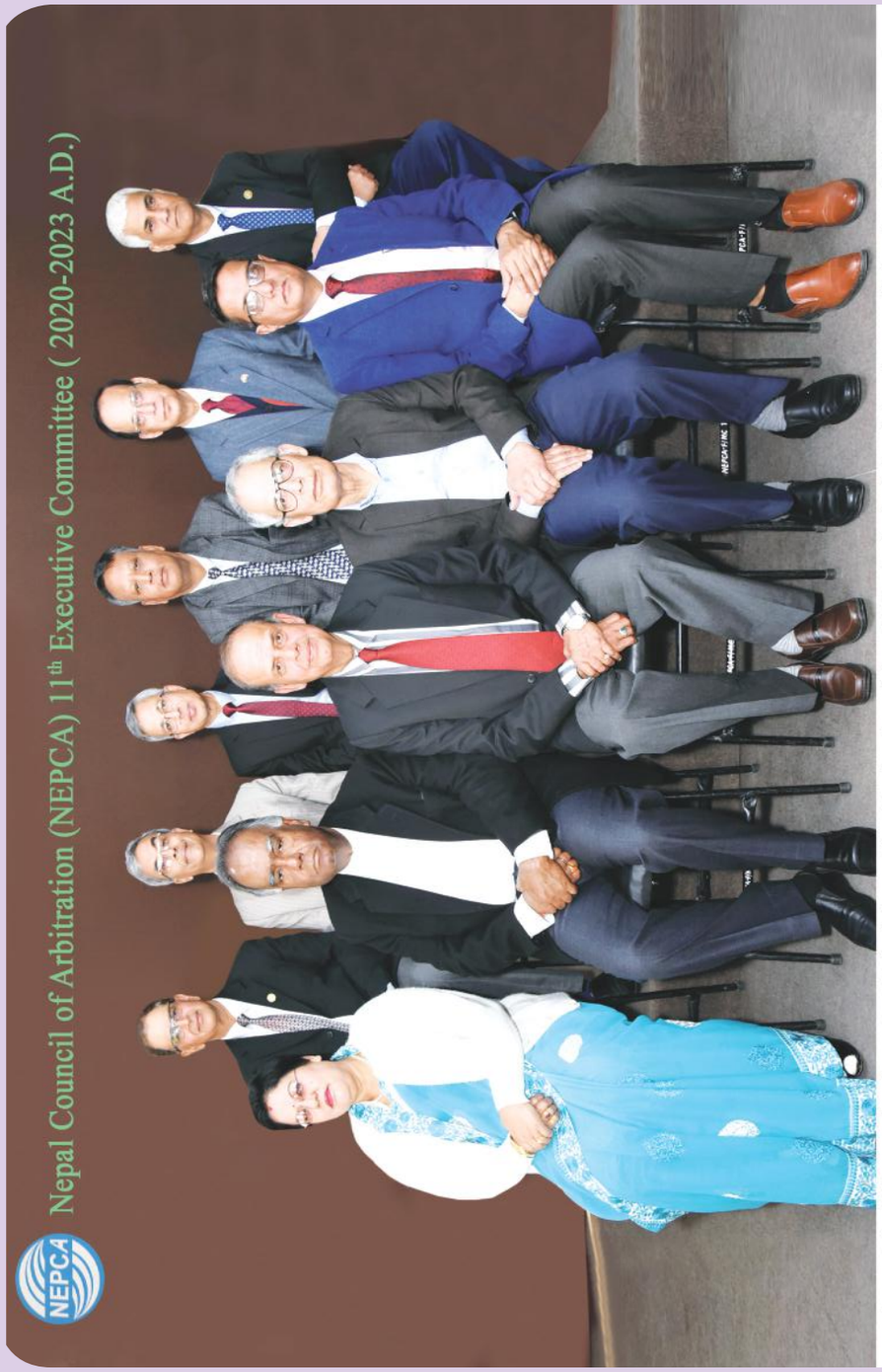

Nepal Council of Arbitration (NEPCA) 11th Executive Committee (2020-2023 A.D.)

First Row:-(Left to Right) 1. Ms.Gosai K.C. (Treasurer) 2. Bipulendra Chakravartty (Vice- Chairman) 3. Dhurva Raj Bhattarai (Chairman) 4. Birendra Bahadur Deoja (Immediate Past President) 5. Baburam Dahal (General Secretary) ,
Second Row:-(Left to Right) 1. Matrika Prasad Niraula (EC Member) 2. Prof. Khem Dallakoti (EC Member) 3. Dr. Rajendra Prasad Adhikari(EC Member) 4. Gyanendra Prasad Kayastha (EC Member)
5. Er. Bhoj Raj Regmi (Secretary) 6. Shailendra Kumar Dahal (EC Member)

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Upper Tamakoshi Hydropower Limited
अपर तामाकोशी हाईड्रोपावर लिमिटेड

"दोलखा जिल्लाको लामावगरमा निर्माणाधीन तामाकोशी जलविद्युत आयोजना बाँधस्थल"

प्रकाशकीय

अधिकार र कर्तव्य एकै सिक्काको दुई पाटा हुन्, एक विना अर्काको अस्तित्व रहँदैन । करार त्यहि अधिकार र कर्तव्य सृजना गर्ने दस्तावेज र मध्यस्थ सेवाको आधारस्तम्भ हो । करारका पक्षहरुका बीचको विवादमा मध्यस्थताको सेवा उपलब्ध गराउने उद्देश्यले वि.स. २०४८ मा हाम्रा अग्रजहरुका प्रयासले स्थापना भएको यस नेपाल मध्यस्तता परिषद् (Nepal Council of Arbitration) ले आफ्नो स्थापनाको २९ वर्ष पूरा गरेको छ । यसरी पूर्ण वयस्क बनेको यस संस्थाले मध्यस्थताको प्रक्रियालाई संस्थागत एवम् सुदृढीकरकण गर्नका लागि आवश्यक हुने बिभिन्न कार्यहरु गर्दै आएको छ । उदाहरणको लागि, मध्यस्थता र एडजुडिकेसन सम्बन्धी नियमावली प्रकाशन, मध्यस्थताको लागि सुनुवाई कक्ष सहितको सचिवालय सेवा र तालिम तथा सभा सेमिनार आदि । यसै क्रममा नेप्काद्वारा नियमित रुपमा प्रकाशन गरिने बुलेटिनको यो अङ्क यहाँहरु समक्ष सार्वजनिक गरेका छौं ।

कोभिड (१९ का कारण २०७६ चैतदेखिको समय प्रभावकारी रुपमा काम गर्नका लागि अनुकुल रहेनन् । कोभिड (१९ ले सम्पूर्ण मानव जीवनमा ठूलो चुनौति खडा गरेको छ भने यसैको कारण विश्वभर नयाँ प्रयासहरु पनि शुरु भएका छन। आशा गरौं हरेक चुनौतिले नयाँ संभावनाका ढोकाहरु खोल्ने छन् । यसै पृष्ठभूमिमा नेप्का पनि अनलाइन सुनुवाई सहितको डिजिटल प्रविधिमा आधारित मध्यस्थ सेवा प्रदान गर्ने तयारीमा लागेको व्यहोरा सहर्ष जानकारी गराउछौं र यस कार्यमा यहाँहरु सबैको सहयोगको पनि अपेक्षा गर्दछौं ।

यस वुलेटिन प्रकाशनका लागि आवश्यक लेख रचना उपलब्ध गराई सहयोग गरिदिनु भएकोमा सबै विज्ञलेखकहरुलाइ हार्दिक धन्यवाद ज्ञापन गर्दछौ । वुलेटिनको सम्पादन कार्यमा सहयोग पुऱ्याउनु हुने श्री रुद्रप्रसाद सिटौला र नेप्का सचिवालयका कर्मचारीहरुलाई धन्यवाद ज्ञापन गर्दछौं ।

प्रकाशन समिति

11th Executive Committee

Mr. Dhurva Raj Bhattarai
Chairman

Mr. Birendra Bahadur Deoja
Immediate Past President

Mr. Bipulendra Chakravartty
Vice-Chairman

Mr. Baburam Dahal
General Secretary

Mr. Bhoj Raj Regmi
Secretary

Ms. Gosai K.C.
Treasurer

Prof. Khem Dallakoti
Member

Mr. Matrika Prasad Niraula
Member

Dr. Rajendra Prasad Adhikari
Member

Mr. Shailendra Kumar Dahal
Member

Mr. Gyanendra Prasad Kayastha
Member

विवाद समधानमा वर्णशङ्कर (Hybrid) पद्धतिको आवश्यकता

मातृका प्रसाद निरौला
वरिष्ठ अधिवक्ता

"Traditional Trial System is too costly, too painful, too destructive and too inefficient for a truly civilized people" -US Chief Justice Berger

विवाद समाधानका परम्परागत पद्धति निरर्थक साबित भएको वास्तविकतालाई अमेरिकाका पूर्व प्रधान न्यायाधीश बर्गरले ८० को दशकमा नै महशुस गरी माथिका भनाइ व्यक्त गरेका हुन् । विवाद समाधानका औपचारिक संस्थाहरु (अदालत, आर्बिट्रेसन ट्राईब्युनल आदि) समक्ष दायर गरिएका विवादहरुको फैसला भई कार्यान्वयन हुँदासम्म लाग्न जाने समय, खर्च आदि जस्ता कुराहरुको आंकलन गर्दा उनको अभिव्यक्ति सत्य नै देखिन्छ ।

विवाद बिनाको समाज र समाज बिनाको विवाद कल्पना गर्न कठीन छ । विवादको पक्षले स्वभाविक रुपमा आर्थिक क्षति, आपसी सम्बन्धमा वैमनस्यता, सामाजिक अपयस, मानसिक तनाव, पारिवारिक वा संगठनात्मक कोलाहल एवं शारीरिक र मानसिक तनाव जस्ता कुराहरु व्यहोर्नु पर्ने भएता पनि विवाद अवश्यम्भावी छ । यिनै कारणहरुले गर्दा विवाद समाधानका निर्णयहरुले यथार्थ क्षतिको परिपूरण हुन सक्दैन । यस अर्थमा पनि विवाद समाधानका परम्पागत उपचार पद्धति पूर्ण रुपमा उपयुक्त छन् भन्न सकिने अवस्था छैन ।

