws relating to arbitration or the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)[2].

Foreign Investment and Technology Transfer Act, 2075, According to section 40, If any dispute arises between a Nepali investor and a foreign investor in relation to foreign investment, the Department may facilitate its settlement through mutual discussions or negotiations between the concerned parties. If the dispute is not settled through this process within forty-five days of its arising, and a joint investment or dispute settlement agreement exists between the parties, the dispute shall be settled in accordance with such an agreement, and the parties must inform the Foreign Investment Approving Body about the settlement within fifteen days, though they are not obligated to disclose the terms and conditions of the settlement. If the agreement has no provision for dispute settlement, the dispute shall be settled by arbitration under Nepal's arbitration law. Any dispute arising in connection with foreign

1 Development Board Act, 2013 of Section 9
2 Privatization Act, 2050 of Section 13,

investment shall be settled by arbitration under the prevailing Rules or Procedures of the United Nations Commission on International Trade Law (UNCITRAL), unless otherwise agreed by the parties. Arbitration under this Section shall be held in Nepal, applying Nepal's substantive law on arbitration, provided that the provision in sub-section (2) shall apply to cases referred to therein. If no prior agreement on dispute settlement exists or if the existing agreement is deemed inadequate, the parties may make a new agreement for dispute settlement even after the dispute has arisen, and such an agreement must be reported to the body registering the industry. Any dispute concerning the agreement made under this provision may also be settled under this Section 40.[3]

Bank and Financial Institution Act, 2073,According toSection 123,In the event of any dispute between banks or financial institutions, such dispute shall be settled through mutual understanding. If the dispute cannot be resolved through mutual consent as per Sub-Section (1), the Rastra Bank shall settle the dispute through mediation or other methods of dispute resolution as per the prevailing laws, and the decision made by the Rastra Bank pursuant to Sub-Section (2) shall be final[4].

Nepal Airlines Corporation Act, 2019 (1963), According to section 23, In case there arise any dispute regarding agreements among the Board, General Manager, or other officials or employees of the Corporation, it shall be decided solely by an arbitrator designated by the Government of Nepal. The arbitrator shall have such powers as are enjoyed by a court of law in respect to examination of witnesses, collecting evidence, summoning parties to the dispute, and procuring documents relating to the dispute referred to him/her for decision under this provision. The decision of the arbitrator shall be final and binding on both parties[5].

Mines and Minerals Act, 1985, According to Section 26, if the Government of Nepal and the licensee are unable to come to a mutually agreeable resolution regarding any dispute arising out of matters related to mining operations, the dispute will be settled by arbitration in accordance with any provisions that may have been included in the agreement reached between the parties, or, in the absence of such provisions, by arbitration as specified.[6]

Arbitration Act, 2055,According to section 3, In case any agreement provides for the settlement of disputes through arbitration, the disputes connected with that agreement or with issues coming under that agreement shall be settled through arbitration according to the procedure prescribed in that agreement, if any, and if not, as per the provision of this Act. Notwithstanding this, if partiesto a civil suit of a commercial nature which has been filed in a court and which may be settled through arbitration according to prevailing laws, file an application for its settlement through arbitration, such dispute shall also be settled through arbitration[7].

Nepal Council of Arbitration (NEPCA) is playing

3 Foreign Investment and Technology Transfer Act, 2075 of section 40
4 Bank and Financial Institution Act, 2073 of Section 123
5 Nepal Airlines Corporation Act 1963 of section 23
6 Mines and Minerals Act, 1985 of Section 26
7 Arbitration Act, 2055 (1999) of section 3

vital role in development of arbitration in Nepal. These days, globalization, liberalization, privatization, and sound corporate governance are all contributing factors to the fast growth of commercial activity. A court case is expensive and time-consuming. Thus, alternative conflict resolution is frequently applied to provide a prompt resolution and respite from the issue. ADR processes are complementary to courts since they are an addition to them. In contrast to the formal and strict methods used in the regular process of conflict settlement in courts of law, alternative dispute resolution (ADR) procedures are more flexible and informal, allowing for easier access to justice.Nepal's ADR legislative system is strong and extensive, offering a number of channels for resolving disputes. Under the direction of statutory requirements, legislative frameworks, and seminal case laws, it is always changing. In order to guarantee the impartial and effective settlement of conflicts in Nepal, this framework is essential.

Types of ADR Mechanisms in Nepal

In Nepal, Alternative Dispute Resolution (ADR) mechanisms are widely used to resolve disputes efficiently, cost-effectively, and amicably. ADR is particularly important in a country where formal judicial processes can be lengthy and expensive. Here are the types of ADR:

a. **Mediation**

Mediation is a process of resolving disputes with the aid of a neutral person who help parties to identify issues and develop proposals to resolve their disputes. Unlike arbitration, the mediator is not empowered to decide disputes. It is a process where the parties to a pending case are directed by the court to submit their disputes to a neutral third party (the mediator), who works with them to reach a settlement of their controversy. The mediator acts as a facilitator for the parties to arrive at a mutually acceptable arrangement, which will be the basis for the court to render a judgment based on a compromise. The mediation includes dispute settlement(Roberts, 2014).

If one were to take the word reconciliation at its literal root, the English word "mediate" comes from the Latin word "mediare". One of the different alternative dispute resolution procedures is mediation. Through this process, an impartial third party is sought out to assist in resolving the disagreement. That comes to "to be in the midway". As a matter of fact, given his position, the mediator stays in between the disputing sides. However, comprehending the definition of mediation as a method of resolving disputes and the mediator's function is not enough to fully comprehend negotiating peace(Subedi, 2018).

A neutral third party mediates disputes on behalf of conflicting parties in order to help them come to a mutually accepted agreement. This is known as mediation[8]. Mediation is "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute"[9].

8 Bhattarai, A. M. (2020). Legal Framework for Mediation in Nepal: Gaps and Opportunities. *Kathmandu School of Law Journal*, 15(1), 35–58.

9 Moore, C. W. (2014). The Mediation Process: Practical

i. **Process of Mediation**

Through the process of mediation, two or more disputing parties can work with an impartial, independent a mediator to explore their choices, determine their wishes, and come to a legally binding agreement. The following is how Nepalese law defines Mediation. "Mediation" refers to the method used by the parties to resolve a dispute or issue with the help of a Mediator.

The parties have the power to make decisions in mediation. The role of the mediator includes but is not limited to assisting the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.Settlements in our traditional court matters were and are guided by judges, attorneys, or parties. The process by which qualified mediators assist the parties to the disagreement in reaching a resolution by adhering to all recognized procedures in a proper setting and fostering debate is known as Mediation(Sapkota, 2019).

ii. **Mediation Practices in Nepal**

It is also a cultural practice. Throughout Nepal's history, various methods of dispute resolution have been observed, such as Pantumyang during the Kirant period, Panchali during the Lichhavi period, Panchasamuchchaya during the Malla period, and ManyajanKachahari during the Shah period. In the present day, in various regions at the local level, practices like Panchachahari and Mukhiya continue the tradition of resolving disputes through Mediation in village gatherings. The Muluki Ain issued in 1910 B.S. included a provision pertaining to the rights of businessmen and traders to resolve local disputes at the community level. The Sanad issued on the 27th of Baisakh, 1983 B.S., established the "ManyajanKachhari" to mediate between parties regarding matters such as land acquisition, Kulopani, dams, etc. The Village Panchayat Act of 2006 and the Village Development Committee Act of 2048 empowered the Village Panchayats to address disputes at the local level, with legal provisions for reaching settlements through discussion.In the Muluki Ain of 2020, regarding Settlement No. 182 of the Court, in criminal cases where the government is the plaintiff, except for bribery cases, there was a provision that other cases could be mediated at any level. Sections 33 and 101 of the Local Self-Governance Act, 2055, granted limited judicial powers to local bodies. However, those provisions of the Act were not implemented. Mediation formally entered court proceedings in the then District Court Regulation of 2052. In 2060 B.S., it was revised, adding Rule 32A to that regulation, which provided a legal provision for mediating civil cases pending in the district court(Devkota, centre for Research TU, Kathmandu 2020).In 2063 B.S., this provision was added to the then-existing Appellate Court Regulations and the Supreme Court Regulations, creating a legal framework for mediating cases across the three levels of courts.

Though the traditional method of settling cases has been utilized for around twenty years in Nepal, systematic Mediation only commenced within this timeframe. After the enactment of the Mediation Act, 2068, as a separate legislation, it materialized into a concrete form. Since the implementation of this Act, informal mediation within communities

Strategies for Resolving Conflict (4th ed.)

has evolved into a formal process where disputes pending in court can be resolved and concluded through legal means. The purpose of the Act is to expedite dispute resolution through conciliation, simplifying the process and reducing costs, thus enhancing access to justice for ordinary people. Additionally, the Administration of Justice Act, 2073, the National Civil Procedure Codes, and the rules of courts at all three levels contain provisions prioritizing mediation for parties involved. There is a legal arrangement allowing mediation from the stage of pending cases to the execution of decisions.

Initially, it was introduced within the court system through procedural rules. Subsequently, the Mediation Act of 2068 and the Mediation Regulations of 2070 were enacted and implemented. These Acts and Regulations primarily emphasize mediation within the judicial framework.In accordance with the Local Self-Governance Act of 2055, the mediation was to be conducted under the auspices of the then (Ga.V.S) and municipality. However, as the related provisions were to be implemented upon the government's notification in the Nepal Gazette, and since such notification was not issued, the act was repealed in 2074.Non-governmental organizations such as CIVICT, CeLRRd, Pro-Public, and TAF have initiated community Mediation practices in Nepal to align with the spirit of the aforementioned Act. While the success rate of mediation centers within the court system is notably disappointing, community mediation efforts boast an impressive settlement rate of around 80 to 90 percent.Article 51 (k) of the Constitution of Nepal clarifies that the state's policy is to employ alternative measures such as Arbitration and mediation to settle disputes of a general nature. Additionally, Article 127(2) of the Constitution stipulates that, besides the regular courts in Nepal, judicial bodies or other entities may be established as necessary to facilitate alternative methods of dispute resolution at the local level.In Article 217 of the Constitution, it is stipulated that at each local level, a three-member judicial committee, chaired by the vice-chairman or deputy chairperson, is empowered to address disputes as specified by law. Additionally, Schedule 8 of the Constitution places the administration of local courts, Mediation, and Arbitration under the exclusive jurisdiction of the local level.In the Local Government Operation Act of 2074, lists of disputes are mentioned, enabling the judicial committee to address two types of disputes. [10]Section 47(1) of the Act states that the Judicial Committee shall refer registered disputes to trained mediators listed therein for mediation.If mediation is successful, the agreement reached shall be enforced; if not, the Judicial Committee may render a decision upon review, which can be appealed to the District Court. In Section 47(2) of the Act, it is stipulated that registered disputes will be referred to the Judicial Committee for mediation. If mediation fails, the cases will be forwarded to the District Court without a decision being made by the Judicial Committee. Considering the provisions of the Constitution and the Local Government Operation Act, along with the authority granted to each local level to enact laws, it appears necessary to amend laws and regulations concerning mediation to align them with the constitutional provisions and the Local Government Act.

10 The Constitution of Nepal, 2072, Mediation Act, 2068, Administration of Justice Act, 2073,

iii. **Role of Community Mediation**

It is produced by decentralization concept. Any kinds of the disputes, the community settles to use conciliation, mediation in mutual understanding within the society i.e. Mukhiya, Guthi, Jamindar, Gyalbo, Thakali. Now, Nyaya committee of Jyapu Samaj is being popular for community mediation in Kathmandu Valley.[11]

b. **Arbitration**

Alternative Dispute Resolution (ADR) is the means of settling disputes without going through legal procedures with or without the help of a third party. It is alternative to formal court hearing and litigation. Among various modes of ADR, arbitration is the most commonly used mode.

Arbitration is a process whereby a private court, formed at the parties' discretion, is utilized to resolve any disputes arising from legal or contractual relations related to transactions not prohibited by law. Factors such as the complexity of the subject matter, the backlog of regular courts, delays in decision-making, declining public trust, the impact of open economies, increasing industrial and commercial activities, and disputes involving parties from different countries have underscored the need for mediation in Nepal's arbitration laws.The process of using an alternative dispute resolution approach is called arbitration. It is an"out of court" settlement process where the arbitrator is usually chosen by both parties to resolve their disagreement. The arbitrator's ruling is final and binding, and the disputing parties select the arbitrator and decide on the settlement procedure, including all judicial adjudication procedures as required by arbitration law and regulations. Arbitration is a private conflict resolution process that involves the appointment of an arbitrator, a third party who is impartial and independent. The arbitrator hears both sides of the argument, evaluates their arguments, and issues a final decision known as an "award."Arbitration gives the disputing parties the opportunity to select the arbitrators and settle their differences directly. The courts do not have the authority to replace arbitrators' wrongful rulings, even in cases where they have made mistakes, subject to specific restrictions(Gautam).

The Model Convention on International Commercial Arbitration was established by UNCITRAL, the United Nations Commission on International Trade Law, in 1985. In order to guarantee uniformity and consistency of the arbitration practice in a field of international trade, the UN General Assembly suggested that all nations take this model into consideration. Nepal's Arbitration Act is likewise drafted as the Arbitration Act 1999 in accordance with this. Arbitration has not been defined in this Act. Instead, it merely defines "agreement" as "a formal agreement established between the parties for arbitration to settle a dispute pertaining to a defined legal relationship, whether contractual or not, that has occurred at that time or may arise in the future,Arbitration is the referral of an issue or dispute involving at least two parties to an individual or group of individuals other than a court with appropriate jurisdiction for resolution following a formal hearing of all sides.

11 Sapkota, T. P. (2019). Traditional Mediation Practices in Nepal: A Study of Community-Based Models. Nepal Law Review, 41(2), 125–146.

Arbitration is defined as "a process of dispute resolution in which a neutral third-party render has an opportunity to be heard" in Black's Law Dictionary.[12] When arbitration is optional, the parties in dispute choose the arbitrator who will be able to make a legally enforceable ruling."

"Arbitration" refers to a process wherein a neutral third party or panel, known as an arbitrator or arbitration panel, evaluates the facts and arguments presented by the involved parties and issues a decision, which may be binding or nonbinding as specified in this chapter.Arbitration hearings are typically conducted in private unless otherwise requested by the parties. Its practice was initiated in Nepal under the Development Committee Act of 2013. With the enactment of the Arbitration Act in 2038, significant advancements have been made in this field. Various laws, including the Arbitration Act of 2055, the Labor Act of 2074, the Nepal Air Services Corporation Act of 2019, the Banks and Financial Institutions Act of 2063, the Foreign Investment and Technology Transfer Act of 2075, the Public Private Partnership and Investment Act of 2075, and the Public Procurement Act of 2063, among others, govern arbitration. Presently, the Arbitration Act of 2055 is in effect, with its key provisions outlined as follows:

When discussing arbitration, primary attention should be given to the agreement reached between the disputing parties. In every instance, the terms specified in the contract are given precedence. If the agreement specifies otherwise, its terms shall govern, while matters not covered in the agreement shall be subject to the provisions of the Arbitration Act. The choice of mediator, venue, procedure, language, and applicable law for resolving disputes is determined by the parties involved. The decision rendered by the arbitrator is generally final, unless otherwise provided by law. Parties voluntarily adhere to the arbitration decision(Singh).

c. **Conciliation and Negotiation**

i. **Conciliation**

Conciliation is the process of resolving a dispute through the involvement of a third party, appointed by unanimous decision of the disputing parties, who acts as an impartial conciliator. The aim of is to alleviate tension between the parties, enhance understanding, clarify points of contention, offer technical assistance, explore potential solutions, and facilitate the parties in reaching an amicable resolution. Particularly in commercial disputes, conciliation proves effective through its participatory approach(Sharma, 2022).