अदालतको फैसला वा मध्यस्थद्वारा गरिने निर्णय (अवार्ड) मा विवादका दुवै पक्षले सन्तुष्टि महसुस गरिहालेता पनि विवादले उत्पन्न गराएको मानसिक पीडा, सामाजिक अपयस, अर्को पक्षसँग टुटेको सम्बन्ध र दुई पक्ष वीचको सहकार्यबाट भविष्यमा प्राप्त हुन सक्ने सम्भावित व्यवसायिक उपलब्धी दुवै पक्षले गुमाउनु पर्ने हुन्छ । यतिमात्र नभएर उनीहरु सम्बद्ध घर परिवार आफन्त र व्यवसायिक क्षेत्रमा पनि विवाद र वैमनस्यताको पीडा फैलन्छ । विवादको निर्णय गरिदिने निकाय अदालत वा मध्यस्थलाई भने विवाद बढ्नु र घट्नुले कुनै अर्थ राख्दैन किन भने यस्ता निकायहरु विवाद समाधानमा अभ्यस्त र व्यवसायी हुन्छन । अझ भनौं भने नयाँ विवादको लागि प्रतिक्षारत हुन पनि सक्नेछन ।

अदालती प्रक्रिया तथा सर्वोच्च अदालतमा दायर भएका मुद्दाका चापको बारेमा कम जानकार दुरदराजबाट सर्वोच्च अदालतसम्म आई मुद्दा दर्ता गर्न पुगेको पक्षले उसको कानुन व्यवसायीलाई "वकिल साहेब, मेरो मुद्दामा सर्वोच्च अदालतका मान्छेहरु के भन्छन् ?" भनेर सोध्ने गरेको यदाकदा सुन्नमा आउँछ । यसो भनिरहँदा निजले बिपक्षीद्वारा आफू बिरुद्ध गरिएको अन्याय हेरेर साहानुभुति व्यक्त होला कि भन्ने अपेक्षा गरी रहेको अनुभूति गर्न सकिन्छ । कहिले काहीँ कुनै पक्ष त "यस्तो दुष्ट झगडिया कसैलाई नदेऊ प्रभु !" भन्दै रोएको पनि देखिन्छ । यी सबै अभिव्यक्तिहरु मुद्दाबाट सिर्जना भएका मानविय पीडाका प्रतिनिधि

अभिव्यक्तिहरु हुन् र यस्ता पीडाहरु अनगिन्ति छन् । तर निर्णय गर्ने निकायले भने विवादका पक्षको दुखेको, चिथरिएको, पिल्सिएको, जरजर र छियाछिया भएको मन देख्दैन । वाहिरी शरीरको घाउ औषधीले निको हुन्छ तर नदेखिने मनको घाउ निको हुँदैन । त्यही अन्तरमनको पीडाले गर्दा वर्षौं वर्ष मुद्दा गरेर जिति पाएपछि वैरागिएर सन्यास धारण गरेको र हारे पछि बहुलाएको धेरै घटना छन् । असल र सवल मनले सन्यास धारण गर्नु उसको लागि राम्रो होला तर बहुलाउनु ठूलो पीडा हो । समाजमै सवलतापर्वूक बसेर पूर्ववत व्यापार व्यवसाय उद्यम गरेको भए समाज र राष्ट्रको लागि योगदान नै पुग्ने हुन्छ । तर कुनै होनहार उच्च व्यवसायिक व्यक्तित्वले सन्यास लिए सोझै चौतर्फी प्रतिकूल असर पर्दछ । पागल भए झन घर परिवार, समाज र राष्ट्रलाई नै क्षति पुग्न जान्छ । के मुद्दा मामिलाबाट उत्पन्न हुन जाने यस्तो विकराल अवस्थालाई पन्छाउन सकिदैन? यो लेखको उद्देश्य विवादका कारण माथि चित्रण गरिए जस्ता विकराल अवस्था आउन नदिन विवाद समाधानका नव विकशित पद्धतिहरुको बारेमा चर्चा गर्नु रहेको छ ।

करिव एक दशक अगाडी **नेपाल कानून समाज**ले विवादका पक्षहरु विवाद समाधानको लागि कहाँ जान्छन् भन्ने सम्बन्धमा अध्ययन गराएको थियो[1] । सो अध्ययनको निष्कर्ष यस प्रकारको रहेको छ :

अदालत जाने विवाद जम्मा	१५%
आफ्नै समुदायमा जाने जम्मा	१०%
स्थानीय निकायमा जाने जम्मा	६%
प्रहरीमा जाने जम्मा	७%
प्र.जि.अ. समक्ष जाने जम्मा	२%
कुनै निकायमा नजाने जम्मा	६०%

सर्भेको आकडामा हेर्दौं, ६० प्रतिशत विवाद कहिँ जाँदैनन् किन ? ती कुन क्षेत्रका विवाद हुन् ? र विवादका पक्षहरुलाई विवाद समाधानका लागि सम्बन्धित निकायमा जान के कुराले हतोत्साह पार्‍यो ? यसरी हतोत्साहित हुने मध्येको मूल क्षेत्र उद्योग वाणिज्य क्षेत्र भएको सहजै अनुमान गर्न सकिन्छ । साथै केही सम्वेदनशील पारिवारिक विवाद पनि कुनै निकायमा प्रवेश गर्न नचाहने गरेको पाईन्छ । विवाद समाधानका लागि कहिँ नजानु र आफैभित्र गुम्सिएर बस्नुको कारण सायद यस्ता हुन सक्छन् ।

१. गोपनियता भङ्ग हुने भय,

२. समय ज्यादा लाग्ने भय,

३. सम्बन्ध थप विग्रन सक्छ भन्ने भय,

४. निर्णयबाट कुनै समाधान नदेख्नु,

५. खर्च बढी लाग्ने भय,

६. व्यापार व्यसाय थप बिग्रने भय,

७. विविध कारण र परिस्थिती,

विश्वका धनाढ्य अम्बानी दाजुभाई बिचको विवादमा भारतका प्रधान न्यायाधीश श्री के जी बालकृष्णन सहतिको इजलासले अदालत बाहिर वैकल्पिक उपचार पद्धतिबाट समाधान गर्न आदेश दिएको थियो । सोही बमोजिम उच्च अदालतले उनीहरुकी आमालाई अदालतमै बोलाएर विवाद मिलाइ दिन अनुरोध गर्‍यो । सोही आदेश बमोजिम २००९ मा आमा कोकिलावेन अम्बानीको प्रयासमा अम्बानी दाजुभाईको विवाद समाधान गर्न सफल भएको देखिन्छ । तर सो विवाद विवाद समाधानका औपचारिक निकायहरु (अदालत वा मध्यस्थ) बाट समाधान गर्ने बाटो अवलम्बन गरिएको भए आजसम्म मुद्दा चलिनै रहको हुन सक्ने थियो र सो मुद्दाबाट सवैभन्दा ठूलो फाईदा पाउने वर्ग कोही हुन्थ्यो भने कानुन व्यवसायी नै हुने थिए । दुवै पक्षका कानुन व्यवसायीलाई कम्तिमा ३ दशकसम्म आकर्षक आम्दानीको स्रोत बन्न सक्ने थियो र अन्त्यमा कागजी फैसलालाई न्याय पाएको मान्नु पर्ने अवस्था हुने थियो । त्यसमा पनि आपसी

1. स्रोतः जन अभिमत सर्वेक्षण, नेपाल कानुन समाज, २०५९

गोपनियता भङ्ग हुने, सम्बन्धको सौहार्दता समाप्त हुने र अन्त्यमा कार्यान्वयनमा अनेकौँ जटिलता अर्थात के कति समस्या आउने हुन् भन्ने कुरा अनुमान गर्न पनि सम्भव देखिँदैन । सायद यिनै कुराहरुलाई मनन् गरेर सर्वोच्च अदालतले आदेश दिएको थियो र दुवै पक्षको पूर्ण सहमतिमा विवाद समाधान भयो ।

अदालत र मध्यस्थको निर्णय प्रकृया करिव करिव समान छन् । अदालत राज्यको न्यायिक निकाय हो भने मध्यस्थ विवादका पक्षहरुले रोजेको संयन्त्र हो यी दुवैमा रहेको मुख्य भिन्नता यति नै हो । माथि उल्लेख गरिएका तथा यस्तै अनेकौँ समस्याका कारण विवादमा निर्णय गर्नु गराउनु मात्र अन्तिम विकल्प होईन ।

राष्ट्रिय तथा अन्तर्राष्ट्रिय विवादमा मध्यस्थ गर्ने उदेश्यले सन् १९०३ मा स्थापित Lodon Court of International Arbitration (LCIA), सन् १९१५ मा स्थापित Charted Institute of Arbitrations (CIArb), सन् १९१९ मा स्थापित International Chamber of Commerce (ICC) सन् १९२६ मा स्थापित American Arbitration Association (AAA), लगायत सवै अन्तर्राष्ट्रिय ख्याती प्राप्त संस्था र भर्खरै सन् २०१५ मा स्थापना भएको Sigapapore International Commerial Court (SICC) तथा हालै स्थापित Asia Pacific Centre for Arbitration & Mediation (APCAM) लगायत नयाँ पुराना सवै संस्थाबाट गरिएका प्रयास हेर्दा दुई पक्ष बिचको विवादमा तेश्रो पक्षबाट गरिएको निर्णयले पूर्ण समाधान दिदैन भन्ने महसुस गरी कुनै निर्णय गर्नु भन्दा पहिले मेलमिलापको सम्भावना खोज्न आवश्यकता बोध गरेको पाईन्छ । त्यसो गर्नका लागि मध्यस्थ मात्र गर्न खडा भएका संस्थाहरुले आफ्ना घोषित नीति र कार्यक्रममा परिवर्तन गरी मेलमिलापलाइ प्रबर्धन गर्दै पक्षलाई निर्णय मात्र होइन सौहार्द्र सम्बन्ध सहितको न्याय प्राप्त मिलोस भनी मेलमिलाप सहित अन्य पद्धतिको बाटो अवलम्वन गर्ने गरेको देखिन्छ । नेपालमा पनि त्यसै गर्नु पर्ने आबश्यकता सबैले बोध गर्न जरुरी भएकोछ ।

सन् १९८० को दशकबाट व्यवसायिक रुपमा शुरु भएको मेलमिलाप खास गरी उद्योग वाणिज्य सम्बन्धी विवाद र संवदेनशील पारिवारिक विवादमा वरदान सावित हुँदै आएको पाउन सकिन्छ । अगाडी देखी नै विश्वभर सफल अभ्यास भई आएको तर अन्तर र्ाष्ट्रिय स्तरमा अभिसन्धि हुन बाँकी रहेको परिस्थितीमा दुई वर्ष अगाडि सन् २०१८ मा संयुक्त राष्ट्रसंघले ७३/१९८ प्रस्ताव पारित गरी UN Coonvention on International Settlement Agreement Resulting from Mediation, 2018 पारित गरेको छ र हाल यसको विश्वका धेरै देशहरुमा सफल कार्यान्वयन भई रहेको छ । संयुक्त राष्ट्र संघको यो अभिसन्धी र यसको कार्यान्वयन खासगरी उद्योग वाणिज्य व्यापार व्यवासायका क्षेत्रमा वरदान सावित हुँदै गएको छ । त्यस्ता बिवादमा मेलमिलापबाट हुनसक्ने फाईदाहरु निम्न बमोजिम छन्:

- गोपनीयता कायम रहनु,
- विवादको छिटो समाधान हुनु,
- कम खर्चिलो हुनु,
- आपसी सम्बन्धको पुनर्स्थापना हुनु,
- विवादको प्रभावकारी र दिगो समाधान हुनु,
- पक्षले रोजेका बिशेषज्ञको सहजिकरणमा विवादको समाधान हुनु,
- विवाद समाधान मात्र नभई आपसी सम्बन्धको बलमा पक्षहरुलाई थप उपलब्धी मिल्न सक्नु,
- दुबै पक्षले विजयी भएको महशुस गर्नु,
- करार भएको वा नभएको दुवै अवस्थामा यो उपाय अवलम्बन गर्न मिल्नु, र
- मेलमिलापकर्ता सहजकर्ता मात्र हुन्छन पक्ष आफैँ समाधानकर्ता बन्न सक्नु ।

विवाद समाधानमा वर्णसङ्कर प्रकृया के हो ?