During conciliation, the conciliator endeavors to identify potential solutions and gain agreement from the parties to resolve the dispute through those means. They discuss the nature of the dispute, highlight the benefits of resolution, and outline the risks of non-resolution. Taking the lead in fostering consensus, the conciliator works to mitigate disagreements and animosity between the parties.

ii. **Negotiation**

The process wherein both parties to a dispute, either directly or through their representatives, seek a mutually acceptable resolution is termed Negotiation. Whether consciously or unconsciously, negotiation is commonly used in

12 Black's Law Dictionary, *meaning of Arbitration.*

dispute resolution and is often characterized as a bargaining process between the involved parties. Through negotiation, the contentious issues are typically narrowed down, leading to the eventual formulation of an agreement.

Negotiations can be categorized into two main types: position-based and interest-based. Position-based negotiation, often resulting in a win-loss outcome, focuses on asserting specific stances. In contrast, interest-based negotiation aims for a win-win outcome by addressing underlying interests rather than fixed positions. The initial phase of negotiations typically involves position-based discussions before transitioning to interest-based considerations (Aryal, First Edition, 2020).

4. **Practical Implementation of ADR in Nepal**

a. **Case Studies of Successful ADR Resolutions**

The use of ADR in Nepal has been shaped by a number of significant cases. For example, the Supreme Court ruled that if a contract contains an arbitration clause, the clause is enforceable up until the point at which disagreements over the terms of the contract or its performance are settled. Parties have the liberty to select distinct substantive and procedural legislation for the arbitration provision, according to a noteworthy verdict.

Rajendra man Sherchan on behalf of Vijay Construction Pvt. Ltd. V. Appellate Court, Patan, 2064, Decision No. 7823. In the case of Rajendra man Sherchan on behalf of Vijay Construction Pvt. Ltd. v. Appellate Court, Patan, 2064, Decision No. 7823, the Hon'ble Supreme Court ruled that failure to comply with Section 6(1) of the Arbitration Act, 2055, which mandates the initiation of arbitrator appointment within three months of the arising reason to commence arbitration unless the contract states otherwise, precludes the initiation of arbitrator appointment through court under Section 7(1) of the Arbitration Act, 2055. Additionally, the court asserted that the issue of the limitation period is a legal matter, and there exists no legal provision restraining the Hon'ble Appellate Court from reviewing it.[13]

National Construction Company, Nepal V. Appellate Court, Patan, 2065, Decision No. 7933

The Hon'ble Supreme Court outlined several key points regarding arbitration clauses and dispute resolution procedures in contracts. It emphasized that when an arbitration clause is present, the contract may specify the procedure for arbitrator appointment and other relevant conditions. However, in the absence of such provisions or if parties fail to appoint arbitrators according to the contract's procedure, the Hon'ble Appellate Court can undertake the appointment process under Section 7 of the Arbitration Act, 2055. Furthermore, when parties agree to arbitration, one party cannot obstruct arbitrator appointment. Additionally, in cases involving multi-tiered dispute resolution clauses, the Hon'ble Appellate Court, acting as the appointing authority, must verify if pre-arbitration dispute resolution mechanisms have been utilized. Even after termination of an agreement, the provision for arbitration remains effective, and no party can obstruct the arbitration process for any reason.[14]

13 Introduction to Procedural Law, Somkat Bhandari, p. 279, 280, RajendramanSherchan on behalf of Vijay Construction Pvt. Ltd. V. Appellate Court, Patan, 2064, https://nkp.gov.np/full_detail/3794

14 National Construction Company, Nepal V. Appellate Court, Patan, 2065, https://nkp.gov.np/full_detail/2178

Yashasvi Shamsher JBR v. Vaibers Developers Pvt. Ltd., 2074, Decision No. 9847

Clause 12 of the agreement specifies that if a dispute arises, the parties must settle it amongst themselves. According to Section 2(a) of the Arbitration Act, 2055, an "Agreement" refers to a written understanding between the parties to settle disputes through arbitration regarding specific legal issues that have arisen or may arise in the future under a contract or otherwise. However, if there is no such agreement between the parties, the Arbitration Act does not apply, and instead, the Contract Act, 2056, governs the resolution of disputes.[15]

Enforcement and Recognition of ADR Decisions in Nepal

a. **Role of the Judiciary in Supporting ADR**

Alternative Dispute Resolution (ADR) has been integral to Nepal's legal system for centuries, rooted in traditional community-based practices. The judiciary actively supports ADR, acknowledging its capacity to deliver efficient, cost-effective, and accessible justice. Courts frequently encourage parties, especially in civil cases, to pursue ADR methods like mediation before resorting to litigation, reducing court caseloads and empowering parties in resolving disputes. Furthermore, the judiciary aids in enforcing ADR outcomes by reviewing agreements reached through ADR to ensure compliance with the law and public policy. If deemed acceptable, the court enforces these agreements, granting them the same legal validity as court judgments, thereby bolstering their credibility and acceptance.

Conclusion

In conclusion, Nepal's dispute resolution system is a complex patchwork of both contemporary legal frameworks and customary practices. Nepal has had a slow transition towards formalized ADR processes, with laws like the Arbitration Act of 2055 emerging from more recent institutions like Panchayats and Panchalis. ADR adoption is in line with a global trend towards more accessible and effective legal systems, and Nepal has accepted this paradigm change with the help of the judiciary and legislative measures.Nepal's alternative dispute resolution (ADR) is governed by a broad legislative framework that includes, among other acts, the Arbitration Act, Development Board Act, and Foreign Investment and Technology Transfer Act. These regulations offer a methodical process for settling conflicts via conciliation, arbitration, mediation, and negotiation. ADR procedures are also being developed and implemented in the nation with additional support from non-governmental organizations and institutions such as the Nepal Council of Arbitration.

In landmark cases such as National Construction Company v. Appellate Court and RajendramanSherchan v. Appellate Court, the Supreme Court has offered clarification and direction about the use of ADR principles in commercial disputes. These decisions highlight how crucial it is to follow legal standards and contractual duties while using dispute resolution procedures.The judiciary's proactive support for alternative dispute resolution (ADR) is indicative of its dedication to improving court backlog reduction and increasing access to justice. This is demonstrated by its acceptance of mediation and enforcement of ADR rulings.

15 Yashasvi Shamsher JBR v. Vaibers Developers Pvt. Ltd., 2074, https://nkp.gov.np/full_detail/8898

The court plays a crucial role in enhancing the legitimacy and acceptability of alternative dispute resolution methods in Nepal by acknowledging the legitimacy of ADR results and working for their implementation.When it comes to resolving disputes, Nepal's legal system essentially supports a harmonic fusion of conventional customs and contemporary legal ideas. Its dedication to promoting accessible, affordable, and effective justice through alternative dispute resolution (ADR) processes is unwavering even as the nation changes.

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- National Construction Company, Nepal V. Appellate Court, Patan, 2065, https://nkp.gov.np/full_detail/2178 Yashasvi Shamsher JBR v. Vaibers Developers Pvt. Ltd., 2074, https://nkp.gov.np/full_detail/8898

Artificial Intelligence And Arbitration: Revolutionizing Dispute Resolution

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Abstract

The fusion of Artificial Intelligence (AI) with arbitration is heralding a paradigm shift in the field of dispute resolution. Traditionally, arbitration has been valued for its efficiency, flexibility, and confidentiality, providing an alternative to often lengthy and expensive judicial proceedings. However, even arbitration has its challenges, such as delays in decision-making, high costs in complex disputes, and inconsistencies in awards. With the advent of AI, these challenges are being addressed in innovative ways, fundamentally altering the arbitration landscape. This article explores the multifaceted impact of AI on arbitration, delves into its current applications, examines ethical and operational challenges, and outlines the potential future implications for global dispute resolution systems.

Introduction

Arbitration has consistently been a preferred method of resolving disputes due to its adaptability and private nature, particularly in commercial and cross-border contexts. Yet, even arbitration is not immune to the pressures of increasing caseloads, growing complexity of disputes, and demands for faster resolution. AI, with its capacity for data analysis, predictive modeling, and automation, is now emerging as a game-changer in this space. By integrating AI into arbitration processes, stakeholders can achieve not only significant cost reductions but also enhanced procedural efficiency and consistency in outcomes. This technological shift is also democratizing arbitration by making it more accessible to smaller businesses and individuals who may not have previously been able to afford traditional arbitration mechanisms.

The following sections provide a detailed examination of how AI is reshaping arbitration, the advantages it offers, the challenges it poses, and the ethical considerations it entails.

Applications of AI in Arbitration

Artificial Intelligence (AI) is revolutionizing the arbitration process by introducing innovative tools and systems that enhance efficiency, accuracy, and accessibility. From the early stages of case assessment to the final rendering of awards, AI is transforming how arbitration is conducted, offering substantial improvements over traditional methods. Below is a detailed examination of AI applications across the arbitration spectrum (SAN, 2021).

a. Predictive Analytics and Case Assessment

One of the most transformative applications of AI in arbitration is predictive analytics. AI tools, equipped with advanced algorithms, can process enormous volumes of data, including legal precedents, arbitration awards, and case law, to predict potential case outcomes. These tools analyze patterns and trends from historical cases, considering factors such as jurisdiction, arbitrators' past decisions, and the nature of disputes.

For example, in commercial disputes, predictive analytics can evaluate the likelihood of success for each party, calculate potential award amounts, and estimate timelines for resolution. This information empowers parties to make informed decisions about whether to proceed with arbitration, negotiate a settlement, or explore alternative dispute resolution mechanisms. By reducing uncertainty, predictive analytics helps parties allocate resources effectively and focus on strategies that maximize their chances of a favorable outcome.

b. Document Review and Evidence Analysis

Arbitration cases often involve reviewing massive volumes of documentation, such as contracts, correspondence, financial records, and technical reports. Traditionally, this process has been time-intensive and prone to human error. AI-powered tools, however, streamline this process by automating document review and analysis.

These tools utilize Natural Language Processing (NLP) and machine learning algorithms to identify, categorize, and extract relevant information from large datasets. For instance, AI can pinpoint clauses in contracts that are central to the dispute or identify patterns in email correspondence that may support a party's claim. AI's ability to process vast quantities of information quickly ensures that arbitrators and legal teams can focus on critical aspects of the case without overlooking vital details. Additionally, these tools often include features for cross-referencing documents, flagging inconsistencies, and generating summaries, further enhancing the efficiency and accuracy of evidence analysis (Alenezi, 2024).

c. Automated Legal Research

Legal research is a cornerstone of arbitration preparation, as it involves identifying relevant laws, case precedents, and international regulations applicable to a dispute. AI has significantly enhanced this process by enabling rapid and comprehensive legal research.

AI-powered research platforms employ sophisticated algorithms to scan databases, legal texts, and case law repositories, delivering precise and contextually relevant results. Unlike traditional research methods, which can take days or weeks, AI tools produce results in a matter of minutes. They also offer advanced search functionalities, such as semantic search, which understands the intent behind a query rather than relying solely on keywords.

For arbitrators and legal practitioners, this means more time can be spent on strategic analysis and argument development rather than on labor-intensive information gathering. Furthermore, automated research tools reduce the risk of missing critical legal precedents, ensuring that parties are well-prepared and that decisions are grounded in comprehensive legal frameworks.

d. Virtual Arbitration Platforms

The advent of virtual arbitration platforms has been a game-changer, especially in cross-border disputes. These platforms, enhanced by AI, streamline various logistical and procedural aspects of arbitration, ensuring seamless communication and efficiency in multi-jurisdictional cases.

AI automates several critical functions within virtual arbitration platforms:

- **Scheduling:** AI tools coordinate between parties across different time zones, identifying mutually convenient times for hearings and meetings.
- **Real-Time Transcription:** AI-powered transcription services provide instantaneous and accurate transcripts of proceedings, enabling participants to follow the discussion closely and maintain detailed records.
- **Translation Services:** Language barriers are addressed through AI-based real-time translation tools, which allow participants to communicate effortlessly in their native languages.

These capabilities have proven particularly valuable in the post-pandemic era, where virtual hearings have become commonplace. By eliminating the need for physical travel and streamlining administrative tasks, AI-driven platforms reduce costs and improve accessibility, making arbitration a more viable option for a broader range of users.

e. Decision Support Systems

AI is also playing a pivotal role in assisting arbitrators during the decision-making process. Decision support systems leverage AI to analyze case details, identify key issues, and provide insights based on data from similar cases.

For example, these systems can generate comprehensive summaries of a dispute, highlighting the central arguments, evidence presented, and applicable laws or precedents. They can also simulate possible outcomes by applying legal principles and examining similar arbitration awards. While the final decision remains the responsibility of the human arbitrator, these tools enhance their ability to make impartial and well-informed judgments.

By offering a structured and data-driven approach, AI ensures consistency in arbitration awards, which is particularly critical in high-stakes disputes. Additionally, decision support systems can help arbitrators manage complex cases involving technical or scientific evidence by providing clear, concise interpretations of specialized information.

In short, the applications of AI in arbitration are broad and transformative, addressing many of the challenges traditionally associated with this dispute resolution method. From predictive analytics and document review to automated legal research and virtual platforms, AI is streamlining processes, reducing costs, and improving the accuracy and accessibility of arbitration. As these technologies continue to evolve, they promise to further enhance the efficiency and fairness of arbitration proceedings, solidifying AI's role as an indispensable tool in modern dispute resolution.

Advantages of AI in Arbitration

The integration of Artificial Intelligence (AI) into arbitration offers numerous significant advantages, fundamentally reshaping the dispute resolution process. By leveraging AI, arbitration becomes faster, more accurate, and accessible, addressing many of the inefficiencies associated with traditional practices.

a. Efficiency and Cost-Effectiveness

One of the most evident benefits of AI in arbitration is its ability to automate repetitive and time-consuming tasks. Processes like document review, evidence analysis, and legal research, which traditionally require extensive human effort, are streamlined through AI-powered tools. For instance, AI can rapidly sift through thousands of pages of documentation to identify relevant information, reducing the time required for case preparation. Similarly, automated legal research ensures that arbitrators and legal teams have instant access to pertinent laws and precedents.

This efficiency translates directly into cost savings. With reduced reliance on manual labor and quicker case processing times, arbitration becomes more affordable. This cost-effectiveness is particularly appealing to small and medium-sized enterprises (SMEs) and individual disputants who may have previously found arbitration prohibitively expensive. By making arbitration a viable option for a broader range of users, AI fosters greater inclusivity in the dispute resolution landscape.

b. Accuracy and Consistency

AI enhances the accuracy of arbitration processes by minimizing the potential for human errors. It achieves this by employing algorithms capable of processing and analyzing data with a high degree of precision. For example, AI can detect inconsistencies in evidence, flag errors in legal arguments, and identify patterns in arbitration awards that might otherwise go unnoticed.

In addition to accuracy, AI promotes consistency in arbitration outcomes. By relying on data-driven analyses and objective criteria, AI reduces the likelihood of subjective biases influencing decisions. This consistency is particularly important in commercial disputes and cross-border arbitrations, where predictability and reliability are critical for maintaining trust in the arbitration process.

c. Accessibility

AI-powered arbitration platforms are democratizing access to dispute resolution. These platforms simplify complex procedures, reduce costs, and offer user-friendly interfaces that allow individuals and businesses with limited legal expertise to navigate the arbitration process.

For instance, AI-based chatbots can guide parties through filing claims, understanding procedural requirements, and preparing for hearings. Virtual arbitration platforms, often powered by AI, eliminate geographical barriers, enabling parties to participate in hearings from anywhere in the world. By lowering entry barriers and enhancing convenience, AI ensures that arbitration is accessible to a diverse range of users, including those who may have been excluded under traditional models.