मध्यस्थ के हो? यस क्षेत्रमा संलग्न सवै व्यक्तिहरुले

धेरथोर बुझेकै कुरा भएकोले यस लेखमा सो बारेमा धेरै चर्चा गरिएको छैन । संक्षेपमा मध्यस्थ प्रकृयालाई निजिक्षेत्रको अदालत मानिन्छ । यसले दिने निर्णयलाई बधबचम भनिन्छ। अर्का तर्फ तेश्रो पक्षको सहजिकरणमा विवादका पक्षहरु बसी आपसमा सहमति गरी विवाद सुल्झाउने पद्धती मेलमिलाप हो । यो तालिम प्राप्त मेलमिलापकर्ताद्वारा ज्ञान र सिपको प्रयोग गरी पक्षहरु बिचको विवाद पक्षहरुद्वारा समाधान गराउने वैकल्पिक पद्धति हो ।

अब वर्णसङ्कर उपाय भनेको के हो? हेरौँ । विवाद समाधानका विभिन्न वैकल्पिक पद्धतिहरु मध्येमा एक पद्धतिको अवलम्वन भई रहेकोमा आवश्यकता अनुसार अर्को पद्धतिको पनि अवलम्वन गरी दुवै पद्धतिहरुको एकसाथ अवलम्वनबाट प्रभावकारी रुपमा विवाद समाधान गर्न विकसित वैकल्पिक पद्धति नै वर्णसङ्कर पद्धति हो । खासगरी मध्यस्थ र मेलमिलाप प्रकृयाको मिश्रित रुप नै प्रभावकारी वर्णसङ्कर (effective hybrid) हो । यसको मिश्रित हुने अंशका आधारमा कहिले Arb-Med त कहिले Med-Arb हुन सक्ने हुन्छ । यसको परिभाषा गर्ने क्रममा Weixia Gu ले "Arb-med is a form of hybrid dispute resolution ... A typical arb-med proceding arise when the parties have entered in to arbitration and within that arbitration procedure decide to mediate. If and when meditaation fails, arbitration resumes..."[2] भनेका छन् ।

त्यसै गरी अर्का विद्वानले "Med-Arb is a hybrid of mediations and arbitration and can be used where mediated negotiations do not lead to a settlement. In those circumnsantaces the partis can agree for the mediator to become an arbitrator and issue final and binding award on the outstanding matters." भनेका छन् ।

2. weixia Gu, Hybrid Dispute lesolution beyoad the blt RoadM towards a new design of chinese Ard-Med-Arb_ and its global implications, Washingtorn International Law Journal, Vol-29 Number-1 -12-23-2019_ P=118

अर्को एक परिभाषा पनि हेरौँ: "The process of mixing arbitration and mediation, called arb-med, where by the praties initiate an arbitration, but later during the course of arbitration, the dispute is reffered to mediation for settlement negotiations - one variation of the med-arb process can be deseribed as a shealed envelope arb-med, when arbitration process is finatized, the arbitrator deposits a decision in a envelop. The parties are then offered a possibility to reach a mediated settlement having benifited from the discovery and adjudicative process of arbitration bee still under the uncertainty about the outcome of the arbitrator's decision and the arb-med-arb is a process where a disput is first referred to arbitration before mediation is attempted and then arbitration" .

माथिका ३ वटा परिभाषाले वर्णसङ्कर पद्धतिको परिचयलाई बुझाउन सहज बनाएको छ । विवादले निम्त्याउने भौतिक र मानसिक पिडा कुनै निर्णयले हल गर्न नसक्ने कुरा माथि नै उल्लेख गरी सकिएको छ । त्यसैले निर्णय दिने पद्धतिका साथ विवाद उत्पन्न हुनुमा प्रत्येक पक्षको योगदान र समाधानको आवश्यकता बोध वा आत्मानुभूति (Realiazation) हुने यो पद्धतिले मात्र पक्षलाई मानसिक पीडाबाट मुक्त हुन मद्दत गर्दछ । त्यसैले आजभोली विवाद समाधानको लागि विश्वका विभिन्न देशमा वर्णसङ्कर पद्धतिलाई प्रोत्साहन गर्दै लान थालिएको छ ।

वैकल्पिक उपचार पद्धति पक्षको मन्जुरीमा अवलम्वन गरिन्छ । कहिले त्यस्तो मन्जुरी पहिले नै करार मार्फत व्यक्त हुन्छ भने कहिले विवाद उत्पन्न भएपछि पक्षले स्वीकार गर्दछन् । पक्षहरु बिचमा पहिले नै भएको करार मार्फत आउने विवादको प्रवेश विन्दु मध्यस्थ वा मेलमिलाप दुवै हुन सक्दछ । तर मध्यस्थ समक्ष प्रवेश गरेको विवादमा माथि उल्लेख गरिए झैँ मध्यस्थले नै प्रेशित गरी मेलमिलापको प्रयास गर्नु सर्वथा उपयुक्त हुन्छ र पक्षको मानसिक पीडाको समाधान गर्न सक्ने उपाय मेलमिलाप मात्र हो । मध्यस्थले मेलमिलापको

लागि पठाईएको विवादमा मेलमिलापका आवश्यक सिप, समाधानका सुत्र र साधन अवलम्वन गर्दा त्यसै क्षण विवादको फायल बन्द होला नहोला अलग हो तर सो अवधिमा योग्य, तालिम प्राप्त र सिपयुक्त मेलमिलापकर्ताद्वारा सम्पन्न वार्ताको चरणमा पक्षहरु बिचको मानसिक पीडा चाहि अवश्य हलुका हुनेछ । पटक पटक प्रयास गर्दा विवादको फायल बन्द भएन भने पनि सो फायल पुनः मध्यस्थ समक्ष फिर्ता जान्छ र आवश्यक निर्णय हुन्छ जसलाई पक्षले सहज परि स्थितिमा स्वीकार गर्दछन् । यो प्रकृया ब्चद(ःभम(ब्चद अर्थात मध्यस्थ-मेलमिलाप-पुन मध्यस्थ हो । यसमा दुबै पद्धतीका राम्रा पक्ष मिश्रित रुपमा अवलम्वन गरिने हुँदा वर्णशङ्कर भनिएको हो ।

वर्णसङ्कर मध्येको अर्को तरिका हो खामबन्दी (Envelope Award) अवार्ड । मध्यस्थ समक्ष प्रवेश गरेको विवादमा मध्यस्थ स्वयंले सुनुवाई सम्पन्न भएका दिन दुबै पक्षलाई हामी यस मुद्दामा अवार्ड यति औं दिन (३०, ६० वा ९० मध्ये कुनै) दिन्छौं तर तपाईहरुलाई मेलमिलापको प्रकृया अवलम्वन गर्न हाम्रो सुझाव छ । तपाईहरुको उत्तम समाधान हामीले मेलमिलाप नै देख्यौं तर यत्तिका समय सुनुवाई भयो, श्रोत साधन र समयको लगानी भयो । त्यसैले हामीले सो दिन दिने ब्धबचम हाम्रो सचिवालयको जिम्मामा खामबन्दी रुपमा रहनेछ । यदि मेलमिलाप प्रकृयाबाट समाधान भएमा सोही बमोजिम हुनेछ र खामबन्दी निर्णय खोलिदैन तर यदि मेलमिलापबाट विवाद समाधान नभएमा त्यस बन्दी खाम भित्र रहेको निर्णय नै Arbitration Tribunal को निर्णय हुनेछ । तपाईहरुको सहमतीमा हाम्रो सचिवालयले बन्द खाम खोलेर तपाईहरुको अवार्ड दिनेछ के त्यसो गर्न मन्जुर हुनुहुन्छ? भनी पक्षलाई सवै कुरा सम्झाई वुझाई सोधनी गर्दा सहमत भएमा मध्यस्थ प्रणालीबाट मेलमिलापमा परिणत गराई पुनः खामबन्दी अवार्ड सम्म पुगिन्छ । यसरी सवै प्रकृयाद्वारा खामबन्दी अवार्डसम्म आई पुग्ने यो पद्धती Arb-Med-Arb हो । हालका दिनमा यसलाई प्रभावकारी प्रणालीको रुपमा लिन थालिएको छ ।

सुनुवाई सकिएका दिन सामान्यतया पक्षहरुले मेरो दाबी वा प्रतिदाबी जिकिरमा कति दम छ भन्ने बारे केही बुझि सकेका हुन्छन् । त्यस माथि उनीहरुका कानुन व्यवसायीले यथार्थ कुरा बुझाइ सहयोग गरी दिने हो भने पक्षहरु मेलमिलापबाटै विवाद समाधान गर्न तत्पर हुन सक्छन् । जवरजस्त र ठूला व्यापारिक विवादमा संलग्न हुने मेलमिलापकर्ता विशिष्ट सिप र क्षमतायुक्त हुन जरुरी छ । मेलमिलापमा समस्या पक्षको र समाधान पनि पक्षको हुन्छ तर साथ सहयोग र उत्प्रेरणा भने मेलमिलापकर्ताको हुन्छ । यस प्रकृयामा पक्षलाई अनुपम स्वरुपमा परिवर्तन (Remodeling) गरी प्रस्तुत गरिन्छ । यस्ता विशिष्ठ वाणिज्य विवादमा मेलमिलापकर्ताले पक्षलाई केही लिखित गृहकार्य गराउन सक्ने सम्भावना पनि रहन्छ ।