Challenges and Ethical Considerations

While the advantages of AI in arbitration are undeniable, its integration also raises significant challenges and ethical concerns that must be carefully addressed to ensure fair and responsible use.

a. Bias in AI Algorithms

AI systems are only as unbiased as the data they are trained on. If the training datasets contain historical biases or incomplete information, these biases can be perpetuated in the system's outputs. In arbitration, such biases could result in unfair outcomes, particularly in cases involving parties from different cultural, legal, or socioeconomic backgrounds. For example, an AI tool trained predominantly on arbitration awards from developed countries might fail to account for legal nuances specific to developing jurisdictions. Addressing this issue requires developers to use diverse and representative datasets and regularly audit AI systems for potential biases (Barzelay, 2024).

b. Confidentiality and Data Security

Confidentiality is a cornerstone of arbitration, making data security a critical concern. AI systems often require access to sensitive information, including case documents, financial records, and personal data. This reliance on digital platforms introduces vulnerabilities, such as the risk of cyberattacks, unauthorized data access, or breaches of privacy regulations.

Cross-border arbitrations face additional challenges due to varying data protection laws across jurisdictions. For example, transferring sensitive data between countries with differing regulatory standards may expose parties to legal risks. Ensuring robust cybersecurity measures and compliance with international data protection standards is essential to maintaining trust in AI-driven arbitration processes (Alhitmi, 2024).

c. Transparency and Accountability

AI decision-making is often criticized for its lack of transparency, commonly referred to as the "black box" problem. This term describes the difficulty of understanding the logic and reasoning behind AI-generated outcomes. In arbitration, where parties expect clarity and accountability, this opacity can undermine confidence in the process.

For instance, if an AI tool provides a recommendation or analysis without explaining its methodology, disputants may question its reliability or perceive the process as unfair. To address this, AI developers must prioritize transparency by designing systems that provide clear explanations for their outputs. Arbitrators and legal teams should also retain the ability to review and override AI-generated recommendations when necessary (Cheong, 2024).

d. Adapting Legal Frameworks

The rapid adoption of AI in arbitration has outpaced the development of corresponding legal frameworks. Many existing arbitration laws and institutional rules do not account for the unique challenges posed by AI, such as the admissibility of AI-generated evidence or the legal validity of AI-assisted awards (Akpuokwe, 2024).

To ensure the effective and ethical use of AI in arbitration, legislators and arbitration institutions must update their rules and guidelines. This may include drafting provisions that govern the use of AI, establishing standards for AI tool certification, and defining the roles and responsibilities of arbitrators when using AI-assisted technologies.

Future Implications

The integration of AI into arbitration is set to bring about profound changes in how disputes are resolved. The following developments are likely to shape the future of arbitration in the AI era:

a. Enhanced Arbitrator Training

As AI tools become more sophisticated, arbitrators will need to develop a working understanding of these technologies. Training programs should focus on AI literacy, equipping arbitrators with the skills to interpret AI-generated analyses, assess their relevance, and identify potential biases. Such training ensures that arbitrators can effectively use AI tools without compromising the quality or impartiality of their decisions (Florescu, 2024).

b. Collaborative AI Systems

The future of arbitration is likely to involve hybrid models where AI supports human arbitrators rather than replacing them. In this collaborative approach, AI handles tasks such as data analysis, document review, and legal research, while arbitrators retain control over case strategy and decision-making. This balance ensures that AI enhances the arbitration process without diminishing the human judgment essential for resolving complex disputes (Schleiger, 2024).

c. Global Standardization

To address the challenges of inconsistent AI practices across jurisdictions, the international arbitration community must work towards establishing standardized protocols for AI use. Such standards should cover issues like data privacy, algorithmic fairness, and the admissibility of AI-generated evidence. By fostering uniformity, these protocols will enhance the predictability and fairness of AI-driven arbitration outcomes, particularly in cross-border disputes (Igbinenikaro, 2024).

d. Ethical AI Development

Developers of AI tools for arbitration have a responsibility to prioritize ethics in their designs. This includes ensuring that AI systems uphold principles of fairness, transparency, and justice. For example, developers should implement mechanisms for auditing and correcting biases, provide explanations for AI-generated outputs, and design systems that align with the ethical values of the arbitration community. Ethical AI development will be critical for building trust and gaining acceptance among stakeholders (Araluce, 2024).

So, while AI offers transformative potential for arbitration, its successful integration requires careful navigation of ethical and practical challenges. By addressing issues related to bias, transparency, and legal adaptation, and by focusing on training, collaboration, and standardization, the arbitration community can harness AI to create a more efficient, inclusive, and fair dispute resolution system for the future.

Conclusion

The integration of AI into arbitration is not merely an innovation but a transformative shift that has the potential to redefine dispute resolution. By improving efficiency, reducing costs, and enhancing accessibility, AI can make arbitration a more robust and inclusive mechanism. However, its adoption must be tempered with caution, addressing ethical, operational, and legal challenges to ensure its responsible use. With

balanced integration, AI can elevate arbitration to new heights, making it a more effective tool for resolving disputes in an increasingly complex and interconnected world.

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12th Executive Committee

31st Annual General Meeting of NEPCA was held on 2079/09/30 at NEPCA Conference Hall, Kupondol, Lalitpur. The AGM has elected the 12th Executive Committee members as follows:

1.	Dr. Rajendra Prasad Adhikari	- Chairperson
2.	Mr. Dhurva Raj Bhattari	- Immediate Past Chairperson
3.	Mr. Lal Krishna KC	- Vice-Chairperson
4.	Mr. Baburam Dahal	- General Secretary
5.	Mr. Thaneshwar Kafle	- Secretary
6.	Mr. Hari Kumar Silwal	- Treasurer
7.	Prof. Dr. Gandhi Pandit	- Member
8.	Mr. Manoj Kumar Sharma	- Member
9.	Mr. Mahendra Bahadur Gurung	- Member
10.	Mr. Madhab Prasad Paudel	- Member
11.	Mr. Som Bahadur Thapa	- Member

Various committees were formed in order to achieve the objectives of NEPCA. The committees are as follows:

a. Membership Scrutiny Committee

i.	Mr. Baburam Dahal	- Coordinator
ii.	Mr. Hari Kumar Silwal	- Member
iii.	Mr. Mahendra Bahadur Gurung	- Member

b. Arbitrator/Adjudicator/DB Appointment Committee

i.	Dr. Rajendra Prasad Adhikari	- Coordinator
ii.	Mr. Thaneshwar Kafle (Rajesh)	- Member
iii.	Mr. Som Bahadur Thapa	- Member

c. Statute, Discipline and Panelist Scrutiny Committee

i.	Mr. Dhruva Raj Bhattarai	- Coordinator
ii.	Dr. Rajendra Prasad Adhikari	- Member
iii.	Mr. Madhab Prasad Paudel	- Member

d. Training Committee

i. Prof. Dr.Gandhi Pandit - Coordinator
ii. Mr. Thaneshwar Kafle - Member
iii. Mr. Manoj Kumar Sharma - Member

e. Institutional Development and International Relations Committee

i. Mr. Mahendra Bahadur Gurung - Coordinator
ii. Mr. Hari Kumar Silwal - Member
iii. Mr. Naveen Mangal Joshi - Member

f. Research and Publication Committee

i. Mr. Manoj Kumar Sharma - Coordinator
ii. Mr. Gyanendra Prasad Kayastha - Member
iii. Dr. Bal Bahadur Parajuli - Member

g. Finance and Physical Infrastructure Development Committee

i. Mr. Hari Kumar Silwal - Coordinator
ii. Mr. Mahendra Bahadur Gurung - Member
iii. Mr. Janak Raj Kalakheti - Member

Activities of NEPCA/Seminars & Trainings

1. On 27th to 31st August 2024

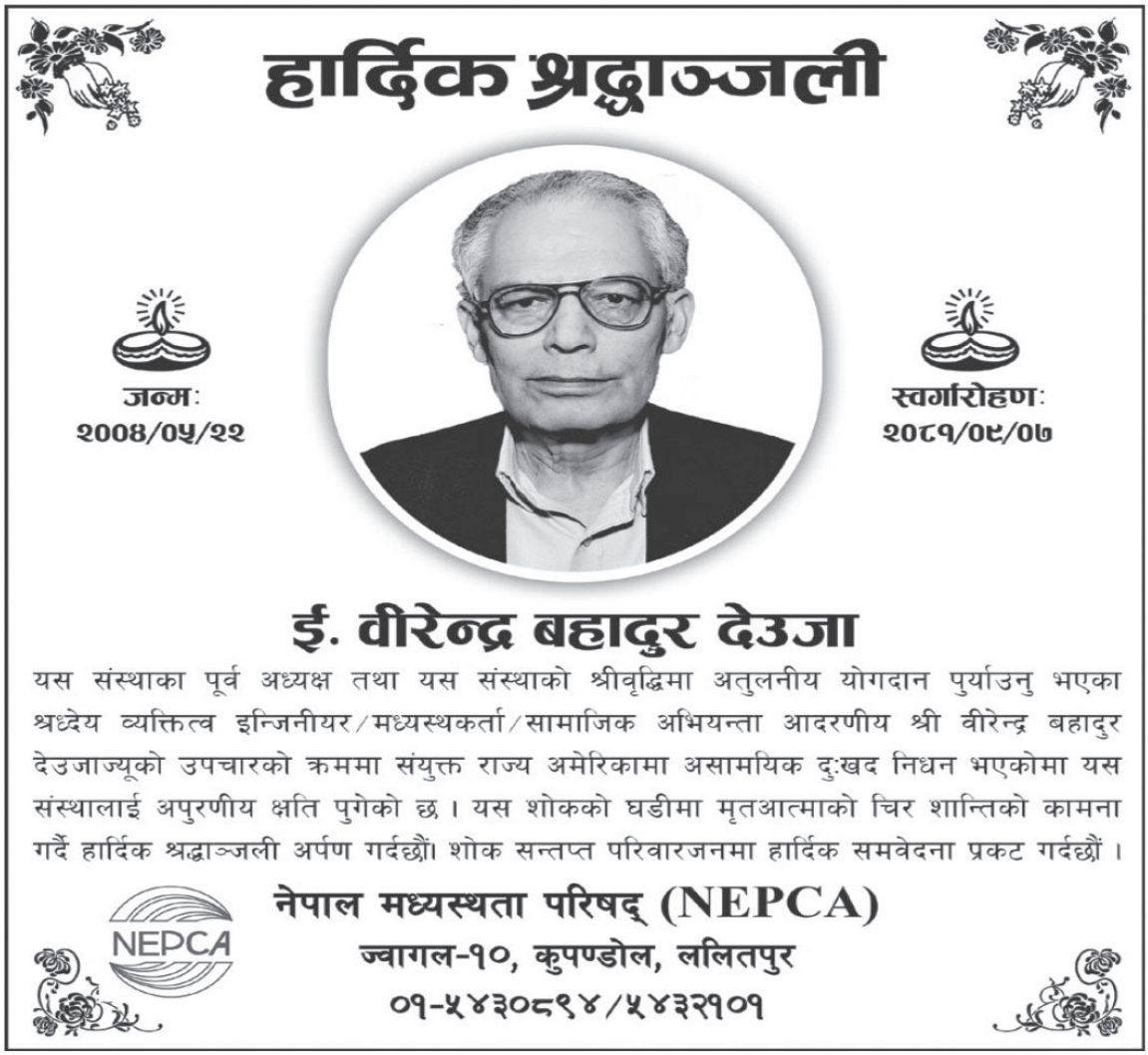
Nepal Council of Arbitration (NEPCA) conducted a 5-day training on Construction Management and Dispute Settlement at NEPCA training hall, Kupondole, Lalitpur. All together 50 participants were participated physically and Virtual on the training program. Law practitioners, Government Officials, Private Companies and Individual Professionals took part in the training. Dr. Rajendra Prasad Adhikari, Chairperson distributed certificates to the participants. Finally, training closed bygroup photographs.

2. On 22nd to 26th October 2024

Nepal Council of Arbitration (NEPCA) conducted a 5-day training on Construction Management and Dispute Settlement at NEPCA training hall, Kupondole, Lalitpur. All together 55 participants were participated physically and Virtual on the training program. Law practitioners, Government Officials, Private Companies and Individual Professionals took part in the training. Dr. Rajendra Prasad Adhikari, Chairperson distributed certificates to the participants. Finally, training closed by group photographs.

हार्दिक श्रद्धाञ्जली

यस संस्थाका पूर्व अध्यक्ष तथा यस संस्थाको श्रीवृद्धिमा अतुलनीय योगदान पुर्याउनु भएका श्रध्देय व्यक्तित्व इन्जिनीयर/मध्यस्थकर्ता/सामाजिक अभियन्ता आदरणीय श्री इन्जिनियर वीरेन्द्र बहादुर देउजाज्यूको मिति २०८१/९/७ का दिन असामयिक स्वर्गारोहण भएकोमा नेप्का कार्यसमितिको मिति २०८१/९/९ को बैठकको निर्णय अनुसार १३औं पुण्य तिथिका दिन मिति २०८१/९/१९ गते दिनको १ बजे NEPCA Conference Hall Kupondole मा श्रद्धाञ्जली शभा आयोजना गरिएको थियो ।



मिति २०८१/९/१९ गते NEPCA कार्यालय शोक बिदा गरिएको थियो ।

NEPCA Panelist

S.N	Name	Profession	Address
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2	Mr. Ashish Adhikari	Advocate	Naxal, Kathmandu
3	Mr. Babu Ram Dahal	Advocate	Anamnagar, Kathmandu
4	Mr. Bhoj Raj Regmi	Engineer	Baluwatar, Kathmandu
5	Mr. Bhola Chhatkuli	Engineer	Kritipur, Kathmandu
6	Mr. Bhoop Dhoj Adhikari	Former Judge	Baneshwor, Kathmandu
7	Mr. Bindeshwar Yadav	Engineer	Baneshwor, Kathmandu
8	Mr. Bipulendra Chakraworty	Senior Advocate	Biratnagar, Morang
9	Mr. Birendra Mahaseth	Engineer	Chakupat, Lalitpur
10	Mr. Dev Narayan Yadav	Engineer	Baneshwor, Kathmandu
11	Mr. Dhruba Prasad Paudyal	Engineer	Putalibazar, Syangja
12	Mr. Dhruva Raj Bhattarai	Engineer	Gyaneswor, Kathmandu
13	Mr. Dinker Sharma	Engineer	Mandikatar, Kathmandu
14	Mr. Dipak Nath Chalise	Engineer	Maligaun, Kathmandu
15	Mr. Durga Prasad Osti	Engineer	Baneshwor, Kathmandu
16	Mr. Dwarika Nath Dhungel	Social Sciences Researcher	Baneshwor, Kathmandu
17	Dr. Gokul Prasad Burlakoti	Advacate	Babarmahal, Kathmandu
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33	Mr. Manoj Kumar Yadav	Engineer/ Advocate	Gauada, Rautahat
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35	Mr. Mohan Man Gurung	Engineer/ Advocate	Bagbazar, Kathmandu
36	Mr. Murali Prasad Sharma	Advocate	Baneswor, Kathmandu
37	Mr. Narayan Datt Sharma	Advocate/ Engineer	Gyaneshwor, Kathmandu
38	Mr. Narayan Prasad Koirala	Advocate	Baneshwor, Kathmandu
39	Mr. Narendra Kumar Shrestha	Fromer Deputy AG/ Advocate	Baneshwor, Kathmandu
40	Mr. Naveen Mangal Joshi	Engineer	Kobahal Tole, Lalitpur
41	Mr. Niranjan Prasad Poudel	Engineer	Baluwatar, Kathmandu
42	Mr. Poorna Das Shrestha	Engineer	Balkot, Bhaktapur
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3	Mr. Amar Jibi Ghimire	Advocate
4	Mr. Amber Prasad Pant	Senior Advocate
5	Mr. Amod Kumar Adhikari	Engineer
6	Mr. Amog Ratna Tuladhar	Advocate
7	Mr. Ananta Raj Dumre	Rt. Judge
8	Mr. Anil Kumar Sinha	Senior Advocate
9	Mr. Anup Kumar Upadhyay	Engineer
10	Mr. Ashish Adhikari	Senior Advocate
11	Mr. Awatar Neupane	Advocate
12	Mr. Babu Ram Dahal	Senior Advocate
13	Mr. Babu Ram Pandey	Advocate
14	Mr. Badan Lal Nyachhyon	Engineer
15	Dr. Bal Bahadur Parajuli	Engineer
16	Mr. Bala Krishna Niraula	Engineer
17	Mr. Bala Ram K.C.	Former Justice, Supreme Court
18	Mr. Balaram Shrestha	Engineer
19	Mr. Bedh Kantha Yogal	Engineer
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37	Mr. Bimal Subedi	Advocate
38	Mr. Bindeshwar Yadav	Engineer
39	Mr. Binod Mohan Acharya	Rt. Judge
40	Mr. Binod Shrestha	Engineer/Advocate
41	Mr. Bipulendra Chakravartty	Senior Advocate
42	Mr. Birendra Mahaset	Engineer
43	Mr. Birendra Siwakoti	Advocate
44	Mr. Bishnu Om Baade	Engineer
45	Dr. Bishwadeep Adhikari	Senior Advocate
46	Mr. Bodhari Raj Pandey	Former Justice, Supreme Court
47	Mr. Bolaram Pandey	Advocate
48	Mr. Buddha Kaji Shrestha	Insurance Professional
49	Mr. Chabbi Lal Ghimire	Advocate
50	Mr. Chandeshwor Shrestha	Senior Advocate
51	Mr. Chandra Bahadur KC	Engineer
52	Mr. Daya Kant Jha	Engineer
53	Mr. Deepak Kunwar	Engineer

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56	Mr. Devendra Karki	Engineer
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59	Mr. Dhruva Raj Bhattarai	Engineer
60	Mr. Dhundi Raj Dahal	Engineer
61	Mr. Digamber Jha	Engineer
62	Mr. Dilip Bahadur Karki	Engineer
63	Mr. Dilli Raman Dahal	Advocate
64	Mr. Dilli Raman Niraula	Engineer
65	Mr. Dinesh Kumar Karky	Advocate
66	Mr. Dinesh Raj Manandhar	Engineer
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75	Dr. Prof. Gandhi Pandit	Senior Advocate
76	Ms. Gauri Dhakal	Former Justice, Supreme Court
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93	Mr. Hari Prasad Dhakal	Engineer
94	Mr. Hari Prasad Sharma	Engineer
95	Mr. Hari Ram Koirala	Engineer
96	Mr. Hari Ram Koirala (2)	Former Chief Judge
97	Mr. Hari Ram Shrestha	Engineer
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99	Mr. Hariom Prasad Shrivastav	Engineer
100	Mr. Hum Nath Koirala	Construction Entrepreneur
101	Mr. I.P. Pradhan	Engineer
102	Mr. Indra Lal Pradhan	Engineer
103	Mr. Indu Sharma Dhakal	Engineer
104	Mr. Ishwar Bhatta	Engineer
105	Mr. Ishwar Prasad Tiwari	Engineer
106	Mr. Ishwori Prasad Paudyal	Engineer
107	Mr. Jagadish Dahal	Advocate

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110	Mr. Jayandra Shrestha	Adviser/Finance
111	Mr. Jayaram Shrestha	Advocate
112	Mr. Jivendra Jha	Engineer
113	Mr. Kamal Karki	Engineer
114	Mr. Kamal Kumar Shrestha	Joint Secretary, PMO
115	Mr. Kamal Raj Pande	Engineer
116	Mr. Kameshwar Yadav	Engineer
117	Mr. Kedar Man Shrestha	Engineer
118	Mr. Kedar Nath Acharya	Former Justice, Supreme Court
119	Mr. Kedar Neupane	Advocate
120	Mr. Kedar Prasad Koirala	Senior Advocate
121	Mr. Keshari Raj Pandit	Former judge, High Court
122	Mr. Keshav Bahadur Thapa	Engineer/Advocate
123	Mr. Keshav Prasad Mainali	Advocate
124	Mr. Keshav Prasad Ghimire	Engineer
125	Mr. Keshav Prasad Pokharel	Engineer
126	Mr. Keshav Prasad Pulami	Engineer
127	Prof. Khem Dallakoti	Engineer
128	Mr. Khem Prasad Dahal	Accountant
129	Mr. Kishor Babu Aryal	Engineer
130	Mr. Komal Natha Atreya	Engineer
131	Mr. Krishna Prasad Nepal	Engineer
132	Mr. Krishna Sharan Chakhun	Engineer,
133	Mr. Kul Ratna Bhurtyal	Former Chief Justice
134	Dr. Kumar Sharma Acharya	Senior Advocate

S.N	Name	Profession
135	Mr. Lal Krishna K.C.	Engineer
136	Mr. Lava Raj Bhattarai	Engineer
137	Mr. Laxman Krishna Malla	Engineer,
138	Mr. Laxman Prasad Mainali	Advocate
139	Mr. Laxmi Sundar Hakuduwal	Engineer
140	Mr. Lekh Man Singh Bhandhari	Engineer
141	Mr. Lok Bahadur Karki	Advocate
142	Mr. Madan Gopal Maleku	Engineer
143	Mr. Madan Shankar Shrestha	Engineer
144	Mr. Madan Timsina	Engineer
145	Mr. Madhab Prasad Paudel	Rt. Civil Servent/Lawyer
146	Mr. Madhav Belbase	Engineer
147	Mr. Madhav Das Shrestha	Advocate
148	Mr. Madhav Prasad Khakurel	Engineer
149	Mr. Madhusudan Pratap Malla	Engineer
150	Mr. Mahendra Bahadur Gurung	Engineer
151	Mr. Mahendra Kumar Yadav	Engineer
152	Mr. Mahendra Narayan Yadav	Engineer
153	Mr. Mahendra Nath Sharma	Engineer
154	Mr. Mahesh Bahadur Pradhan	Engineer
155	Mr. Mahesh Kumar Agrawal	Entrepreneur
156	Mr. Mahesh Kumar Thapa	Senior Advocate
157	Mr. Manoj Kumar Sharma	Engineer
158	Mr. Manoj Kumar Yadav	Engineer/Advocate
159	Mr. Matrika Prasad Niraula	Senior Advocate
160	Mr. Meen Raj Gyawali	Engineer
161	Mr. Min Bahadur Rayamajhee	Former Chief Justice, Supreme Court

S.N	Name	Profession
162	Mr. Mitra Baral	Civil Service
163	Mr. Mohan Man Gurung	Engineer/Advocate
164	Mr. Mohan Raj Panta	Engineer
165	Mr. Mukesh Raj Kafle	Engineer
166	Mr. Mukunda Sharma Paudel	Senior Advocate
167	Mr. Murali Prasad Sharma	Advocate
168	Mr. Nagendra Nath Gnawali	Engineer
169	Mr. Nagendra Raj Sitoula	Consultant
170	Mr. Narayan Datt Sharma	Advocate/Engineer
171	Mr. Narayan Prasad Koirala	Engineer/Advocate
172	Mr. Narendra Bahadur Chand	Engineer
173	Mr. Narendra Kumar Baral	Engineer
174	Mr. Narendra Kumar K.C	Advocate
175	Mr. Narendra Kumar Shrestha	Former DAG, Advocate
176	Mr. Narendra Pratap Singh Budhathoki	Advocate
177	Mr. Naveen Mangal Joshi	Engineer
178	Mr. Niranjan Prasad Chalise	Engineer
179	Mr. Niranjan Prasad Poudel	Engineer
180	Mr. Om Naraya Sharma	Engineer
181	Mr. Om Narayan Shrestha	Advocate
182	Mr. Panch Dev Prasad Gupta	Advocate
183	Mr. Pawan Karki	Engineer
184	Mr. Pawan Karki	Advocate
185	Mr. Poorna Das Shrestha	Engineer
186	Mr. Prabhu Krishna Koirala	Senior Advocate
187	Mr. Pradip Chandra Poudel	Advocate
188	Mr. Prajesh Bikram Thapa	Engineer
189	Mr. Prakash Jung Shah	Engineer

S.N	Name	Profession
190	Mr. Prakash Poudel	Engineer
191	Mr. Pramod Krishna Adhikari	Engineer
192	Ms. Prativa Neupane	Advocate
193	Mr. Prithivi Raj Poudel	Engineer
194	Prof. Purna Man Shakya	Senior Advocate
195	Mr. Purnendu Narayan Singh	Engineer
196	Mr. Purusottam Kumar Shahi	Engineer
197	Mr. Puspa Raj Pandey	Advocate
198	Mr. Radheshyam Adhikari	Senior Advocate
199	Mr. Raghab Lal Vaidya	Senior Advocate
200	Mr. Raghabendra Yadav	Engineer
201	Mr. Rajan Adhikari	Advocate
202	Mr. Rajan Raj Pandey	Engineer
203	Mr. Rajendra Kishore Kshatri	Advocate
204	Mr. Rajendra Kumar Bhandhari	Former Justice, Supreme Court
205	Mr. Rajendra Niraula	Engineer
206	Mr. Rajendra Paudel	Engineer
207	Dr. Rajendra Prasad Adhikari	Project Mgmt, Advocate
208	Mr. Rajendra Prasad Kayastha	Engineer
209	Mr. Rajendra Prasad Yadav	Engineer
210	Mr. Raju Man Singh Malla	Advocate
211	Mr. Ram Gopal Siwakoti	Engineer
212	Mr. Ram Krishna Sapkota	Engineer
213	Mr. Ram Krishna Sapkota	Engineer
214	Mr. Ram Kumar Lamsal	Engineer
215	Dr. Ram Lal Sutihar	Advocate
216	Mr. Ram Prasad Acharya	Advocate

S.N	Name	Profession
217	Mr. Ram Prasad Gautam	Advocate
218	Mr. Ram Prasad Shrestha	Senior Advocate
219	Mr. Ram Prasad Silwal	Engineer
220	Mr. Ram Shanker Khadka	Lawyer
221	Mr. Ramesh Kumar Ghimrie	Advocate
222	Mr. Ramesh Prasad Rijal	Engineer
223	Mr. Ramesh Raj Satyal	Auditor
224	Mr. Rameshwar Lamichhane	Engineer
225	Mr. Rameshwar Prasad Kalwar	Engineer/Advocate
226	Mr. Ratneshwar Prasad Sharma	Advocate
227	Mr. Ravi Sharma Aryal	Former Justice, Supreme Court
228	Mr. Resham Raj Regmi	Senior Advocate
229	Mr. Rishi Kesh Sharma	Engineer
230	Dr. Rishi Kesh Wagle	Dean KU, Law
231	Mr. Rishi Ram Sharma Neupane	Engineer (Water Mgmt)
232	Mr. Rishiram Koirala	Engineer
233	Mr. Roshan Soti	Engineer
234	Dr. Rudra Prasad Sitaula	Advocate
235	Mr. Rupak Rajbhandari	Engineer
236	Mr. Sahadev Prasad Bastola	Former Judge, District Court
237	Mr. Sajan Ram Bhandary	Senior Advocate
238	Mr. Sanjeev Koirala	Engineer
239	Mr. Santosh Kumar Pokharel	Engineer
240	Ms. Sarala Moktan	Advocate
241	Mr. Sarb Dev Prasad	Engineer
242	Mr. Saroj Chandra Pandit	Engineer

S.N	Name	Profession
243	Mr. Satya Narayan Shah	Engineer
244	Mr. Shailendra Kumar Dahal	Senior Advocate
245	Mr. Shaligram Parajuli	Engineer/Advocate
246	Mr. Shambhu Thapa	Senior Advocate
247	Mr. Shankar Prasad Pandey	Former Secretary
248	Mr. Shant Raj Sharma Neupane	Financial Analyst
249	Mr. Sharada Prasad Sharma	Engineer
250	Ms. Sharda Shrestha	Former Justice, Supreme Court
251	Mr. Sher Bahadur Karki	Senior Advocate
252	Mr. Shishir Koirala	Engineer
253	Mr. Shital Babu Regmee	Engineer
254	Mr. Shiva Hari Sapkota	Engineer
255	Mr. Shiva Kumar Basnet	Engineer
256	Mr. Shiva Prasad Sharma Paudel	Engineer
257	Mr. Shiva Prasad Uprety	Engineer
258	Mr. Shiva Raj Adhikari	Advocate
259	Mr. Shiva Ram K.C	Engineer
260	Mr. Shree Prasad Agrahari	Engineer
261	Mr. Shree Prasad Pandit	Senior Advocate
262	Mr. Shreedhar Sapkota	Advocate
263	Mr. Shyam Bahadur Karki	Engineer
264	Mr. Shyam Bahadur Pradhan	Former Justice, Supreme Court
265	Mr. Shyam Prasad Kharel	Engineer
266	Mr. Shyam Shrestha	Advocate
267	Mr. Sira Bahadur Ghimire	Engineer
268	Mr. Som Bahadur Thapa	Engineer

S.N	Name	Profession
269	Mr. Som Nath Poudel	Engineer
270	Ms. Srijana Subedi	Advocate
271	Mr. Subash Kumar Mishra	Engineer
272	Mr. Subhash Chandra Verrma	Engineer
273	Ms. Sujan Lopchan	Senior Advocate
274	Mr. Suman Kumar Rai	Advocate
275	Mr. Suman Prasad Sharma	Engineer
276	Mr. Suman Rayamajhi	Chartered Accountant
277	Mr. Sunil Bahadur Malla	Engineer
278	Mr. Sunil Ghaju	Engineer
279	Mr. Sunil Kumar Dhungel	Electrical Engineer
280	Mr. Sunil Man Shakya	Advocate
281	Mr. Suresh Chitrakar	Engineer
282	Mr. Suresh Kumar Regmi	Engineer
283	Mr. Suresh Kumar Sharma	Engineer
284	Mr. Suresh Man Shrestha	Advocate
285	Mr. Surya Dev Thapa	Engineer
286	Mr. Surya Nath Upadhyay	Former CIAA Chief/Advocate
287	Mr. Surya Prasad Koirala	Advocate
288	Mr. Surya Raj Kadel	Engineer/Advocate
289	Mr. Sushil Bhatta	Engineer
290	Mr. Suvod Kumar Karna	Chartered Accountant
291	Mr. Tanuk Lal Yadav	Engineer
292	Mr. Tara Bahadur Sitaula	Senior Advocate
293	Mr. Tara Dev Joshi	Advocate
294	Mr. Tara Man Gurung	Engineer
295	Mr. Tara Nath Sapkota	Engineer

S.N	Name	Profession
296	Mr. Tej Raj Bhatta	Advocate
297	Mr. Tek Nath Achraya	Chartered Accountant
298	Mr. Thaneshwar Kafle(Rajesh)	Senior Advocate
299	Mr. Tika Ram Bhattarai	Senior Advocate
300	Mr. Tika Ram Regmi	Advocate
301	Mr. Tilak Prasad Rijal	Advocate
302	Mr. Trilochan Gauchan	Senior Advocate
303	Mr. Tul Bahadur Shrestha	Advocate
304	Mr. Tulasi Bhatta	Senior Advocate
305	Mr. Udaya Nepali Shrestha	Former VC, Law Commission
306	Mr. Uddhav Prasad Kadariya	Tax Counselor
307	Mr. Uma Kanta Jha	Engineer
308	Mr. Umesh Jha	Engineer
309	Mr. Upendra Dev Bhatta	Engineer
310	Mr. Upendra Rja Upreti	Advocate/Engineer
311	Mr. Varun Prasad Shrestha	Engineer
312	Mr. Vinod Prasad Dhungel	Former Judge
313	Mr. Vishnu Bahadur Singh	Engineer
314	Mr. Vishwa Nath Khanal	Engineer
315	Mr. Yadav Adhikari	Nepal Police
316	Mr. Yagya Deo Bhatt	Engineer
317	Mr. Yajna Man Tamrakar	Engineer
318	Mr. Yaksha Dhoj Karki	Construction Entrepreneur
319	Mr. Yoganand Yadav	Engineer
320	Mr. Yubaraj Snagroula	Senior Advocate