यसरी मध्यस्थमा प्रवेश गरेको विवादमा मेलमिलाप हुँदा Arb–Med हुने भयो तर शुरुमै मेलमिलापमा प्रवेश गरेको विवाद पूर्ण समाधानका लागि निर्णय गर्नै पर्ने अवस्था आउन सक्छ । त्यस्तो अवस्थामा मेलमिलापकर्ताले कुनै निर्णय नगर्ने हुँदा त्यही विवाद मध्यस्थ समक्ष प्रेषित गरिन्छ र मध्यस्थको निर्णयद्वारा विवादको समाधान गरिन्छ । यसरी मेलमिलापबाट मध्यस्थ समक्ष पुगी पुनः मध्यस्थका निर्णयद्वारा टुङ्गो लाग्ने प्रकृयालाई Med-Arb भनिन्छ । तर कहिले काहिँ मध्यस्थको निर्णयबाट पनि टुङ्गो नलाग्ने वा आंशिक मात्र टुङ्गो लाग्ने वा टुङ्गो लागे पनि पुःन बल्झिने अवस्था भएमा वा कार्यान्वयनमा समस्या आएमा पुनः मध्यस्थ मार्फत वा सोझै पक्षहरु सो विवाद लिएर मेलमिलापकर्ता समक्ष आउन सक्नेछन । त्यस्तो अवस्थामा विवाद समाधानको सो मिश्रित प्रणालीलाई Med-Arb-Med भनिन्छ । यस प्रकृयाबाट समाधान हुने विवाद नै पूर्ण परिपक्वताका साथ समाधान भएको मानिन्छ ।

कहिले काहिँ मेलमिलाप र नेगोसिएशन (उपयुक्त नेपाली शब्द नभएकोले) एकैखाले हो कि भन्ने देखिन सक्छ। खास गरी तेश्रो पक्षको मार्गदर्शन वा सहयोगमा हुने नेगोसिएशन (Guided / Assisted-Negotiation) भएको अवस्थामा उस्तै देखिन सक्छ । यस्तो अवस्थामा विश्वमा सर्वाधिक बिक्री भएको, हार्वड विश्वविद्यालयका प्रोफेसरहरु रोजर फिसर, विलियम युरी र ब्रुस प्याटनद्वारा विवाद समाधानका प्रक्रियाहरुका सम्बन्धमा लेखिएको न्भततष्लन तय थ्भक पुस्तक (नेपाली संस्करण "समाधान") मा लेखकहरुले उल्लेख गर्नु भएका ५ सुत्रहरु : '(१) व्यक्तिलाई समस्याबाट अलग गर (२) अडानमा होइन हितमा ध्यान देऊ (३) पारस्पारिक लाभको लागि विकल्पको खोजी गर (४) वस्तुगत मापदण्डको उपभोग गर (५) वाल्कोनीको प्रयोग गर' जस्ता सुत्रहरुको सहायता लिन सकिन्छ । उल्लिखित ५ सुत्रहरु लेखकहरुद्वारा विभिन्न विवादहरुमा परीक्षण गरी खारिएका सुत्र हुन् । उल्लिखित तरिकाहरु मेलमिलापको उपाय र नेगोसिएशनमा समेत अवलम्वन भएका छन् । सन् १९८० को दशक देखी मेलमिलाप र नेगोसिएशन क्षमता विकासमा धेरै प्रयासहरु भएका छन्। त्यस कारण पनि यी प्रणालीहरु प्रभावकारी छन्।

मेलमिलाप वा मध्यस्थ प्रणाली प्रायजसो एकल र तदर्थ (ad hoc) रुपमा हुने गरेका र कुनै न कुनै रुपमा सफल भई रहेकै छन्। माथि उल्लेख गरिएका Med-Arb-Med cyjf Arb-Med-Arb वा खामबन्दी अवार्ड (Envelope Award) को पद्धतिहरु व्यापक र सफल अवलम्बनको लागि एकल र तदर्थ (ad hoc) नभई संस्थागत (Institutional Setup) को आवश्यकता हुन्छ । एकल तथा तदर्थ ९बम जयअ० अभ्यासमा केही समस्या आउन सक्ने सम्भावना रहन्छ । त्यसका लागि खास गरी तेश्रो विश्वमा कुनै एक विवाद समाधानका क्रममा एउटै व्यक्ति एक चरणमा मध्यस्थ र अर्को चरणमा मेलमिलापकर्ता हुन सजिलो हुँदैन । मध्यस्थ भएकाले मेलमिलापकर्ता नहुने र मेलमिलापकर्ता भएकाले मध्यस्थ नहुने व्यवस्था अवलम्बन गर्नु नेपाल सुहाउँदो मान्नु पर्दछ । तर अन्यत्र एकै व्यक्ति दुवै भूमिकामा रहेका सफल उदाहरण छन् ।

हामीमा २१ औँ शताब्दी अनुकूल क्षमता र उत्साह नपुगेको हुन सक्छ तर पनि हामी विकल्प रहित मार्गमा छौँ । हाम्रो समाजको आवश्यकता अथाह छन् । खास गरी वाणिज्य सम्बन्धी विवाद समाधानमा हामीले धेरै काम गर्न सक्छौँ । उद्योग वाणिज्य क्षेत्रका विवादका तीन धरातल भेटिन्छन्: कम्पनी, करार र सूचना प्रविधि (information technology) का भौतिक तथा अभौतिक स्वरुप । सूचना प्रविधिको अवलम्बनले विश्व ज्यादै सानो गाउँमा परिणत भएको छ । जसरी चीनको एउटा सानो शहर वुहानबाट फैलिएको कोभिड-१९ ले हप्ताभरमा विश्वलाई ढाक्यो त्यसरी नै ज्ञान, सिप र अभ्यासले सानो समयमा विश्व ढाक्न पुग्छ । विवाद समाधानका यी नविनतम् पद्धति अवलम्बन गर्न हामी अवश्य नै पछि परेका छौँ तर पछाडि नै फर्केर भाग्न सक्दैनौँ । सभ्य समाज जता अगाडि बढ्छ त्यतै तिर बढ्नै पर्छ। हामी जस्तैलाई मार्गदर्शन गर्न १९५८ मा ल्भध थ्यचप ऋयलखभलतष्यल लागू भएको थियो । हामीले मध्यस्थताबाट धेरै लाभ लिन सकेनौँ । सन् २०१८ मा मेलमिलाप सम्बन्धी Singapore Convention आएको छ तर आजसम्म पनि हामीले त्यसबाट लाभ लिन सकिरहेका छैनौँ। जसको एउटा कारण मध्यस्थ र मेलमिलापको वर्णसङ्कर प्रयोग नभएर हो । Singapore Convention ले खास गरी उद्योग वाणिज्य व्यापार व्यवसाय क्षेत्रका विवाद समाधानबाट ठूलो फाइदा लिन सक्ने मार्ग प्रशस्त गरेको छ। त्यसैले त्यस तर्फ वेलैमा सवैको ध्यान जान जरुरी छ।

अन्त्यमा भारतीय सर्वोच्च अदालतबाट एक फैसलामा उद्धृत गरिएको तलको भनाइलाई हेरौँ जसले विवाद समाधानमा मध्यस्थलाई दिईएको अत्यधिक महत्वलाई व्यंग्य गरेको छ:

"... the way in which the proceedings under the (Arbitration) Act are conducted and without an exception challenged in courts has made lawyers laugh and legal philosophers weep..."

बास्तवमा विवाद समाधानमा प्रयोग हुने मध्यस्तको पद्धति दुनियाभर एकै शैली र रफ्तारमा चल्ने विश्वव्यापी विधा हो। तर भारतीय सर्वोच्च अदालतको सो कटाक्षपूर्ण अभिव्यक्ति हाम्रो हकमा पनि मिल्ने देखिन्छ । आवश्यकता र अवसर पहिचान गर्न नसक्दा विवाद समाधानका नविनतम् विधा आत्मसाथ गर्न हामी पछि परेका छौँ । जसको कारणले विवाद समाधानको हाम्रो अभ्यास समेत एकाङ्गी बन्न गएको हो कि जस्तो देखिन्छ। बाँकी विश्व कता बढ्दैछ भन्ने ख्याल नगरी हामीले एकाङ्गी अभ्यास गर्दै जाने हो भने नेपालमा मध्यस्थको मूल मर्म र अभ्यास नै सङ्कटग्रस्त बन्न सक्छ । त्यसो हुन गए उल्लेखित भारतीय सर्वोच्च अदालतको फैसलामा भनिए झैँ मध्यस्थका प्रतिपादकहरु रुनु पर्ने अवस्था आउन सक्नेछ। हामी समक्ष विश्वका ठूला विवाद र ठूला पक्षहरु किन आउन चाहदैनन्? नेपाली व्यक्ति वा संस्था नै करारका पक्ष भएका विवाद किन महङ्गो खर्च व्यहोरेर विदेशी संस्था र व्यवसायीको खोजी गर्दछन? विवाद समाधानको उपचार दिने हामीहरुले आजका दिनमा हाम्रो भविष्य तर्फ नसोच्ने हो भने हामी समाप्तिको मार्गमा अग्रसर हुनेछौँ । "Lex Mercatoria" को जगमा आज विश्वभर प्रवर्द्धन भएको मध्यस्थको महत्व सानो छैन । कुनै राज्यको सीमा भित्र सोझै प्रवेश पाउने र कार्यान्वयन गर्नु पर्ने मध्यस्थको अवार्ड मुलुकको सिमा भित्र फैसला मात्र होइन फैसलाको पनि फैसला हो । जवसम्म विश्वमा व्यापार व्यवसाय चलिरहन्छ तवसम्म मध्यस्थ रही नै रहन्छ। नेपालमा मध्यस्थलाई थप प्रभावकारी र उपयोगी बनाउन ऐनमा केही संशोधन जरुरी हुनसक्दछ र केही हाम्रै शिक्षा र चेतनाले परिपूर्ति गर्न जरुरी छ। मध्यस्थलाई सहज र सफल बनाउन मेलमिलाप मिश्रित वर्णसङ्कर प्रणाली अवलम्बन गर्न आवश्यक छ । हालै सातवटा मुलुकबाट एकसाथ शुभारम्भ गरिएको नेपालका पूर्व प्रधान न्यायाधीश तथा राष्ट्रिय मानव अधिकार आयोगका अध्यक्ष श्री अनुपराज शर्माले उद्घाटन गर्नु भएको Asia Pacific Centre for Arbitration & Mediation-APCAM ले यही वर्णसङ्कर पद्धतीको अवलम्वन गर्ने गरी आवश्यक नियम र पूर्वाधारको तैयारी गरेको छ। हामीले आवश्यकता महसुस गरे यहीं आवश्यक प्रशिक्षणको आयोजना गर्न सकिन्छ तर त्यस तर्फ सोच्न अझै ढिलो गर्नु हुँदैन ।

उद्योग व्यापार व्यवसाय र केही संवदेनशील घरायसी विवाद समाधानका लागि मेलमिलाप वा यसको वर्णसङ्कर नै उत्तम विकल्प हो । यसलाई हामीले नै अङ्गिकार गर्नु जरुरी छ। त्यसका लागि केही थप सिप ग्रहण गर्न प्रशिक्षण, अनुशिक्षण र अध्ययन गर्दै Singapore Convention ले मार्गदर्शन गरेझैँ मेलमिलाबाट नयाँ उचाईमा उपलब्धी थप गर्न सकिन्छ। यी दुवै पद्धति (मध्यस्थ र मेलमिलाप) लाई सक्षमता र होसियारी पूर्वक सिप र योग्यताका आधारमा एकैसाथ अवलम्वन हुने वर्णसङ्कर स्वरुपमा अभ्यास विकास गर्ने हो भने वाणिज्य क्षेत्रका विवाद समाधानमा वरदान साबित हुन सक्नेछ।

Revisiting Force Majeure in the COVID-19 Pandemic: A Global Perspective

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Abstract

The present paper attempts to explore the legal trajectory of the *force majeure* doctrine, and discuss the extent of immunity offered by a *force majeure* clause in light of the pandemic. It will draw distinctions between the doctrine of *force majeure* and the doctrine of economic hardship, legal maxims that are often used interchangeably. The paper will also shed light on whether the said immunity can be claimed when there is no *force majeure* clause in the contract and will do so against the background of Nepalese law, Indian law, US law and UK law.

Keywords

Force majeure, frustration, economic hardship, COVID-19, international commercial arbitration.

Introduction

Since the declaration of the novel coronavirus (Covid-19) as a "global pandemic" by the World Health Organization[2], countries all around the world have declared states of emergency of varying degrees. Aside from witnessing grave humanitarian crisis, the lockdown and the resulting financial slowdown has plunged the world into a period of deep economic crisis. As businesses struggle to prepare a response to the pandemic and navigate these troubled waters successfully, one question that has assumed center stage is "Does the global pandemic qualify as a *force majeur*e, thereby justifying suspension of contractual performance?". At a time like this, the ever-changing landscape of COVID-19 in the domestic and international arbitration context begs legal practitioners to re-learn and perhaps, unlearn the fundamentals of age-old concepts of *force majeure*, doctrine of frustration and doctrine of impractability. Needless to say, a large number of post-pandemic litigation suits will bring the application of these concepts into sharp focus.

The foreshadowing of the novel coronavirus as a "*force majeure* event" was done much before WHO declared the virus as a pandemic. As early as February 10, 2020, China's Legislative Affairs Commission of the National People's Congress Standing Committee had declared that the Chinese Government would be taking drastic and strict measures to combat the virus and any and all such measures affecting or

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2 COVID-19 was declared as a pandemic by the Director-General of the World Health Organization (WHO), Dr. Tedros Adhanom Ghebreyesus, on 11 March 2020, see WHO announces COVID-19 outbreak a pandemic, <http://www.euro.who.int/en/health-topics/healthemergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> (accessed April 20, 2020).

hindering a contract would be considered a "*force majeure* event".[3] Thereafter, the China Council for the Promotion of International Trade (CCPIT) issued a total 6454 *force majeure* certificates to various Chinese companies.[4] In particular, export companies were exempt from fulfilling their contractual obligations with overseas parties if they could prove that non-performance was in direct relation to the pandemic. Likewise, the French Ministry of Economy had also announced that the effect of the pandemic on the French economy has been monumental and that any late deliveries will be granted the exemption of *force majeure*.[5] There have been similar arrangements and declarations being made by other jurisdictions (both civil and common).

The inherent difficulty underlying the *force majeure* doctrine and principle of frustration/hardship is that these principles are products of national laws and follow a different trajectory across the globe. While the theory is uniform, the applicability of the same is left entirely to the respective nation's legal system. In light of these tremendously fluid times, resolution of non-performance related issues necessitates a development of set rules that correspond to the complexity and unpredictability of the situation at hand. Under these circumstances, the aforementioned doctrines demand a strict perusal in order to assess its applicability, implementation and relevance in the context of the pandemic.

Force Majeure, Doctrine of Frustration and Economic Hardship: A Dire Need for Distinction

A. Force Majeure

Force Majeure, a legal term originating from the French Civil Code, is defined as "an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes and wars).[6] It is important to recognize that in most common law jurisdictions, *force majeure* is a doctrine that does not exist outside of contract. Every *force majeure* provision must thus be clearly stipulated in the contract and clarify which events fall under the category of "*force majeure*". This is in contrast with civil law countries as most civil law jurisdictions afford *force majeure* a statutory protection. For example, Article 1218 of the French Civil Code states that "In contractual matters, there is *force majeure* where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1."[7] Likewise, *force majeure* as a doctrine exists under Article 180 of the People

3 "A force to be reckoned with-Chinese firms use obscure legal tactics to stem virus losses, The virus has led to firms trying to get out of contracts" https://www.economist.com/business/2020/02/20/chinesefirms-use-obscure-legal-tactics-to-stem-virus-losses (accessed April 20, 2020)

4 "CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts" http://en.ccpit.org/info/info_40288117668b3d9b017163990e5a082a.html (accessed April 20, 2020).

5 The original text of the declaration can be found here: https://www.vie-publique.fr/discours/273763- bruno-le-maire-28022020-coronavirus (accessed April 20, 2020). See also <https://www.economie.gouv.fr/dgccrf/mesures-daccompagnement-des-entreprises-impactees-par-le-coronavirus-covid19> (accessed April 20, 2020).

6 Fareya Azfar, "The Force Majeure Excuse" (2012) < https://heinonline.org/HOL/LandingPage?handle=hein.journals/arablq26&div=18&id=&page=> (accessed June 02, 2020).

7 French Civil Code 2016, Art. 1218

Republic of China (PRC) General Rules on Civil Law and Article 117 of the PRC Contract Law. In such cases, even if the immunity is not covered in the contract, parties can seek statutory protection from their national laws.[8]

In contractual history, unexpected circumstances have assumed different characteristics - they can be entirely technical, financial, administrative, environmental and even political in nature. However, much of what accounts as "*force majeure*" depends on the contract entered into between two parties. Events such as the global financial crisis of 2008/2009 that caused unforeseeable economic burdens for a party to a contract[9]; civil riots, natural calamities such as hurricanes or typhoons or earthquake, an unprecedented drought[10] have qualified as "*force majeure*" events. Parties to a contract are thus free to specify the events that qualify *as force majeure* events and they will be successful in their force majeure claim if they can prove that:

1. The event has rendered the contract impossible to perform.[11]
2. The event was unforeseeable and made the performance impossible and not merely impracticable or difficult.[12]
3. There was direct correlation between the unforeseeable event and the ability to perform the contractual obligation.[13]
4. All the conditions precedent were fulfilled.[14]

Typically, a *force majeure* provision is worded in the following way:

> "*Neither party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure results from events, circumstances or causes beyond its reasonable control including (without limitation) acts of God or natural disaster, epidemic or pandemic, chemical or biological contamination, wars, strikes, riots, or acts of domestic or international terrorism. In such circumstances the time for performance shall be extended by a period equal to the period during which performance of the obligation has been delayed or failed to be performed. If the period of delay or non-performance continues for four weeks, the party not affected may terminate this agreement by giving ten days' written notice to the affected party.*"

If the event that is alleged to have prevented performance under the contract has been specifically mentioned in the contract, the parties may only have to fulfil procedural obligations, such as sending notice to the other party to bring attention to the event to seek immunity. However, even in the event that a *force majeure* clause may not have encompassed all unforeseeable circumstances, usually a catch

8 The General Principles of Civil Law of the PRC, Art. 180

9 ICC Case No. 8486 of 1996, 24 Y.B. Comm. Arb. 162, 168 (1999)

10 Gould Marketing, Inc. v. Ministry of National Defence, 3 Iran-U.S. Cl. Trib. Rep. 147, 152-153 (1983): "[S]trikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By 'force majeure' we mean social and economic forces beyond the power of the state to control through the exercise of due diligence. Injuries caused by the operation at such forces are therefore not attributable to the state for purposes of its responding for damages".

11 Chitty on Contracts, 31st Edn., Para 14-151

12 David Thomas QC, "Frustration and Force Majeure: A Hard Line in English Law" (2011) < https://heinonline.org/HOL/LandingPage?handle=hein.journals/cnstrcnl6&div=18&id=&page=> (accessed June 02, 2020).

13 Treitel on Frustration and Force Majeure, 3rd Edn.

14 ibid

all phrase, such as "*including, but not limited to*" or "*any cause/ event outside the reasonable control of the parties*" will help include crisis such as an epidemic/pandemic within the ambit of the *force majeure* clause. In the current scenario, if the clause includes the terms "Act of God", it can be contended that the novel coronavirus is an Act of God and falls within the ambit of the clause. The Courts in the United States of America and the United Kingdom have held that an epidemic can be contended as an Act of God. In *Lakeman v. Pollard*[15], the Supreme Court of Maine held that the cholera outbreak was an 'Act of God' and the parties could not bring a suit of damages against each other for breach of obligations. Similarly, in *Coombs v. Nolan*[16], the District Court for the Southern District of New York excused cargo delay as the defendant was unable to obtain horses to unload a ship on time due to the prevailing horse flu pandemic at the time and held that the horse flu pandemic would fall under the residuary clause of the contract.

B. Doctrine of Frustration

Doctrine of frustration, on the other hand, is a doctrine wherein contractual obligations are allowed to be discharged and suspended if the unforeseen event renders the contract impossible of impractical to perform. Unlike *force majeure* which must be included in a contract to be invoked, doctrine of frustration is a product of the national law of the country and can be invoked by any party if a *force majeure* clause does not already exist in the contract. However, the threshold for invoking the doctrine of frustration is much higher than that of *force majeure*. To invoke frustration, parties must prove that:

a. The supervening event must have substantially changed the nature of the contractual rights which the parties could not have reasonably contemplated at the time of the execution of the contract.
b. The event makes the performance of the contract impossible.
c. The event has affected the nature, meaning, purpose and effect of the contract so as to render the effect permanent and not temporary.[17]

The first seminal case on frustration was *Taylor v. Caldwell*[18], where the Court established two important doctrines: subsequent impossibility and frustration of contract. According to the holding in that case, a claim for frustration required parties to improve that the "implied condition" had been significantly altered and that such alteration led to "impossibility of performance". However, a line of latter decisions, most notably *Krell v. Henry*[19] have held that even where the performance is still possible, if the foundation on which the contract was built gets upset and destroyed, parties may succeed in their claim for frustration.