NEPCA Ordinary Member

S.N.	Name	Profession
1	Mr. Abhi Man das Mulmi	Engineer
2	Mr. Ajay Adhikari	Engineer
3	Mr. Ambika Prasad Upadhay	Engineer
4	Mr. Ananta Acharya	Engineer
5	Mr. Anil Kumar Shrestha	Advocate
6	Mr. Ashish Upadhyay	Engineer
7	Mr. Babu Lal Agrawal	Engineer
8	Mr. Bharati Prasad Sharma	Engineer
9	Mr. Bhawesh Mandal	Engineer
10	Mr. Bimal Timilsina	Engineer
11	Mr. Bipin Paudel	Engineer
12	Mr. Chet Nath Ghimire	Advocate
13	Mr. Deepak Man Singh Shrestha	Engineer
14	Mr. Deepak Prasad Aryal	
15	Mr. Deependra Prasad Bhatta	Engineer
16	Mr. Devendra Shrestha	Architect
17	Mr. Dipendra Kumar Yadav	Deputy Professor
18	Federation of Contractors' Association of Nepal	
19	Mr. Gouri Shankar Agrawal	Engineer
20	Mr. Guru Bhakta Niroula Sharma	Advocate
21	Mr. Kalyan Gyawali	Engineer
22	Mr. Kamala Upreti -Chhetri	Advocate
23	Mr. Kashi Raj Dahal	Chief, Administrative Court
24	Mr. Krishna Bahadur Kunal	Engineer/ Advocate
25	Mr. Laxman Prasad Adhikari	Engineer
26	Mr. Mahendra Kanta Mainali	Senior Advocate
27	Mr. Manaj Jyakhwo	Advocate
28	Mr. Milan Wagle	Engineer
29	Mr. Nanda Krishna Shrestha	Advocate
30	Mr. Narendra Kumar Dahal	Advocate

S.N.	Name	Profession
31	Mr. Prabhu Krishna Koirala	Advocate
32	Mr. Prajwal Shrestha	Engineer
33	Mr. Pramesh Tripathi	Engineer
34	Mr. Puskar Pokhrel	Advocate
35	Mr. Rabin Nepal	Engineer
36	Ms. Rabina KC	Advocate
37	Dr. Rabindra Nath Shrestha	Engineer
38	Mr. Rabindra Shah	Engineer
39	Mr. Raj Narayan Yadav	Engineer
40	Mr. Rajeev Pradhan	Engineer
41	Ms. Rakshya Singh	Advocate
42	Dr. Ram Chandra Bhattarai	Lecturer, T.U
43	Mr. Sadhu Ram Sapkota	Lawyer
44	Mr. Santosh K.Pokharel	Engineer
45	Ms. Saraswati Shah	Advocate
46	Mr. Satyendra Sakya	Engineer
47	Mr. Semanta Dahal	Advocate
48	Mr. Shailendra Upareti	Advocate
49	Mr. Shankar Prasad Agrawal	Advocate
50	Mr. Shankar Prasad Yadav	Engineer
51	Mr. Shishir Dhakal	Engineer
52	Mr. Sita Prasad Pokharel	Advocate
53	Mr. Sital Kumar Karki	Advocate
54	Mr. Suraj Regmi	Engineer
55	Mr. Surendra Pradhan	Advocate
56	Mr. Tarun Ranjan Datta	Engineer/ Lawyer
57	Mr. Temba Lama Sherpa	Engineer
58	Mr. Tilak Prasad Rijal	Advocate
59	Mr. Tribhuvan Dev Bhatta	Advocate
60	Mr. Ujjwal Karki	Engineer

सर्वोच्च अदालत, संयुक्त इजलास

माननीय न्यायाधीश डा. श्री आनन्दमोहन भट्टराई

माननीय न्यायाधीश श्री सुष्मालता माथेमा

आदेश

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मुद्दाः-उत्प्रेषणसमेत।

6 Manoramaganj, Indore - 452001, India स्थित भारतीय कम्पनी ऐन, १९५६ बमोजिम दर्ता रहेको साङ्गी ब्रदर्स (इन्दोर) प्रा लि. (Sanghi Brothers (Indore) Pvt. Ltd.) को तर्फबाट अधिकार प्राप्त Mr. Raveesh Bafna, Executive Director (DIN 02962084) ----------1 — रिट निवेदक

विरुद्ध

उच्च अदालत पाटन, ललितपुर ----------1

वागमती अञ्चल, काठमाडौं जिल्ला, काठमाडौं महानगरपालिका वडा नं.३२ तीनकुने सावि क वडा नं.३५) स्थित रजिष्टर्ड कार्यालय रहेको प्रभु हेलिकप्टर प्रा.लि. (सावि क मुक्तिनाथ एअरलाइन्स प्रा.लि.) १

ऐ. प्रा. लि. का सञ्चालक (सावि क अध्यक्ष) इच्छा बहादुर डंगोल.....1 — विपक्षी

नेपालको संविधानको धारा 46, 133(२) बमोजिम यसै अदालतको क्षेत्राधिकार भित्रको भई पेश हुन आएको प्रस्तुत रिट निवेदनको संक्षिप्त तथ्य

एवम् आदेश यस प्रकार छः

तथ्य खण्ड

भारतीय कम्पनी Sanghi Brothers (Indore) Pvt. Ltd. खरिदकर्ता र नेपाली कम्पनी प्रभु हेलिकप्टर प्रा.लि. साविक Muktinath Airlines Pvt. Ltd.) बिक्रेता भै १७ जुलाई, २०१३ मा हेलिकप्टर ("a helicopter R44 Raven II, Serial No. 13006; Registration 9N AJW") खरिद बिक्रि प्रयोजनको लागि समझदारी पत्र (MOU) मा हस्ताक्षर भएको थियो। सो समझदारी (MOU) कार्यान्वयनमा विवाद भै सोही समझदारी पत्र (MOU) मा उल्लेख भएबमोजिम विवाद समाधान प्रयाजनको लागि Indian Arbitration and Conciliation Act, 1996 बमोजिम भारतीय सर्वोच्च अदालतबाट हालको प्रधान न्यायाधीश Hon'ble Mr. Justice Ranjan Gogoi (तत्कालीन मा.न्या) को 15 October, 2015 को Judgment / Order बमोजिम Justice Mukul Mudgal (Former Chief Justice, Panjab & Haryana High Court) समक्ष विवाद पेश भएको थियो। उक्त विवादमा रिट निवेदक Sanghi Brothers (Indore) Pvt. Ltd. लाई प्रत्यर्थी प्रभु हेलिकप्टर प्रा.लि. ले भा.रु.८४,६७,७७६।- (अक्षेरुपी भा.रु. चौरासी लाख सतसठी हजार सात सय छयहत्तर रुपैयाँ) र सो रकमको भुक्तानी मिति सम्मको प्रचलित व्याजदरको अतिरिक्त वार्षिक थप २ प्रतिशत व्याज रकमसमेत तिर्नु बुझाउनुपर्ने उल्लेख गरी सन् २७।१२।२०१७ (मिति २०७४।९।१२) मा भारतीय मध्यस्थकर्ताबाट New Delhi, India मा रिट निवेदक र प्रत्यर्थी दुवै पक्षको प्रतिनिधित्व गराई भएको संशोधित निर्णय बमोजिम रकम दिलाई भराई उक्त निर्णय कार्यान्वयन गरी पाउँ भनी मध्यस्थता ऐन, २०५५ को दफा ३४, मध्यस्थता अदालत कार्यविधि) नियमावली, २०५९ को नियम १३, पारस्परिक कानूनी सहायता ऐन, २०७० को दफा ३७ समेतको कानूनी व्यवस्था बमोजिम रिट निवेदक साङ्गी ब्रदर्स (इन्दोर) प्रा.लि. को तर्फबाट उच्च अदालत पाटनसमक्ष निवेदन पत्र दर्ता भएको थियो।

विदेशी अदालतबाट भएको निर्णय कार्यान्वयन प्रयोजनको लागि Convention on the Recognition and Enforcement of Arbitral Awards, 1958(New York Convention) नेपाल र भारत दुवै देशले हस्ताक्षर गरेको एवम् मध्यस्थता ऐन, २०५५ को दफा ३४ बमोजिम उल्लिखित निर्णय कार्यान्वयन गर्नमा कुनै बाधा थिएन। फैसला कार्यान्वयन गरिपाँउ भन्ने

मुद्दा उच्च अदालत पाटनमा विचाराधीन रहेकै अवस्थामा विपक्षी District Court, Saket, New Delhi मा गएकोमा सो अदालतबाट सो विषयको क्षेत्राधिकार उच्च अदालतमा रहेको भनी निवेदन माथि कारवाही गर्न नमिल्ने हुँदा फिर्ता गर्ने र उपयुक्त निकायमा निवेदन दिन ४ हप्ताको समय दिने गरी आदेश भएकोमा प्रत्यर्थी प्रभु हेलिकप्टर प्रा.लि.को तर्फबाट भारतीय उच्च अदालतमा कुनै निवेदन दर्ता भएको छैन। पारस्पारिकता कायम भएका (Reciprocating) वा नभएका (Non-reciprocating) दुवै देशमा भएको मध्यस्थको निर्णय भारतीय अदालतबाट कार्यान्यन गर्न भारतमा कानूनी बाधा छैन। भारतको केन्द्रिय सरकारले नेपालमा भएको मध्यस्थको निर्णय भारतमा कार्यान्वयन हुन नसक्ने गरी कुनै सूचना प्रकाशन वा सम्प्रेषण गरेको अवस्था पनि छैन। त्यसैगरी नेपाल र भारत दुवै SAARC Arbitration Council को सदस्य भएको, सो सम्बन्धी सम्झौतालाई दुवै देशले अनुमोदन गरेको, सो सन्दर्भमा दुवै देशले सहकार्य गर्दै आएकोबाट पनि नेपालमा भएको मध्यस्थको निर्णय भारतमा र भारतमा भएको मध्यस्थको निर्णयको कार्यान्वयन हुनमा कुनै बाधा अड्चन छैन। यस स्थितिमा माथि उल्लिखित विवादीत विषयमा मिति २०७६।३।२४ (प्रमाणिकरण मिति २०७६।४।२८) गते उच्च अदालत पाटन, संयुक्त वाणिज्य इजलाशबाट मिति २०७४।९।१२ (सन् २७।१२।२०१७) को भारतीय मध्यस्थकर्ता JUSTICE MUKUL MUDGAL बाट भएको निर्णय कार्यान्वयन गरी पाउँ भन्ने निवेदन दावी पुग्न नसक्ने ठहर गरी भएको आदेशबाट निवेदकको नेपालको संविधान, २०७२ को धारा १८, २५ मध्यस्थ ऐन, २०५५ को दफा ३४, पारस्परिक कानूनी सहायता ऐन, २०७० को दफा ३७ समेतको संवैधानिक एवम् कानूनी हक अतिक्रमण हुन पुगेको र सो हक प्रचलनको लागि अन्य प्रभावकारी उपचारको मार्गको अभावमा सन् २७।१२।२०१७ (मिति २०७४।९।१२) मा भारतीय मध्यस्थ कर्ताबाट New Delhi, India मा रिट निवेदक र प्रत्यर्थी दुवै पक्षको प्रतिनिधित्व गराई भएको संशोधित निर्णय कार्यान्वयन गर्नु नपर्ने उल्लेख गरी उच्च अदालत पाटनबाट मिति २०७६।३।२४ गते भएको आदेश उत्प्रेषणको आदेशले बदर गरी सन् २७।१२।२०१७ (मिति २०७४।९।१२) मा भारतीय मध्यस्थ कर्ताबाट भएको निर्णय कार्यान्वयन गरी पाउन रिट निवेदक साङ्गी ब्रदर्स (इन्दोर) प्रा. लि. ले उच्च अदालत पाटन, ललितपुरमा दर्ता गरेको निवेदन समेतलाई मध्यनजर गरी मध्यस्थता (अदालती कार्यविधि) नियमावली,

२०५९ को नियम १३ बमोजिम मध्यस्थको निर्णय कार्यान्वयन गर्न गराउन भनी विपक्षीहरुको नाममा परमादेश समेतको आवश्यक र उपयुक्त आदेश जारी गरी पाउँ एवम् तत्कालीन पुनरावेदन अदालत पाटनबाट मिति २०७१।९।३० गते जारी भएको आदेशउपर सम्मानित अदालतसमक्ष दर्ता भएको पुनरावेदन एवम् १७ नं. को निवेदनको अन्तिम टुंगो नलागे सम्मको लागि तत्कालीन पुनरावेदन अदालत पाटनबाट जारी भएको मिति २०७१।९।३० गतेको आदेश विपरीत कुनै कार्य नगर्नु नगराउनु भनी प्रत्यर्थीहरुको नाममा सर्वोच्च अदालत नियमावली, २०७४ को नियम ४९ (१(२) बमोजिम अन्तरिम आदेश समेत जारी गरी पाउँ भन्नेसमेत व्यहोराको **मिति २०७६।७।४ मा साङ्गी ब्रदर्स प्रा.लि. को तर्फबाट यस अदालतसमक्ष दायर भएको रिट निवेदन।**

यसमा के कसो भएको हो? निवेदकको माग बमोजिमको आदेश किन जारी हुनु नपर्ने हो? आदेश जारी हुन नपर्ने भए आधार र कारणसहित यो आदेश प्राप्त भएका मितिले बाटाका म्यादबाहेक १५ दिनभित्र विपक्षी नं.१ को हकमा महान्यायाधिवक्ताको कार्यालयमार्फत र विपक्षी नं.२ र ३ को हकमा आफै वा आफ्नो प्रतिनिधिमार्फत लिखित जवाफ पेश गर्न भनी विपक्षीहरूका नाममा यो आदेश र रिट निवेदनको प्रतिलिपि साथै राखी म्याद सूचना पठाई सोको बोधार्थ महान्यायाधिवक्ताको कार्यालयलाई दिई म्यादभित्र लिखित जवाफ परे वा अवधि नाघेपछि नियमानुसार पेश गर्नू भन्नेसमेत व्यहोराको **मिति 2076।7।7 गते यस अदालतको आदेश।**

प्रस्तुत मुद्दामा मिति २०७४।०९।१२ मा भारतीय मध्यस्थकर्ता Justice Mukul Mugdal बाट भएको निर्णय कार्यान्वयन गराइ पाउँ भन्ने निवेदनमा यस अदालतबाट मिति २०७६।०३।२४ मा अन्तिम आदेश भई निवेदनको किनारा लागिसकेको अवस्थामा सो आदेशबाट विपक्षीको कुनै पनि संवैधानिक एवम् कानूनी हक अतिक्रमण नभएको हुँदा विपक्षीको माग बमोजिमको उत्प्रेषण परमादेशसमेत जारी हुनुपर्ने होईन भन्नेसमेत व्यहोराको **मिति २०७६।७।२१ मा उच्च अदालत पाटनको तर्फबाट यस अदालतसमक्ष प्रस्तुत भएको लिखित जवाफ।**