C. Doctrine of Economic Hardship

Likewise, while the doctrine of economic hardship shares similarities with *force majeure* and frustration, it is a doctrine that specifically deals with cases where the performance contemplated in the contract has not become impossible. In such cases, only some circumstances have been altered, making the fulfilling of the contract merely difficult or often, of little economic sense. For example, the seller of an object that was contracted for loses it in an ocean. Theoretically, he must attempt to recover the lost object at any

15 Lakeman v. Pollard, 43 Me 463 [1857]
16 Coombs v. Nolan, 6 F Cas. 468 [1874]
17 ibid, n (14)
18 Taylor v. Caldwell, [1863] EWHC QB J1, (1863) 3 B & S 826, 122 ER 309
19 Krell v. Henry, [1903] 2 KB 740

cost and must fulfill his end of the bargain. However, the cost, effort and labor required to recover that lost good is infinitely higher than paying damages for breach of contract. Such a case would fall under the doctrine of economic hardship and not *force majeure*.

Jurisdictional Comparison of Force Majeure: A Cursory Glance

A. **Nepal**

The National Civil (Code) Act, 2017 (2074) contains provisions which are relevant to *force majeure* and doctrine of frustration. While "*force majeure*" as a term has not been codified in the statute, a potential attempt to encompass the principle has been couched under the terms "impossibility" and "fundamental change in circumstance". Section 513 of the Act deals with contingent contracts and *inter alia* provides that if a contract is based on the happening of a future event and such event becomes impossible, the contract becomes void. Section 531 of the Act deals with "fundamental change in circumstance" and states that "in case it becomes impossible to execute a contract as a result of fundamental change in the situation prevailing at the time of signing of the contract, the work under the contract need not be performed".[20] Furthermore, Section 531 (2) (b) elaborates that the fundamental change shall be deemed to have come in the situation prevailing at the time of signing of the contract in case it becomes impossible to execute the contract due to emergence of such situations as war, floods landslides, fire, earthquakes, and volcanic eruptions, which are beyond the control of human beings. Furthermore, the provision clarifies that fundamental changes shall not be deemed to have come in the situation prevailing at the time of signing the contract in any of the following circumstances: (a) In case it becomes difficult to perform the contract; (b) In case profit margin is low or loss is expected; (c) In case any party to a contract is dependent upon any third party who is not a party to the contract for performing the contract, if the third party commits a mistake or becomes unfit; (d) In the event of strikes and lockouts; (e) In case it becomes necessary to pay additional tax, fee or other revenue; (f) In case the contract has been signed with several objectives and only some of them cannot be fulfilled.[21]

The Supreme Court of Nepal in *Pradip Raj Pandey v. Karmalakshmi Kansakar* (*D.N. 9368, N.K.P. 2072)* is one of the few cases that has dealt with frustration of the contract. From a jurisprudential perspective, the decision does not elaborate on the specifics of the doctrine but has held that a contract can be said to be frustrated if the following elements are present:

1. Impossibility of performance,
2. Unlawful performance by change in law,
3. Destruction of subject matter for performance, and
4. Death or incapacity of party essential for contract performance.

It is clear from the provisions outlined under the Act that economic hardship will not qualify as a *force majeure* event and that courts tend to restrictively construe doctrine of frustration and demand a clear and direct causal connection between the event and the non-performance of the contract. If the performance has been made merely difficult but not impossible, courts will most likely be reluctant to grant immunity.

20 The National Civil (Code) Act, 2017 (2074), s. 531.

21 ibid

B. **India**

The Indian Contract Act, 1872 ("**Act**") has not incorporated "*force majeure*" provisions. However, it has envisaged the doctrine under Section 32 of the Act that deals with "contingent contracts" and states that in the happening of a "future event" that renders the contract impossible to perform, such contracts may be considered void. Furthermore, Section 56 of the Act deals with frustration of a contract and provides that a contract becomes void *inter alia* if it can be established that "the circumstances have materially affected the parties and obligations and there is no way to continue the contract while such circumstances exists".[22] In such cases, the contract is voided and the parties are discharged of their subsequent obligations and in effect, both the parties are stripped off of their right to claim damages. In *Satyabrata Ghosh v. Mugneeram Bangur*[23] and *Energy Watchdog v. CERC*[24], the Supreme Court clearly held that if *force majeure* events are not clearly and widely stipulated in a contract, the parties could seek protection of Section 56 of the Act and that in seeking immunity, the party claiming relief must mandatorily demonstrate that the unforeseeable event has fundamentally altered the equilibrium of the contract and that the unanticipated event has rendered the contract objectively impossible to perform. Therefore, if a pandemic like Covid-19 falls within the ambit of a *force majeure* clause, the party would still need to fulfill the burden of proof and establish the causal connection between the event and the performance of the contract.

Recently, Bombay High Court and Delhi High Court have passed orders in varied cases drawing the causal connection between the pandemic and the contractual obligations. Depending on the facts and circumstances of the case, courts have granted relief if the parties successfully fulfill all the conditions required to invoke *force majeure*. In this regard, while the approach has been liberal, relief has been granted only if the causal connection is clearly established. The Order passed in *Standard Retail Pvt. Ltd vs Gs Global Corp And Ors* on 8 April, 2020 refused to grant interim measures to the Petitioner and held that the commodity in question was an essential item and since lockdown was only for a limited period, the party was expected to deliver products on time. However, the Delhi High Court's Order passed in *M/s. Halliburton Offshore Services Inc. vs Vedanta Limited & Anr.* on 20 April 2020 observed that the country wide lockdown was in the nature of force majeure and therefore, it could be said that equity needed to exist at a time like this.

C. **US Law**

The United States (**US**) does not have a codified *force majeure* provision in its statutes. In such circumstances, what constitutes a *force majeure* event, what criteria needs to be fulfilled to invoke the doctrine and what remedies are available are dictated on a case to case basis and differs from one state to another. For example, New York and Texas courts are generally restrictive in the way they read *force majeure* clauses and in the absence of specific wording, the courts are reluctant to grant immunity. It is also not sufficient to show that the event was unforeseeable but must also go to prove that the event was a direct cause of the party's inability to perform. In contrast, California courts afford immunity as long as parties can establish that they took reasonable and sufficient steps to avoid the consequences of the *force majeure* event.

22 The Indian Contract Act, 1872, s. 56
23 Satyabrata Ghosh v. Mugneeram Bangur, [1954] SCR 310
24 Energy Watchdog v. CERC, (2017) 14 SCC 80

In a similar situation in 1921, the Illinois Supreme Court in the case of *Phelps v. School District No. 109, Wayne County*[25] had held that an epidemic does not qualify as Act of God. The Court held that the epidemic was not a reason to withhold payment to teachers who were willing and ready to teach students. In contrast, however, the North Dakota Supreme Court in the case *Sandry v. Brooklyn School District No. 78 of Williams County*[26] held that schools were exempted from paying the drivers on the grounds of pandemic qualifying as *force majeure* and frustrating the very foundation on which the contract with school drivers was based on.

D. **UK Law**

In UK, much like in other common law nations, law surrounding *force majeure* is guided by case laws. There is no specific definition on "*force majeure*" but has been developed over time through a line of decisions. In *Costal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (The Marine Star)*[27], the English court held that the wording of the contract must be prioritized over the intention of the parties, thereby upholding the autonomy principle that contract law relies on. Likewise, the court in *Tenants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917] AC 495*[28] held that the event that triggers the *force majeure* clause must "prevent" performance and must disable the parties from performing the contract in toto. Therefore, mere economic hardship would not trigger the clause.

D. **International Conventions**

Often, in international arbitrations, parties choose international conventions and international commercial practices to make their claims and such conventions have their own threshold to judge a *force majeure* claim. The table below will provide further insight on the same[29]:

Convention	Requirement	Legal Consequence
ICC *Force Majeure* Clause 2003	1. Impediment, beyond a party's control. 2. Not foreseeable at the time of conclusion of the contract. 3. Duty of notification	Relief from liability, no damage claim, termination of contract allowed.
Art 79, CISG	4. Failure due to an impediment. 5. Not foreseeable at the time of conclusion of the contract. 6. Impediment of consequences were unavoidable. 7. Must give notice.	Relief from liability, no damage claim, termination of contract allowed.
Art 7.17 UNIDROIT Principles	8. Failure due to an impediment. 9. Not foreseeable at the time of conclusion of the contract. 10. Impediment of consequences were unavoidable. 11. Must give notice.	Relief from liability, no damage claim, termination of contract allowed.

25 Phelps v. School District No. 109, 302 Ill. 193 (1922)
26 Sundry v. Brooklyn School Dist. No. 78 of Williams County, 47 N.D. 444, 182 N.W. 689 (1921)
27 Costal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (The Marine Star)[1996] 2 Lloyd's Rep 383
28 Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917] AC 495
29 "Comparison of Commonly-Used Force Majeure and Hardship Clauses in International Contracts"(2020) <https://lorenz-partners.com/NLB/Newsletter/NL119E-Force-Majeure-and-Hardship-Clauses-in-International-ContractsMar20.html#:~:text=Force%20majeure%20applies%20to%20cases,performance%20is%20basically%20still%20possible.> (accessed June 08, 2020)

Conclusion

The countries of the world are now collectively facing the challenge of drafting strict and comprehensive *force majeure* clause in their respective legal regimes that adequately reflects the change in the ever changing "unexpected circumstances" field and formulating a strong *force majeure* clause is the first step towards achieving that goal. Parties all around the world, including in Nepal, are currently seeking refuge under the *force majeure* clauses in their contracts. In the event that the contract does not accommodate an "epidemic" or a "pandemic" and has no catch-all phrase, many will depend on the frustration doctrine outlined under Section 531 of the National Civil (Code) Act, 2017. However, the onus of demonstrating that it was the pandemic that affected the performance of the contract is on the party that is seeking relief from breach of the contract. Therefore, while *force majeure* is the safest fall back option, parties are not exempt from establishing causal connection and duty of mitigation. It will be on the party's favour to also immediately issue relevant letters and correspondences that will document not just the occurrence of the event but also show the specific effects the event had on the contractual obligation.

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9. *ibid,* n (14)
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13. *Energy Watchdog v. CERC,* (2017) 14 SCC 80
14. *Phelps v. School District No. 109,* 302 Ill. 193 (1922)
15. *Sandry v. Brooklyn School Dist. No. 78* 47 N.D. 444, 182 N.W. 689 (1921)

मध्यस्थता ऐनको दफा ३० को उपदफा (२) को खण्ड (ग) र (घ) मा प्रयुक्त 'शर्त' एवं 'सम्झौता' शब्दावली: एक अवलोकन

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दफा ३० को उपदफा (२) को खण्ड (ग) र (घ) मा प्रयुक्त "शर्त" एवं "सम्झौता" शब्दावली

मध्यस्थको निर्णय आधारभूतरुपमा अन्तिम एवं बाध्यकारी (Final and Binding) प्रकृतिको हुने भएकोले अत्यन्त सीमित र निश्चित अवस्थामा मात्र त्यस्ता निर्णय बदर गर्न सकिने स्थापित सिद्धान्त एवं मान्यता रहिआएको छ । नेपालको सन्दर्भमा यस्तो सीमित अवस्थाहरुका सम्बन्धमा मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) र (३) मा परिभाषित छ । मध्यस्थको निर्णयमा चित्त नबुझाउने पक्षले मध्यस्थको निर्णयमा दफा ३० उल्लिखित अवस्थाहरु मध्ये कुनै वा सबै अवस्थाहरु रहेको प्रमाण सहित उच्च अदालतमा निवेदन दिन पाउने व्यवस्था रहेको छ । यस्तो सीमित अवस्था अन्तर्गत अदालतले मध्यस्थको निर्णयमा गम्भीर कानूनी त्रुटि छ छैन सो को न्यायिक परीक्षण मात्र गर्ने, विवादको तथ्यभित्र प्रवेश गर्न नहुने/प्रवेश नगर्ने सिद्धान्त, प्रचलन एवं मान्यता रहिआएको छ[!].

मूलत: दफा ३० को उपदफा (२) को खण्ड (ग) र (घ) का अवस्थाहरु प्रमाणित हुने आधार नहुँदा-नहुँदै पनि मध्यस्थको निर्णय आफ्नो अनुकूल भएको छैन भनी महसुश गर्ने पक्षले उक्त निर्णय बदर गराउन उच्च अदालतमा निवेदन दिने प्रचलन नै स्थापित भईसकेको छ । यसरी अदालतमा निवेदन दिँदा निर्माण क्षेत्रका करार अर्न्तगतका विवादमा प्रायश: दफा ३० को उपदफा (२) को खण्ड (ग) र (घ) को अवस्थाहरु रहेको जिकिर लिने गरिएको र त्यसमा पनि खण्ड (ग) तथा (घ) मा रहेका क्रमश: "शर्त" एवं "सम्झौता" शब्दावलीलाई आधार लिने गरिएको पाइन्छ । अर्थात अदालतमा निवेदन दिने पक्षले आफ्नो दलिल पुष्टि गर्न यी शब्दहरुलाई आधार बनाउँदै मध्यस्थको निर्णय पक्षहरुबीच भएको "शर्त" एवं "सम्झौता" भन्दा बाहिर गै भएकोले बदर हुनुपर्ने मागदावी लिइएको पाइन्छ र अदालतले यसै आधारमा बदर घोषित गरिदिएको समेत पाईन्छ[२]. यति मात्र नभै अलग-अलग प्रयोजनका लागि उपदफाका अलग-अलग खण्डहरुमा राखिएका यी दुई शब्दहरुलाई सामान्यीकरण गरेर एउटै कोटीमा राख्दै मध्यस्थको निर्णय "सम्झौताका शर्तहरु" विपरीत रहेको भनी व्याख्या गरिएको पाइन्छ ।

'शर्त' र 'सम्झौता': दफा ३० को उपदफा (२) का विशिष्ट शब्दहरु

झट्ट हेर्दा उपर्युक्त दलिल स्वाभाविकै लाग्दछ । तर, दफा ३० को उपदफा (२) को (घ) मा रहेका "सम्झौता" शब्दलाई पक्षहरुबीच कुनै उद्देश्य पूर्ति (जस्तो: कुनै इञ्जिनीयरिङ निर्माण कार्य गर्ने) गर्नका लागि भएको करार (अर्थात् मुख्य करार वा substantive contract_ तथा (ग) मा रहेको "शर्त" शब्दलाई त्यस्तो करारको शर्त हो भनी मान्ने हो भने उच्च अदालतले मध्यस्थको निर्णयको परीक्षण गर्ने क्रममा उक्त substantive करार अन्तर्गत उत्पन्न विवादको तथ्य (merit) भित्र प्रवेश गर्नुपर्ने स्थिति सृजना हुनजान्छ । किनकि, मध्यस्थता

विधिद्वारा विवादको निरोपण हुने करारहरुमा सयौँ प्राविधिक एवं व्यापारिक पक्षहरु र सो सँग गाँसिएका सयौँ शर्तहरु हुन्छन् । उदाहरणका लागि कुनै जलविद्युत आयोजना निर्माण गर्दा पचासौँ प्रकृतिका यन्त्र-उपकरणहरुको डिजाइन, उत्पादन, जडान, परीक्षण, संचालन, आदि कार्यका लागि गरिने करारभित्र पक्षहरुले पालना गर्नुपर्ने भनी तोकिएका प्राविधिक, व्यापारिक एवं करार-व्यवस्थापन सम्बन्धी शर्तहरु सयौँको संख्यामा रहेको हुन्छन् । पक्षहरुबीच भएको करारको अभिन्न अङ्गको रुपमा General Conditions, Special Conditions, Technical Specifications, Drawings, Prices Schedules, Implementation Schedule, Minutes of Meetings, Addenda, आदि रहेका हुन्छन् र यसभित्र मध्यस्थता सम्बन्धी वा कानूनसँग प्रत्यक्षत: सम्बन्धित बाहेक पनि सयौँ शर्तहरु रहेका हुन्छन् । यस्ता प्राविधिक, व्यापारिक एवं व्यवस्थापनजन्य शर्तहरु रहेको करार अन्तर्गतको विवादको विषयसँग सम्बन्धित तथ्य केलाउने जानकार तथा ज्ञाता मध्यस्थ नै मानिने र उक्त तथ्यको विषयमा निर्णय गर्ने अन्तिम अधिकार मध्यस्थलाई नै हुन्छ भन्ने स्थापित सिद्धान्त छ । मध्यस्थको निर्णयमा विवेचित तथ्य वा मध्यस्थले गरेको तथ्यको मूल्याङ्कनको विषयमा अदातलहरुले आफ्नो धारणा राख्ने काम नगर्ने वा मध्यस्थले गरेको तथ्यगत विश्लेषणको विषयमा प्रवेश गर्न नहुने हुँदा नै गम्भीर कानूनी त्रुटि देखिएको अवस्थामा बाहेक अदालतहरुले मध्यस्थको निर्णयलाई बदर गर्ने भन्दा सदर गर्ने धारणा राख्नुपर्ने मान्य सिद्धान्त रहेको छ ।[ए] १] [३]

उल्लिखित मान्यता एवं सिद्धान्त विपरीत substantive करारभित्र रहेका घेरै शर्तहरुमध्ये एउटा मात्रमा पनि कैफियत उठाइ मध्यस्थको निर्णय "सम्झौताको शर्त" विपरीत रहेको छ भनी बदर गर्न माग गर्ने र कानूनी प्रश्न नभए तापनि यसैका आधारमा निर्णय बदर हुने स्थिति आए मध्यस्थता प्रकृयाको आधारभूत तत्व नै खण्डित हुनजाने देखिन्छ । किनभने करारमा रहेका प्राविधिक, व्यापारिक एवं व्यवस्थापनजन्य कैयौँ शर्तहरुको interpretation (व्याख्या) व्यक्तिपिच्छे फरक हुनसक्छ । यस प्रकार उल्लिखित उपदफाको खण्ड (ग) र (घ) बीच केही हदसम्मको अस्पष्टता झल्किन्छ । अर्थात्, के दफा ३० को उपदफा (२) को (घ) तथा (ग) मा रहेका "सम्झौता" एवं "शर्त" शब्दहरुले वास्तवमै पक्षहरुबीच भएको substantive करार र यसभित्रका विभिन्न तथ्यगत शर्तहरुलाइ नै जनाइरहेको हो त ? भन्ने जिज्ञासा-मिश्रित प्रश्न उब्जने गर्दछ ।

वस्तुत: दफा ३० को उपदफा (२) को खण्ड (ग) तथा (घ) मा रहेका "शर्त" एवं "सम्झौता" शब्दहरुले मध्यस्थताको प्रकृयागत संचालन विधि (conduct of proceeding), मध्यस्थको दायरा निर्धारण (scope of submission to arbitration), क्षेत्राधिकार (jurisdiction), आदि पक्षहरुलाइ ईङ्गित गरेको हो ।

दफा ३० को उपदफा (२) को (ग) सम्बन्धमा

दफा ३० को उपदफा (२) को खण्ड (ग) मा रहेको ".....मध्यस्थलाई सुम्पिएको शर्त विपरित....." भन्ने वाक्यांशको "शर्त" शब्दले मध्यस्थले विवाद समाधान गर्दा कुन-कुन वा के-कस्तो कुराको छिनोफानो गर्नुपर्ने हो वा पक्षहरुले मध्यस्थ समक्ष पेश गरेको दावी, प्रतिवाद, प्रतिदावी र प्रत्युक्तिमा पक्षहरुबाट के-के उपचार को माग (relief sought) भएको छ वा मध्यस्थको क्षेत्राधिकार भए नभएको आदि जस्ता शर्तको दायराभित्र रहनु पर्छ भन्ने तर्फ सङ्केत गरेको हो । उदाहरणका लागि मध्यस्थले विवाद समाधान गर्दा तोकिएकै सारवान कानून अपनाउनु पर्ने, पक्षहरुले स्पष्ट रुपमा अख्तियारी दिएकोमा बाहेक न्याय र सद्विवेक (ex aequo et bono) अथवा प्राकृतिक समन्याय (amiable compositeur) जस्ता सिद्धान्त अपनाउन नपाउने, आफूलाई नभएको अधिकार प्रयोग गर्न नहुने वा भएको भन्दा बढी अधिकार प्रयोग गर्न नहुने, आदि पक्षहरुतर्फ सङ्केत गर्दछ । सडक निर्माण गर्दा चट्टान हातले फोर्नुपर्ने थियो कि बिष्फोटक पदार्थ प्रयोग गर्नुपर्ने, सुरुङ निर्माणको क्रममा देखिएको

चट्टान वा माटो कुन वर्गमा पर्ने हो, सुरुङको भौगर्भिक अवस्थाले गर्दा खर्च बढ्न गयो कि घट्न, ठेकेदारलाई एचययिलनबतष्यल अयकत दिने हो वा होइन, करारको म्याद थप्नुपर्ने हो वा होइन भन्ने जस्ता विवादमा अन्तर्निहित करारका तथ्यगत शर्तहरुलाई दफाको यो व्यवस्थाले ईङ्गित गरेको हो भन्न सकिँदैन ।