UN Convention of the Recognition and Enforcemeent of Arbitral Awards, 1958 यस पछाडि न्यूयोर्क कन्भेन्सन मात्र भनिएको) मा नेपाल र भारत दुवैले हस्ताक्षर गरेकोले कन्भेन्सनको दुबै राष्ट्रहरु त्यसको पक्ष राष्ट्रहरु हुन भन्ने कुरामा कुनै विवाद छैन। तर न्यूयोर्क कन्भेन्सन सम्बन्धित राष्ट्रहरुमा प्रभावि हुनका लागि सम्बन्धित देशले गर्ने कानूनी व्यवस्था निर्णायक हुनेमा पनि विवाद छैन। यस सन्दर्भमा नेपालको हकमा मध्यस्थता ऐन, २०५५ को दफा ३४ को कानूनी व्यवस्था आकर्षित हुन्छ भने भारतको हकमा Indian Arbitration and Conciliation Act, 1996 (यस पछाडि भारतीय मध्यस्थता ऐन भनिएका) को दफा ४४ आकर्षित हुने निर्विवाद छ। रिट निवेदकले उल्लिखित कानूनी व्यवस्था अन्तर्गत नै निर्णय कार्यान्वयन गरी पाउँ भनी उच्च अदालत पाटनमा निवेदन दिएको अवस्था छ र उच्च अदालत पाटनले नेपाल र भारतको मध्यस्थता सम्बन्धी उल्लिखित कानूनी व्यवस्थाको आधारमा निर्णय कार्यान्वयन हुने नहुने के हो भनेर निर्णय आदेश गरेको छ। रिट निवेदकले उक्त दफा ३४ मा भएको नेपालको कानूनी व्यवस्था र दफा ४४ मा भएको भारतको कानूनी व्यवस्थामा उच्च अदालतले गरेको कानूनको अर्थ र व्याख्यालाई अन्यथा भएको छ भन्न सकेको छैन। मध्यस्थता ऐन, २०५५ को दफा ३४ को उपदफा (२) मा निर्णय कार्यान्वयनको विभिन्न अवस्थाहरुको उल्लेख भएकोमा उक्त उपदफा (२) ले व्यवस्था गरेको देहायको (क) देखि (च) सम्मका अवस्थाहरु हुन्। उच्च अदालतले देहायको (क) देखि (च) को अवस्थाहरुमा देहायको (ङ) को अवस्था पूरा नभएको किटान गरेको छ। यसमा "जुन व्यक्तिले निर्णय कार्यान्वयन गराउन निवेदन दिएको हो सो व्यक्तिको मुलुकको कानूनमा वा मध्यस्थता भएको स्थानको मुलुकको कानूनमा नेपालमा भएको मध्यस्थको निर्णय कार्यान्वयन हुन नसक्ने कानूनी व्यवस्था नभएमा" भन्ने व्यवस्था भएबाट र भारतीय कानूनी व्यवस्थाले नेपालमा भएको मध्यस्थको निर्णय कार्यान्वयन गर्न Indian Arbitration and Conciliation Act, 1996 को दफा ४४ बमोजिमको शर्त पूरा गर्नुपर्ने देखिन्छ। जसअनुसार "In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said convention applies" भन्ने व्यवस्था भएकोमा हालसम्म भारतको केन्द्र सरकारले नेपालमा भएको मध्यस्थको निर्णयलाई कार्यान्वयनको सहमतिको लागि मान्यता दिई सूचिकृत गरी

Official Gazette मा सूचना प्रकाशित नगरेकाले नेपालको न्यायिक क्षेत्राधिकार अन्तर्गत भारतमा भएको निर्णय कार्यान्वयन हुन सक्ने स्थिति रहदैन भन्ने स्पष्ट छ। तसर्थ उच्च अदालतबाट मिति २०७६।०३।२४ मा भएको फैसलामा कानूनको व्याख्या सम्बन्धी कुनै त्रुटी नभएकोले प्रस्तुत रिट निवेदन खारेज गरिपाउँ भन्ने समेत व्यहोराको **मिति २०७६।८।९ मा प्रभु हेलिकप्टर प्रा. लि. को अख्तियार प्राप्त भै आफ्नो हकमा समेत ऐ. प्रा. लि.का सञ्चालक इच्छाबहादुर डंगोलले यस अदालतसमक्ष प्रस्तुत गरेको लिखित जवाफ।**

यसमा मध्यस्थता ऐन, २०५५ को दफा ३४(२)(ङ) बमोजिम नेपालमा भएको मध्यस्थताको निर्णय कार्यान्वयनको विषयमा भारतमा के व्यवस्था छ, पारिस्परिकताको स्थिति के छ, रिट निवेदकबाट खुलाउन र सो सम्बन्धमा भारत सरकारले जारी गरेको अभिलेख, सूचना आदि केही भए सो समेत निवेदकबाट पेश गर्न लगाई लगाउका मुद्दाहरु समेत साथै राखी नियमानुसार पेश गर्नु होला भन्नेसमेत व्यहोराको **मिति २०७६।१२।४ मा यस अदालतबाट भएको आदेश।**

नेपाल लगायत कुनै पनि विदेशी मुलुकमा भएको मध्यस्थताको निर्णय कार्यन्वयन प्रयोजनको लागि भारतको कानूनी व्यवस्था शून्य अवस्थामा रहेको छैन। Convention of the Recognition and Enforcement of Arbitral Awards, 1958 लाई भारतको तर्फबाट १३ जुलाई, १९६० मा र नेपालको तर्फबाट ४ मार्च, १९९८ मा अनुमोदन भएबमोजिम नेपालको मध्यस्थता ऐन, २०५५ को दफा ३४ (२) एवम् भारतको The Arbitration and Conciliation Act, 1996 को दफा ४४ बमोजिम विदेशमा भएको निर्णय दुवै देशमा कार्यान्वयन हुने देखिन्छ। भारतमा The Arbitration and Conciliation Act, 1996 को दफा 44 मा उल्लेख भएको कानूनी व्यवस्था बमोजिम New York Convention अनुमोदन गर्ने विदेशी राष्ट्रमा भएको मध्यस्थको निर्णय भारतमा सिधै कार्यान्वयन गराउन सकिन्छ। विदेशमा भएको मध्यस्थको निर्णय कार्यान्वयन प्रयोजनको लागि सम्बन्धित देशलाई समान हैसियत (Reciprocal Provision) भएको उल्लेख गरी Official Gazettee मा समेत प्रकाशन गरी लेखिए बमोजिम अभिसन्धि अनुमोदन गर्ने राष्ट्रमा भएको मध्यस्थको निर्णय कार्यान्वयन प्रयोजनको लागि भारतीय सरकारले उक्त राष्ट्रलाई The Arbitration and Conciliation Act, 1996 का शर्त परिपालना गरेको एवम् गर्ने

शर्तमा समान हैसियतको मान्यता प्रदान गरी सिधै मध्यस्थको निर्णय कार्यान्वयन गराउन सक्ने देखिन्छ।

Non-convention/non-reciprocating territory मा भएको मध्यस्थको निर्णय कार्यान्वयन प्रयोजनको लागि उक्त निर्णयलाई नै प्रमुख प्रमाणको रुपमा संलग्न गरी वा जुन देशको मध्यस्थताको निर्णय हो उक्त निर्णयलाई सम्बन्धित देशको अदालतबाट judgement / decree मा परिणत गरी सो judgement / decree लाई मुख्य प्रमाणको रुपमा समावेश गरी निर्णय कार्यान्वयन प्रयोजनको लागि मुद्दा (suit) को रुपमा दर्ता गरी कारवाही अघि बढाउन सकिन्छ। देवानी प्रकृतीको मुद्दाको कारवाहीसँग सम्बन्धित Code of Civil Procedure, 1908 ("the CPC") मध्यस्थताको निर्णय वा उक्त निर्णयलाई judgement / decree मा परिणत गरी मुख्य प्रमाणको रुपमा पेश गरी दर्ता हुने मुद्दामा समेत आकर्षित हुन्छ। त्यस्तो मध्यस्थको निर्णय एवम् परिणत गरिएको judgement / decree को हकमा Indian Evidence Act, 1872 को दफा ८६ बमोजिम प्रमाणिक महत्व रहने प्रकृतिको निर्णय मानिने हुँदा मध्यस्थता ऐन, २०५५ को दफा ३४(२)(ड.) को प्रयोजनको लागि नेपालमा भएको मध्यस्थको निर्णय भारतमा र भारतमा भएको मध्यस्थको निर्णय नेपालमा कार्यान्वयन हुन सक्नेमा कुनै बाधा अड्चन देखिदैंन।

नेपालमा भएको मध्यस्थको निर्णय भारतीय अदालतमा कार्यान्वयन प्रयोजनको लागि नेपाललाई Reciprocating वा Non-reciprocating Territory जुनसुकै वर्गमा राखे पनि विद्यमान कानूनी व्यवस्था एवम् न्यायिक अभ्यास समेतको आधारमा कार्यान्वयन हुन सक्ने देखिन्छ। नेपाल र भारत दुवै SAARC सदस्य राष्ट्रको रुपमा रहेको र SAARC तहमा व्यापारिक, औद्योगिक, वित्तिय एवम् लगानी सम्बन्धी विवाद निरुपण प्रयोजनको लागि विशिष्टिकृत अंगको रुपमा SAARC Arbitration Council (SAARCO) स्थापना भएको छ। उक्त अन्तर सरकारी संगठन स्थापना प्रयोजनको लागि तयार भएको Agreement for the establishing of SAARC Arbitration Council, 2005 लाई भारतको तर्फबाट २८ डिसेम्बर, २००५ मा र नेपालको तर्फबाट २० मार्च, २००७ मा अनुमादेन गरिएको छ। जसको मुख्य उद्देश्य "assist in the enforcement of arbitral awards" रहेको छ। SAARC Arbitration Council ले Rules of Procedure for

Arbitration, 2016 तर्जुमा गरी लागू गरेको छ भने SAARC Arbitration Council को Expert Report - Study to Develop a Template for a Dispute Settlement Mechanism between SAARC Member States regarding the Interpretation and Implementation of the SAARC Framework Agreement for Energy Cooperation (Electricity) - 4 December, 2017 मा "arbitral award binding" हुने उल्लेख छ। त्यसैगरी SAARC Arbitration Council (SAARCO) लाई प्रभावकारी बनाउने उद्देश्यले समय समयमा हुने विभिन्न कार्यक्रममा नेपालको तर्फबाट समेत सम्माननीय प्रधानन्यायधीश एवम् मा. कानूनमन्त्री तहबाट प्रतिनिधित्व हुँदै आएको छ। त्यसैगरी, SAARC Arbitration Council (SAARCO) लाई प्रभावकारी बनाउन प्रत्येक सदस्य राष्ट्रको तर्फबाट SAARCO मा प्रतिनिधित्व रहेको छ। सो प्रयोजनको लागि भारतको तर्फबाट Ministry of External Affairs बाट Joint Secretary (Legal & Treaties Division) र नेपालको तर्फबाट कानून तथा न्याय मन्त्रालयको तर्फबाट उपसचिव स्तरको प्रतिधित्व रहेको हुँदा भारत र नेपाल दुवै देशले अन्तराष्ट्रिय, क्षेत्रीय एवम् द्विपक्षीय तवरबाट मध्यस्थ मार्फत विवाद समाधान गर्न एवम् विदेशमा भएको मध्यस्थको निर्णय कार्यान्वयन प्रयोजनको लागि सहकार्य गर्दै आइरहेकोले भारतमा भएको मध्यस्थको निर्णय नेपालमा एवम् नेपालमा भएको मध्यस्थको निर्णय भारतमा कार्यान्वयन हुन कुनै बाधा अड्चन नरहेको व्यहोरा अनुरोध छ भन्नेसमेत व्यहोराको **मिति 2077।8।24 मा साङ्गी ब्रदर्स प्रा.लि. ले यस अदालतसमक्ष प्रस्तुत गरेको निवेदन।**

यसमा साङ्गी ब्रदर्श प्रा.लि. विरुद्ध प्रभु हेलिकप्टर प्रा.लि. भएको (मुद्दा नं. ०७४CB-०१७१) मध्यस्थको निर्णय सम्बन्धी मुद्दामा मिति २०७६।३।२४ मा उच्च अदालत पाटनबाट भएको फैसला सहितको सक्कल मिसिल उक्त अदालतबाट मगाई आएपछि नियमानुसार पेश गर्नू भन्नेसमेत व्यहोराको **मिति 2078।12।8 मा यस अदालतबाट भएको आदेश।**

<u>यस अदालतको ठहर</u>

नियमबमोजिम दैनिक पेशी सूचीमा चढी निर्णयार्थ इजलाससमक्ष पेश हुन आएको प्रस्तुत रिट निवेदनमा निवेदक Sanghi Brothers (Indore) Pvt. Ltd को तर्फबाट उपस्थित विद्वान् अधिवक्ता द्वय श्री यादवप्रसाद ढुंगाना र श्री सरोज श्रेष्ठले १७ जुलाई, २०१३ मा मुक्तिनाथ प्रा.लि. र Sanghi Brothers बीच भएको MOU अनुसार बिक्रि गर्नुपर्ने हेलिकप्टर

मुक्तिनाथ एयरलाइन्स प्रा. लि. ले बैङ्कमा धितो राखेका कारणले सम्झौतामा विवाद उत्पन्न भई समाधानका लागि MOU मा उल्लेख भएबमोजिम भारतीय मध्यस्थकर्ता Justice Mukul Mudgal समक्ष विवाद पेश हुँदा मुक्तिनाथ एयरलाइन्स्लाई क्षतिपूर्ति भराउने गरी भएको निर्णय कार्यान्वयन गर्नका लागि उच्च अदालत पाटनसमक्ष निवेदन गर्दा निवेदन खारेज भएको अवस्था छ। SAARC Arbitration Council को मुख्य उद्देश्य "assist in the enforcement of arbitral awards" रहेको छ र नेपाल र भारत दुवैको SAARCO मा प्रतिनिधित्व रहेकाले यसमा भारतीय मध्यस्थकर्ताको निर्णय कार्यान्वयन प्रयोजनको विरुद्धमा भएको उच्च अदालत पाटनको मिति २०७६।०३।२४ को आदेश अन्यायपूर्ण रहेकाले सो आदेश बदर गरी निर्णय कार्यान्वयनका लागि परमादेश समेतको उपर्युक्त आदेश जारी गरिपाउँ भनी बहससमेत प्रस्तुत गर्नुभयो।

त्यसैगरी विपक्षीको तर्फबाट उपस्थित विद्वान् वरिष्ठ अधिवक्ताहरु श्री पूर्णमान शाक्य र श्री निरन्जन आचार्य तथा विद्वान् अधिवक्ताहरु श्री जगत श्रेष्ठ, श्री राजु शाक्य र श्री भेषराज न्यौपानेले हालसम्म भारतको केन्द्र सरकारले नेपालमा भएको मध्यस्थको निर्णयलाई कार्यान्वयनको सहमतिको लागि मान्यता दिई सूचीकृत गरी Official Gazette मा सूचना प्रकाशित गरेको मिसिल संलग्न प्रमाणबाट नदेखिएको, राजपत्रमा सूचीकृत नभएको अवस्थामा विदेशमा भएको मध्यस्थताको निर्णय कार्यान्वयन नहुने भारतीय मध्यस्थता ऐन, १९९६ को दफा ४४ मा व्यवस्था छ। सो बमोजिम नेपाल सूचीकृत नभएको कुरामा रिट निवेदकले अन्यथा भन्न नसकेको प्रष्ट हुँदा नेपालको मध्यस्थता ऐन,२०५५ को दफा ३४ को उपदफा (२) को खण्ड (ङ) अनुसार भारतको मध्यस्थबाट भएको निर्णय कार्यान्वयन नहुने गरी भएको उच्च अदालतको निर्णय कानूनसम्मत नै रहेको छ। विपक्षी निवेदकले SAARC Arbitral Council स्थापना भएको भनी उल्लेख गरेकोमा उक्त Council राष्ट्रिय स्तरमा राष्ट्रहरु बीचको सन्धी सम्झौता सँग मात्र सम्बन्धित भएकोले व्यक्ति व्यक्ति बीच भएको सम्झौता वा समझदारीलाई त्यसले नसमेट्ने र भारतमा भएको मध्यस्थको निर्णय नेपालमा कार्यान्वयन हुने कुरा नेपालको मध्यस्थता ऐनको दफा ३४ को उपदफा (२) को खण्ड (ङ) र भारतीय

मध्यस्थता ऐनको दफा ४४ को कानूनी व्यवस्थासँग सम्बन्धित भएकोले रिट निवेदन खारेज हुनुपर्छ भनी बहससमेत प्रस्तुत गर्नुभयो।

निवेदक र विपक्षी तर्फका विद्वान् कानून व्यवसायीहरुले गर्नु भएको तर्कपूर्ण बहस सुनी रिट निवेदनसहितको मिसिल अध्ययन गरी निर्णयतर्फ विचार गर्दा यसमा मुलतः भारतमा भएको मध्यस्थको निर्णय नेपालमा कार्यान्वयन हुन सक्ने हो वा होइन, त्यसैगरी उच्च अदालत पाटनले गरेको निर्णय त्रुटिपूर्ण छ वा छैन र रिट निवेदन माग बमोजिमको आदेश जारी हुनुपर्ने हो वा होईन भन्ने प्रश्नहरुको निरुपण गर्नुपर्ने देखियो।

उपर्युक्त प्रश्नहरुको निरुपण गर्ने सन्दर्भमा प्रस्तुत विवाद भारतीय कम्पनी Sanghi Brothers (Indore) Pvt. Ltd. खरिदकर्ता र नेपाली कम्पनी प्रभु हेलिकप्टर प्रा.लि. (साविक Muktinath Airlines Pvt. Ltd.) बिक्रेता भै १७ जुलाई, २०१३ मा हेलिकप्टर खरिद बिक्रि प्रयोजनको लागि भएको समझदारी पत्र (MOU) सँग सम्बन्धित देखियो। उक्त समझदारी पत्रको कार्यान्वयनमा पक्षहरु बीच विवाद भएकोमा सोही समझदारी पत्रमा उल्लेख भए अनुसार विवाद समाधान प्रयोजनको लागि भारतीय Arbitration and Conciliation Act, 1996 बमोजिम मध्यस्थताको लागि Justice Mukul Mudgal (Former Chief Justice, Panjab & Haryana High Court) समक्ष विवाद पेश भएको र उक्त पेश भएको विवादमा हालका विपक्षी प्रभु हेलिकप्टरको समेत प्रतिनिधित्व गराई सुनुवाई गर्दा उक्त विवादमा रिट निवेदक साङ्गी ब्रदर्स (इन्दोर) प्रा.लि.लाई विपक्षी प्रभु हेलिकप्टर प्रा.लि. ले भा.रु. ८४,६७,७७६।- (अक्षरुपी चौरासी लाख सतसठी हजार सात सय छयहत्तर रुपैयाँ) र सो रकमको भुक्तानी मिति सम्मको प्रचलित व्याजदरको अतिरिक्त वार्षिक थप २ प्रतिशत व्याज रकमसमेत तिर्नु बुझाउनुपर्ने उल्लेख गरी भारतीय मध्यस्थ कर्ताबाट सन् २७ डिसेम्बर, २०१७ अर्थात वि. सं. २०७४।९।१२ मा निर्णय भएको देखिन्छ। उक्त निर्णय कार्यान्वयन गरी पाउँ भनी रिट निवेदक साङ्गी ब्रदर्स (इन्दोर) प्रा.लि.ले उच्च अदालत पाटनसमक्ष निवेदन गरेकोमा भारतीय मध्यस्थ कर्ताबाट भएको निर्णय कार्यान्वयन नहुने भन्दै उच्च अदालत पाटनबाट मिति २०७६।३।२४ मा फैसला भएको रहेछ। उक्त फैसला कानूनी त्रुटिपूर्ण हुँदा उत्प्रेषणको आदेशले बदर गरी भारतीय मध्यस्थकर्ताबाट मिति २७ डिसेम्बर, २०१७ अर्थात वि.सं. २०७४।९।१२ मा भएको निर्णय

कार्यान्वयन गर्न विपक्षीहरुको नाममा परमादेश समेतको आदेश जारी गरी पाउँ भन्ने मागदावी लिई साङ्गी ब्रदर्स (इन्दोर) प्रा. लि. ले नेपालको संविधानको धारा ४६ तथा धारा १३३ बमोजिम यस अदालतमा प्रस्तुत रिट निवेदन लिएर प्रवेश गरेको देखियो।

सो सन्दर्भमा भारतमा भएको मध्यस्थको निर्णय नेपालमा कार्यान्वयन हुन सक्ने हो वा होइन भन्ने विषयमा नेपाल र भारत दुवै देशको विद्यमान कानून र दुवै मुलुक पक्ष रहेको समेतको व्यवस्था हेरी निर्णय निष्कर्षमा पुग्नुपर्ने देखिन्छ[1]। साथै निवेदकले Agreement for the establishing of SAARC Arbitration Council, 2005 लाई भारतको तर्फबाट २८ डिसेम्बर, २००५ मा र नेपालको तर्फबाट २० मार्च, २००७ मा अनुमोदन गरिएको हुँदा सो क्षेत्रीय सम्झौता बमोजिम समेत भारतीय मध्यस्थबाट भएको निर्णय कार्यान्वयन गरिनुपर्छ भन्ने जिकिर लिएकोले सो सम्झौता बमोजिम समेत विवादित भारतीय मध्यस्थबाट भएको निर्णय नेपालमा कार्यान्वयन गर्न सकिने अवस्था छ वा छैन भन्ने बारेमा समेत हेर्नु पर्ने देखिन्छ।

यस सन्दर्भमा प्रारम्भमा नै के कुरा स्पष्ट गरिनुपर्छ भने नेपालको संविधानको धारा १२६ अनुसार नेपालका अदालतलाई प्राप्त न्याय सम्बन्धी अधिकार नेपालको संविधान, अन्य कानून र न्यायका मान्य सिद्धान्त बमोजिम प्रयोग हुने हो। यहि नै हाम्रो न्याय प्रशासनको आधार हो। सैद्धान्तिकरुपमा पनि एउटा सार्वभौम मुलुकको अदालतले विवादको निरुपणको क्रममा हेर्ने र आधार गर्ने भनेको उसैको संविधान, कानून नै हो। मुलुकले गरेका बाध्यकारी सम्झौताहरुको प्रयोग पनि संविधान र कानून बमोजिम बन्न जाने बाध्यकारिताको हदसम्म मात्र हुने हो। कुनै पनि मुलुक सार्वभौम रहन्छ भन्नुको यो आधारभूत मान्यता, अर्थ र तात्पर्यलाई घरेलु अदालतहरुले न्याय सम्पादनको क्रममा बिर्सन मिल्दैन। प्रस्तुत विवादमा पनि यो संवैधानिक एवम् विधिशास्त्रीय परिवेशलाई यस अदालतले बिर्सन मिल्दैन।

प्रस्तुत विवादमा निवेदकले भारतमा भएको र भारतीय मध्यस्थद्वारा गरिएको निर्णय कार्यान्वयन गरिनुपर्ने भनी उच्च अदालत पाटनमा प्रवेश गर्दा नेपालको मध्यस्थता ऐन,

[1] उल्लेखित अन्तरराष्ट्रिय महासन्धीमा भारतको तर्फबाट १३ जुलाई, १९६० मा अनुमोदन र नेपालको तर्फबाट ४ मार्च, १९९८ मा सम्मिलित गरिएको भन्नेमा पक्षहरुवीच विवाद छैन।

२०५५ को दफा ३४ अन्तरगत उक्त निर्णय कार्यान्वयन गरिनुपर्ने भनी जिकिर लिएको देखिन्छ। **मध्यस्थता ऐन, २०५५** को **दफा ३४** को **उपदफा (१)** मा "**विदेशमा भएको निर्णय नेपालमा कार्यान्वयन गराउन चाहने पक्षले देहायका लिखतहरु संलग्न गरी उच्च अदालत समक्ष निवेदन दिनुपर्नेछ**" भन्दै देहाय (क) मा मध्यस्थको निर्णयको सक्कल वा त्यसको प्रमाणित प्रति, (ख) मा सम्झौताको सक्कल वा त्यसको प्रमाणित प्रति, (ग) मा मध्यस्थको निर्णय नेपाली भाषामा भएको रहेनछ भने सोको नेपाली भाषामा भएको औपचारिक अनुवाद भन्ने कानूनी प्रावधान रहेको पाइन्छ। यी शर्तहरु पूरा भएनन् भन्ने जिकिर विपक्षीहरुबाट लिइएको छैन। यहाँ विवाद गरिएको विषयको प्रसंग दफा ३४ को उपदफा (२) सँग सम्बन्धित छ। उक्त उपदफामा "**विदेशमा भएको मध्यस्थको निर्णयलाई मान्यता दिने तथा कार्यान्वयन गराउने सम्बन्धमा व्यवस्था भएको कुनै सन्धीको नेपाल पक्ष रहेछ भने सो सन्धीको पक्ष भएको विदेशी मुलुकको इलाकामा यो ऐन प्रारम्भ भएपछि भएको मध्यस्थको निर्णय त्यस्तो सन्धीको व्यवस्था तथा त्यसको पक्ष बन्दा उल्लेख गरिएका शर्तहरुको अधिनमा रही देहायको अवस्थामा मान्यता दिई नेपालमा कार्यान्वयन हुनेछ**" भन्दै देहाय खण्ड (क) मा सम्झौतामा उल्लेख भएको कानून तथा कार्यविधि बमोजिम मध्यस्थ नियुक्त भई निर्णय भएको भएमा, (ख) मा पक्षहरुलाई मध्यस्थताको कारवाहीको समयमै जानकारी गराइएको भएमा, (ग) मा सम्झौताका शर्तहरु वा मध्यस्थलाई सुम्पिएको विषयहरुमा मात्र सीमित रही निर्णय भएको भएमा, (घ) मा जुन मुलुकमा निर्णय भएको हो सो मुलुकको कानूनबमोजिम सो निर्णय पक्षहरुलाई अन्तिम र बन्धनकारी भैसकेको भएमा भन्ने उल्लेख भएको पाइन्छ। यहाँ देहाय (क) देखि (घ) सम्म उल्लेख भएका विषयहरुमा पनि विवाद छैन। यहाँ मुख्य विवाद उपदफा (२)को मुल व्यवस्था र देहाय खण्ड **(ङ)** मा उल्लेख भएको कुराहरुमा छ र यसको सान्दर्भिक अर्थ खोजिनु प्रस्तुत विवादको निरुपणको क्रममा आवश्यक हुन गएको छ। सो सन्दर्भमा हेर्दा उक्त दफा ३४(२) को देहाय खण्ड (ङ) मा "**जुन व्यक्तिले मध्यस्थको निर्णय कार्यान्वयन गराउन निवेदन दिएको हो सो व्यक्तिको मुलुकको कानूनमा वा मध्यस्थता भएको स्थानको मुलुकको कानूनमा नेपालमा भएको मध्यस्थताको निर्णय कार्यान्वयन हुन नसक्ने कानूनी व्यवस्था नभएमा**" भन्ने उल्लेख भएको देखिन्छ। प्रस्तुत विवादको सन्दर्भमा उपदफा (२)

को मुल वाक्य र देहाय (ङ)को संयुक्त अर्थ गरी हेर्दा नेपाल UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) को पक्ष राष्ट्र रहेको, त्यसैगरी भारत पनि सो महासन्धीको पक्ष रहेको देखिन्छ। विवादित मध्यस्थको निर्णय नेपाल र भारत दुवै मुलुक महासन्धीको पक्ष राष्ट्र भए पछिको हो। यति सम्म पनि कुरा स्पष्ट नै छ, तर अब "**सन्धीको व्यवस्था तथा त्यसको पक्ष बन्दा उल्लेख गरिएका शर्तहरुको अधिनमा रही**" भन्ने दफा ३४(२) को मुल वाक्यांशमा प्रयोग भएको शब्दावलीको हकमा भने भारतले उक्त महासन्धीको पक्ष बन्दा के शर्त उल्लेख गरेको रहेछ र सो को अर्थ भारतीय कानूनमा के कसरी गरिएको रहेछ भन्ने कुरा महासन्धीले अनुशरण गरेको सिद्धान्त र भारतीय कानूनको व्यवस्था समेतको रोहमा हेर्नुपर्ने हुन्छ। न्यूयोर्क महासन्धीले पक्ष राष्ट्रहरु बीच मध्यस्थको निर्णय कार्यान्वयनमा पारस्पारिकताको सिद्धान्तलाई स्वीकार गरेको छ। पारस्पारिकताको सामान्य अर्थ गर्दा महासन्धीको पक्ष रहेको कुनै राष्ट्रले आफ्नो मुलुकको कानून बमोजिम देशभित्र मध्यस्थबाट भएको वा विदेशमा विदेशी कानून बमोजिम मध्यस्थबाट भएको निर्णयमा विभेद गर्दैन; जसरी आफ्नो मुलुकमा मध्यस्थबाट भएका निर्णयहरु अर्को पक्ष राष्ट्रको मुलुकमा कार्यान्वयन गरिन्छन्, त्यसरी नै विदेशमा भएका मध्यस्थका निर्णयहरु पनि पारस्पारिकताको आधारमा सम्झौताको आफ्नो मुलुकमा कार्यान्वयन गर्छ भन्ने हुन्छ। न्यूयोर्क महासन्धीको धारा १ को उपधारा (३) ले पारस्पारिकताको सिद्धान्तलाई अरु स्पष्ट गर्दै "पक्ष राष्ट्रले महासन्धीमा सहि गर्दा वा अनुमोदन वा सम्मिलन गर्दा पारस्पारिकताको आधारमा सम्झौताको कुनै पक्षराष्ट्रको भूभागमा भएको सम्झौताको मान्यता र कार्यान्वयन गर्ने भनी घोषणा गर्न सक्ने" अधिकारलाई स्वीकार गरेको पाइन्छ[2]। यहि प्रावधानलाई टेकेर भारतले सन् १९६०, जुलाई १३ मा महासन्धी अनुमोदन गर्दा (क) यो सन्धीका पक्ष राष्ट्रको भूभागमा भएको सन्धीलाई मात्र मान्यता दिने र कार्यान्वयन गर्ने; त्यसैगरी (ख) व्यापारिक प्रकृतिको सम्बन्धको कारण

[2] When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

उब्जेको विवादमा दिइएको मध्यस्थको निर्णय मात्र कार्यान्वयन गर्ने भनी दुईवटा सीमावन्धन (Reservation) राखेको पाइन्छ[3]। यसरी भारतले राखेको सीमावन्धन र उसले सो महासन्धी कार्यान्वयनको विषयमा आफ्नो कानूनमा गरेको व्यवस्था कै कारण हालसम्म न्यूयोर्क महासन्धीका पक्ष राष्ट्रहरु मध्ये करिव चार दर्जन देशमा भएका मध्यस्थका निर्णयहरुलाई मात्र बाध्यकारी मानी सूचिकृत गर्दै कार्यान्वयन गर्ने गरेको छ जवकि हालसम्म १७० देशहरु सो महासन्धीको पक्ष राष्ट्र भएको कुरा पनि बहसको सन्दर्भमा प्रत्यर्थी तर्फबाट उठाइएको छ र यो कुरा होइन भनी निवेदक तर्फका विद्वान् अधिवक्ताहरुले जिकिर गर्न सक्नु भएको छैन।

उपर्युक्त जिकिरको सन्दर्भमा न्यूयोर्क महासन्धीको कार्यान्वयन बारेको व्यवस्था हेर्दा भारतमा हाल बहालमा रहेको The Arbitration and Conciliation Act, 1996 को भाग दुईको शिर्षक नै "Enforcement of Certain Foreign Awards भन्ने रही सो अन्तरगत Chapter I मा New York Convention Awards सम्बन्धी व्यवस्था रहेको देखिन्छ। सोही परिच्छेदको दफा ४४ को खण्ड (२) को व्यवस्थाबाट न्यूयोर्क महासन्धीको पक्ष राष्ट्र भएका राष्ट्रहरु मध्ये पनि संघीय सरकारले अमुक पक्ष राष्ट्रमा पारस्पारिक रुपमा महासन्धी कार्यान्वयनका व्यवस्थाहरु गरिएका छन भन्ने कुरामा सन्तुष्ट भई सो महासन्धीको व्यवस्था लागु हुने बारेको सूचना आधिकारिक राजपत्र (Official Gazette) मा प्रकाशित गरेको हुनपर्ने बाध्यकारी व्यवस्था रहेको पाइन्छ[4]। यसबाट भारतीय कानूनी व्यवस्थाले नेपालमा भएको मध्यस्थको निर्णय भारतमा कार्यान्वयन गर्न Indian Arbitration and Conciliation Act, 1996 को उल्लिखित दफा ४४ मा उल्लिखित शर्त पूरा गर्नुपर्ने हुन्छ। अर्थात उक्त दफा अनुसार भारतको केन्द्र सरकारले अन्य मुलुकको हकमा गरे जस्तै नेपालको कानूनमा पनि पारस्पारिक व्यवस्था छ भन्ने कुरामा

[3] "In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State party to this Convention.They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India." See https://www.newyorkconvention.org/countries

[4] 44. Definition.—In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960— (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

सन्तुष्ट भई आधिकारिक राजपत्र (Official Gazettee) मा नेपाललाई सूचिकृत गरी सूचना प्रकाशित गर्नुपर्ने भन्ने देखिन्छ[5]। तर उक्त कानूनी व्यवस्था बमोजिम नेपालमा हुने मध्यस्थको निर्णयलाई मान्यता दिइने सम्बन्धमा भारतले नेपाललाई सूचीकृत गरी भारतको आधिकारिक राजपत्रमा प्रकाशित गरेको भन्ने मिसिल संलग्न कुनै पनि कागजातहरुबाट देखिदैन। यस स्थितिमा नेपालको मध्यस्थता ऐन, २०५५ को दफा ३४ को उपदफा (२) को खण्ड (ङ) मा उल्लेख भए जस्तै हालको अवस्थामा **नेपालमा भएको मध्यस्थताको निर्णय भारतमा कार्यान्वयन हुन सक्ने कानूनी व्यवस्था** विद्यमान रहेनछ भनी मान्नुपर्ने हुन आयो। अर्को शब्दमा, जुन व्यक्तिले मध्यस्थको निर्णय कार्यान्वयन गराउन निवेदन दिएको हो सो व्यक्तिको मुलुकको कानूनमा नै नेपालमा भएको मध्यस्थताको निर्णय कार्यान्वयन हुन नसक्ने कानूनी व्यवस्था रहेको स्थितिमा भारतीय व्यवस्थाले नेपालको हकमा पारस्पारिकताको सिद्धान्तलाई सम्मान गरेको रहेछ भन्न सकिएन।

एकातर्फ स्थिति यस्तो छ भने अर्को तर्फ नेपालले न्यूयोर्क महासन्धीमा पक्ष भई सम्मिलित हुँदा पारस्पारिकतालाई स्वीकार गरेको पाइन्छ[6]। यसबाट कुनै एक पक्ष राष्ट्रको भूमिमा गरिएको मध्यस्थताको निर्णयलाई मान्यता तथा कार्यान्वयन गर्ने वा नगर्ने सम्बन्धमा पारस्पारिकता (reciprocity) को सिद्धान्तलाई नेपालले स्वीकार गरेको, महासन्धीको पक्ष बन्दा व्यक्त गरेको वचनबद्धता अनुरुप नै मध्यस्थता ऐन, २०५५ को दफा ३४(२)(ङ) मा पनि पारस्पारिकता लाई नै मध्यस्थको निर्णयलाई मान्यता दिने र कार्यान्वयन गर्ने आधार बनाएको पाइन्छ। नेपालले पारस्पारिकता बाहेक अन्य कुनै थप कानूनी शर्त थपेको पाइदैन। तर न्यूयोर्क महासन्धीको कार्यान्वयनमा भारतमा आधिकारिक राजपत्र (Official Gazette) मा सूचना प्रकाशित गर्नुपर्ने शर्तले गर्दा दुवै मुलुकमा महासन्धीको कार्यान्वयन बारे समान हैसियत र पारस्पारिकताको स्थिति रहेछ भनी विश्वस्त हुन सकिएन।

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[5] १९९६ को सो ऐनको दफा ८५ ले The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) लाई खारेज गरेको भन्ने कुरा पनि स्मारणीय छ।

[6] "The Kingdom of Nepal will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state. The Government of Nepal further declares that the Kingdom of Nepal will apply the Convention only to the differences arising out of legal relationship, whether contractual or not, which are considered as commercial under the law of the Kingdom of Nepal" See https://www.newyorkconvention.org/countries

न्यूयोर्क महासन्धीले स्वीकार गरेको पारस्पारिकताको सिद्धान्त कुनै रुपमा पनि नौलो सिद्धान्त होइन। सामान्य भाषामा भन्दा पारस्पारिकताले कुनै एक राष्ट्रले अर्को देशको नागरिकलाई, आफ्ना नगरिकले पनि सो मुलुकमा समान किसिमका विशेषाधिकार वा सुविधाहरु पाउँछन् भन्ने अपेक्षाका साथ प्रदान गरिने निश्चित् विशेषाधिकार वा सुविधा हो। राष्ट्र राष्ट्र बीच हुने कारोवारमा सहजताको स्थिति बनोस र कम्तिमा पनि आफ्ना नागरिकहरुले सम्बन्धित राष्ट्रमा समान व्यवहार प्राप्त गर्न सकुन, उपेक्षा, बदला वा प्रतिसोधको कुनै अप्रिय स्थिति नबनोस् भन्ने आसयका साथ अन्तराष्ट्रिय सिष्टाचारकै रुपमा भएपनि पारस्पारिकतालाई स्वीकार गरिएको पाइन्छ। पारस्पारिकताको चासो र सरोकार समन्यायिकता (equitability) र समान व्यवहार (Mutuality) सँग छ। समन्यायिकता र समान व्यवहारको अपेक्षाको साथ प्रायजसो देशहरुले आफ्ना अन्तराष्ट्रिय सम्बन्धहरुमा पारस्पारिकतालाई स्वीकार गर्ने गर्छन्। त्यसै कारण पारस्पारिकता एउटा महत्वपूर्ण सिद्धान्तको रुपमा निजी अन्तराष्ट्रिय कानूनमा विकसित भैरहेको अवस्था पनि अहिले छ।[7] तर यसो भन्दा भन्दै पनि जुन विषयमा पारस्पारिकताको स्थिति छ वा छैन भन्ने कानूनी प्रश्न उठ्छ र त्यहि आधारमा कानूनी परिणामहरु निस्कने सम्भावना रहन्छ यस्तो परिस्थितिमा अदालतले आफ्नो मुलुकको संविधान, कानून र बाध्यकारी सम्झौताहरुको आधारमा समेत सो स्थिति छ वा छैन भनी हेरी निस्कर्षमा पुग्नुपर्ने हुन्छ।

सो सन्दर्भमा हेर्दा, भारतले न्यूयोर्क महासन्धीको अनुमोदन गर्ने समयमा पारस्पारिकताको विषयमा भारतले जे जस्तो सीमावन्दी (Reservation) गऱ्यो, सोहि अनुरुप भारतीय अदालतहरुले आफ्नो मुलुकको कानूनमा पारस्पारिकताको प्रमाणिकरणको लागि आधिकारिक राजपत्रमा सूचना प्रकाशित गरिने कुरालाई अनिवार्य व्यवस्था मान्दै यदि आधिकारिक राजपत्र (Official Gazette) मा सो राष्ट्र सूचिकृत गरिएको छैन भने त्यस्तो राष्ट्रमा गरिएको मध्यस्थको निर्णयलाई भारतमा कार्यान्वयन गरिदैन भन्ने धारणा बनाएको पाइन्छ। एउटा मुद्दामा त दक्षिण अफ्रिका न्यूयोर्क महासन्धीको पक्ष हुनुको बावजुद पनि सो देशको नाम भारतको आधिकारिक राजपत्र (Official Gazette) मा सूचिकृत नगरिएको

[7] Young-Joon Mok, The Principle of Reciprocity in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 21 Case W. Res. J. Int'l L. 123 (1989).

कारण सो देशमा भएको मध्यस्थताको निर्णयले भारतमा मान्यता नपाउने कुराको स्पष्ट घोषणा गरेको पाइन्छ[8]।

भारतीय कानून र अदालती व्यवहार यस्तो देखिएको परिप्रेक्षमा प्रस्तुत रिट निवेदन दर्ता भएपछि पनि यस अदालतबाट मिति २०७६।१२।४ मा यसमा मध्यस्थता ऐन, २०५५ को दफा ३४(२)(ङ) बमोजिम नेपालमा भएको मध्यस्थताको निर्णय कार्यान्वयनको विषयमा भारतमा के व्यवस्था छ, पारिस्परिकताको स्थिति के छ, रिट निवेदकबाट खुलाउन र सो सम्बन्धमा भारत सरकारले जारी गरेको अभिलेख, सूचना आदि केही भए सो समेत निवेदकबाट पेश गर्न लगाउने भन्ने आदेश भएकोमा भारतीय Indian Arbitration and Conciliation Act, 1996 को दफा ४४ को व्यवस्था बमोजिम नेपाललाई आधिकारिक राजपत्र (Official Gazette) मा सूचिकृत गरिएको छ भन्ने जवाफ वा अभिलेख रिट निवेदक तर्फबाट पेश हुन नसकि रिट निवेदनमा उल्लेख गरेका कुराहरुको नै पुनरावृत्ति गरी जवाफ पेश गरेको पाइयो। यस स्थितिमा भारतले नै न्यूयोर्क महासन्धीमा सीमावन्ध (Reservation) राखेको, पारस्पारिकताको हैसियत प्राप्त गर्न भारतीय कानूनमा नै आधिकारिक राजपत्रमा सूचिकृत गरिनुपर्ने व्यवस्था रहेको र सोहि कानूनी व्यवस्था अनुसार भारतीय अदालतहरुले व्यवहार गरेको देखिरहेको, भारतको कानूनी व्यवस्थाले नेपालको हकमा पारस्पारिकतालाई स्वीकार नगरेको र पारस्पारिकताको अवस्था छ भनी सन्तुष्ट हुने अधिकार भारतको केन्द्रीय सरकारमा रहेको देखिई रहेको, सो अधिकारको प्रयोग गरी आधिकारिक राजपत्र (Official Gazette) मा सूचना प्रकाशित भइनसकेको अवस्थामा प्रस्तुत विवादमा भारतीय मध्यस्थद्वारा दिइएको निर्णयले नेपालको मध्यस्थता ऐन, २०५५को दफा ३४ को शर्त पूरा गर्छ र सो निर्णय नेपालमा कार्यान्वयन हुन सक्छ भनी सन्तुष्ट हुन सकिने अवस्था देखिएन। यस स्थितिमा भारतले अन्तराष्ट्रिय कानूनको अनुमोदनमा गरेको सीमावन्धीको व्यवस्था र भारतीय मध्यस्थता ऐनको व्यवस्थालाई उपेक्षा गरेर अन्य असान्दर्भिक कानूनहरु टेकी नेपाली पक्षले भारतीय अदालतमा निवेदन दिन पाउँछन्; नेपालमा भएको मध्यस्थको निर्णय भारतमा कार्यान्वयन हुन सक्छ; पारस्पारिकताको स्थिति छ भनी निवेदकले लिएको तर्कलाई स्वीकार गर्न सकिएन।

[8] Swiss Singapore Overseas Enterprises Pvt. Ltd. v. M/V African Trader, High Court of Gujarat, India, 7 February 2005, Civil Application No. 23 of 2005.

यसै सन्दर्भमा निवेदकले नेपालको पारस्पारिक कानूनी सहायता ऐन, २०७० को दफा ३७ र SAARC Arbitration Council को पनि कुरा उठाएको पाइन्छ। जहाँसम्म पारस्पारिक कानूनी सहायता ऐन, २०७० को प्रश्न छ सो ऐनको दफा ३७ मा विदेशी अदालतबाट भएको फैसलाको विशेष कार्यान्वयनको व्यवस्था रहेको भएपनि यस्तो सुविधा प्राप्त गर्न सोहि ऐनको दफा ३(१) बमोजिम द्विपक्षीय सन्धी आवश्यक पर्ने र सो बमोजिमको सन्धी भारतसँग भएको छ भन्ने विषयमा कुनै अभिलेख प्रस्तुत हुन सकेन। त्यसैगरी SAARC Arbitration Council को विषयमा पनि निवेदकले कुरा उठाएको सन्दर्भमा हेर्दा दक्षिण एशियाली राष्ट्रहरु बीच भएको SAARC Arbitration Council को स्थापना गर्ने सम्बन्धी सम्झौता (Agreement for the establishing of SAARC Arbitration Council 2005) ले सदस्य राष्ट्रहरु बीच लगानी प्रवर्द्धन गर्ने र लगानीकर्ताको सुरक्षाको लागि क्षेत्रीय स्तरको संस्थागत मध्यस्थतालाई विकास गर्न मध्यस्थता परिषदको स्थापना गर्दै सो को उद्देश्य, काम कर्तव्य अधिकारबारे व्यवस्थाहरु गरेको देखिन्छ। उक्त कुराहरुको सन्दर्भिकता प्रस्तुत विवादमा नरहेको र सो सम्झौताको कारण न्यूयोर्क महासन्धी वा भारतीय कानूनी व्यवस्थामा कुनै प्रभाव पर्न सक्ने अवस्था समेत नदेखिंदा मध्यस्थता ऐन, २०५५ को दफा ३४(२)(ङ) को शर्त पूरा हुन्छ भन्न मिल्ने देखिएन।

अतः माथि उल्लिखित आधार कारणहरुबाट दुवै मुलुकका कानूनी व्यवस्था, न्यूयोर्क महासन्धी र सो मा भारतले राखेको सीमावन्धी समेतको परिस्थितिमा भारतमा भएको एकल मध्यस्थको निर्णय नेपालमा कार्ययान्वयन हुन सक्ने अवस्था नदेखिंदा सो निर्णय कार्यान्वयन गर्नु भनी आदेश जारी गर्नुपर्ने अवस्था देखिएन भनी मिति २७ डिसेम्बर, २०१७ अर्थात वि.सं २०७४।९।१२ मा भारतीय मध्यस्थतकर्ता Justice Mukul Mugdal बाट भएको निर्णय The Arbitration Act and Conciliation act, 1996 को दफा 44 को खण्ड (२) र नेपालको मध्यस्थता ऐन, २०५५ को दफा ३४ को उपदफा (२) को खण्ड (ङ) को व्यवस्थाहरुको परिप्रेक्ष्यमा कार्यान्वयन हुन नसक्ने ठहऱ्याई उच्च अदालत पाटनबाट मिति २०७६।३।२४ मा भएको फैसला कानूनबमोजिम नै भए गरेको देखिंदा निवेदन मागबमोजिमको आदेश जारी गर्नु पर्ने अवस्था देखिएन। प्रस्तुत रिट निवेदन खारेज हुने ठहर्छ। प्रस्तुत रिट निवेदनको दायरीको

लगत कट्टा गरी आदेश विद्युतिय माध्यमा अपलोड गरी मिसिल नियमानुसार गरी अभिलेख शाखामा बुझाईदिनू।

न्यायाधीश

उक्त रायमा म सहमत छु।

न्यायाधीश

इजलास अधिकृत: विनिता भारती/ अनुसन्धान सहयोगीः दिक्षा धिताल

कम्प्युटर अपरेटर: रेखा भट्टराई

इति संवत् २०79 साल जेष्ठ महिना १२ रोज ५ शुभम् ----------।

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