दफा ३० को उपदफा (२) को खण्ड (ग) मा रहेको ".....मध्यस्थलाई सुम्पिएको शर्त विपरित....." भन्ने वाक्यांशलाई भारतको मध्यस्थता ऐन, १९९६ को दफा 34(2)(a)(iv) मा रहेको यस्तै प्रावधान (मध्यस्थको निर्णय बदर गराउने प्रावधान) सँग तुलना गर्दा "..... not falling within the terms of the submission to arbitration...." भन्ने पदावली प्रयोग भएको पाईन्छ, not falling within the terms of the contract भन्ने पाइदैन [४] । terms of the contract / terms of the submission to arbitration भनेका अलग-लअग कुराहरु हुन् । मध्यस्थ समक्ष विवाद पेश गर्दा यो-यो कुरामा यस्तो-यस्तो मर्का पऱ्यो, यो-यो तरिकाले यो-यो उपचार प्रदान गरिपाऊँ भन्ने किसिमले पक्षले राखेका दायरा निर्धारक शर्तहरु terms of the submission to arbitration अन्तर्गत पर्दछन् भने terms of the contract भन्नाले पक्षहरुबीच भएको मुख्य करारका शर्तहरु हुन् । terms of the contract अन्तर्गत माथि उल्लिखत प्राविधिक, व्यापारिक र व्यवस्थापनजन्य बहुआयामिक शर्तहरु पर्दछन् । UNCITRAL Model Law को Article 34 (2)(a)(iii) मा पनि ".....not falling within the terms of the submission to arbitration...." भन्ने पदावली पाइन्छ [५] . एकजना विद्वानले The words "terms of the submission to arbitration" have been held to mean and refer to the terms of the arbitration clause भनेका छन् ..... terms of the contract भनेका छैनन् [डा. अवतार सिंह, पृष्ठ ३३९, ऐ ४] । यदि "शर्त" शब्दले मुख्य करारका शर्त जनाउने भए terms of the contract भन्नुपर्ने थियो ।

दफा ३० को उपदफा (२) को (घ) सम्बन्धमा

दफा ३० को उपदफा (२) को खण्ड (घ) मा रहेको ".....त्यसको काम कारवाही पक्षहरुबीच सम्पन्न सम्झौता अनुरुप नभएको....." भन्ने वाक्यांशको "सम्झौता" शब्दले विवादको स्रोतको रुपमा रहेको मुख्य करार (Substantive contract) नभइ मध्यस्थता सम्बन्धि सम्झौता (Agreement to Arbitrate) जनाउँछ । यो तथ्य ऐनको दफा २ को खण्ड (क) मा दिइएको परिभाषाबाट समेत स्पष्ट हुन्छ । पक्षहरुबीच छुट्टै Arbitration Agreement नभई Arbitration clause सहितको मुख्य करार मात्र गरिएको भए तापनि दफा ३० को उपदफा (२) को खण्ड (घ) को यो शब्दको आशय agreement to arbitrate सम्म मात्र सीमित रहने देखिन्छ । ऐनको दफा २ को खण्ड (क) मा यहीअनुसार स्पष्टीकरण दिइएको छ ।

मध्यस्थता-सम्झौता (Agreement to arbitrate) ले केवल मध्यस्थताको गठन, मध्यस्थताको प्रकृया वा कामकारवाही (proceeding), आदि कुराहरुलाइ निर्देश गर्दछ । यसको पक्षहरुबीच भएको substantive करारभन्दा भिन्न छुट्टै अस्तित्व हुन्छ । यो तथ्य ऐनको दफा १६ को उपदफा (३) बाट समेत प्रष्ट हुन्छ । मध्यस्थता-सम्झौता (Agreement to arbitrate) मा तोकिएको कुनै विधि (जस्तै UNCITRAL Rule, NEPCA चाभि, आदि) अनुसार मध्यस्थता गराउने सहमति रहेको हुन्छ भने पक्षहरुबीच भएको substantive करारमा कुनै उद्देश्य पूर्ति गर्ने शर्तहरु रहेका हुन्छन् । दफा ३० को उपदफा (२) का खण्डे (घ) मा रहेको अन्तिम वाक्यांश अध्ययन गर्दा समेत "सम्झौता" शब्दले केवल Arbitration Agreement मात्र बुझाएको प्रष्ट हुन्छ । पक्षहरुबीच सम्झौता (अर्थात् मध्यस्थता-सम्झौता) नभएमा ऐन बमोजिम मध्यस्थताको काम कारवाही हुनुपर्ने अनिवार्यता यहाँ देखिन्छ । ऐनको प्रावधान पक्षहरुबीचको करार होइन भन्ने स्पष्ट छ । यो उपदफाको "कामकारवाही" शब्दले मध्यस्थताको

प्रकृयालाई सङ्केत गरिरहेको छ, विवादका तथ्यहरुको विश्लेषण वा व्याख्या गराइलाई होइन । मध्यस्थता गर्दा तोकिएको कुनै विधि (जस्तै UNCITRAL Rule, NEPCA Rule, आदि) वा मध्यस्थता ऐनको प्रावधान अनुसार काम कारवाही भयो कि भएन भन्ने उपदफा २ को खण्ड (घ) को आशय हो ।

संक्षेपमा भन्ने हो भने मध्यस्थले विवादका तथ्यहरुको विश्लेषण वा व्याख्या गर्दा पक्षहरुबीच भएको substantive करारअनुरुप गऱ्यो वा गरेन भनी substantive करारका दफा-दफा केलाउनु पर्ने किसिमको अदालती परीक्षण दफा ३० को उपदफा (२) को खण्ड (घ) ले गर्न खोजेको होइन । पूर्वनिर्धारित मध्यस्थताविधि वा मध्यस्थता-सम्झौता बमोजिम (जस्तैः NEPCA वा UNCITRAL Rules वा यस्तै निर्धारण भएको भए सो बमोजिम, सो नभए वा मध्यस्थता ऐन बमोजिम) गऱ्यो वा गरेन भन्ने सम्म हो ।

यसप्रकार ऐनको उपदफा ३० को उपदफा (२) को खण्ड (ग) तथा (घ) मा रहेका यी दुई शब्दहरुले विशिष्ट (Specific) अर्थ राख्दछन् । शर्त र सम्झौताले आमरुपमा दिने व्यापक र सामान्य अर्थ राख्दैनन् ।

उपसंहार

माथि गरिएको अवलोकनबाट विवादको निरोपण गर्दा मध्यस्थले पक्षहरुबीच भएको Substantive करारका विभिन्न तथ्यगत शर्तहरु अनुरुप गऱ्यो वा गरेन भन्ने कुराको परीक्षण मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) को खण्ड (ग) र (घ) ले गर्न नसक्ने देखिन्छ । अर्को शब्दमा व्यक्त गर्ने हो भने दफा ३० को उपदफा (२) को खण्ड (घ) तथा (ग) मा प्रयुक्त "सम्झौता" एवं "शर्त" शब्दहरु र पक्षहरुबीच भएको मुख्य (Substantive) करार तथा सो मा रहेका तथ्यगत शर्तहरु एउटै होइनन् । यिनीहरुले फरक-फरक अर्थ राख्दछन् । विवादको निरुपण गर्दा मध्यस्थ आफूलाइ सुम्पिएको scope भन्दा बाहिर गएको छ कि छैन वा आफूलाई नभएको अधिकार प्रयोग गरेको वा भएको भन्दा बढी अधिकार प्रयोग गरेको छ कि छैन भन्ने परीक्षण दफा ३० को उपदफा (२) को खण्ड (ग) ले गर्दछ भने मध्यस्थको गठन वा मध्यस्थता प्रकृया (conduct of arbitral proceeding) मध्यस्थता-सम्झौता (Agreement to Arbitrate) बमोजिम छ कि छैन भन्ने परीक्षण मात्र दफा ३० को उपदफा (२) को खण्ड (घ) ले गर्ने देखिन्छ ।

यस स्थितिमा कुनै पक्षलाई मध्यस्थले करारमा रहेको तथ्यगत कुनै शर्त वा केही शर्तहरु बमोजिम निर्णय नगरेको भन्ने लागेमा कानूनी त्रुटि नभएतापनि दफा ३० को उपदफा (२) को खण्ड (ग) तथा (घ) मा प्रयुक्त "शर्त" एवं "सम्झौता" शब्दहरुलाई आधार बनाई उक्त निर्णय "सम्झौताको शर्त" विपरित रहेको दावी गर्दै बदर गर्न माग गर्नु वा यसैको आधारमा बदर गर्नु मध्यस्थता सिद्धान्तको प्रतिकूल हुनजाने देखिन्छ । दफा ३० को उपदफा (२) को खण्ड (ग) तथा (घ) को यो अस्पष्टता कायमै रहे विशिष्ट अर्थ बोकेको "शर्त" र "सम्झौता" शब्दलाई सामान्यीकरण गर्दै व्यापक अर्थमा लिइने जोखिम रहिरहने र यसबाट मध्यस्थता प्रकृया प्रभावहीन हुनसक्ने देखिन्छ । अतः ऐनका यी प्रावधानहरुमा आवश्यक स्पष्टीकरण थप हुनु उपयुक्त देखिन्छ ।

सन्दर्भ सामग्रीः

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(५) UNCITRAL Model Law on International Commercial Arbitration.

Extension of Time in Construction Contracts as per Nepalese Public Procurement Law

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Abstract

Every construction contract constitutes the provision of Extension of Time (EOT) in Nepal. This contentious issue has made a considerable impact on public construction contracts as well as public procurement law. This is the only provision which has made its place in all amendments made so far in the Public Procurement Regulation (PPR) starting from 6th amendment through 10th amendment, all of which were made within a year. Considering its importance in public procurement in Nepal, I start this article with brief discussion about the meaning and importance of EOT in construction contract and go through their legal provisions as per all amendments in PPR. I then analyze the relevance of these provisions in light of the essence of EOT in construction contract and eventually present the necessary way forward considering the construction practice in Nepal.

Key Words: The Contract, Extension of Time, Public Procurement Regulation, the Contractor, the Employer, the Program.

Introduction

Management of time, cost and quality is the most crucial aspect of a construction project. Every construction contract in Nepal contains 'the time is of the essence' clause which requires the Contractor to complete the works within the specified time. The concept 'the time is of the essence' requires all parties to a Contract should perform within set time period. In this article, however, I will discuss about this concept only from the perspective of the contract period within which the Contractor is required to complete the works. Without this clause in the Contract, time will be at large which requires the parties of the Contract to decide a reasonable time period for the completion of works. However, civil law approach in Nepalese public procurement law warrants that the public entity must specify the time

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period required for the completion of the works as per Rule 10 (3) of Public Procurement Regulation (PPMO, 2007). This time period is decided based on the availability of materials at site and at the time of cost estimate preparation.

Having construction time period mentioned in the Contract helps the prospective bidders, on the one hand, to prepare their bids and decide on bid amounts based on a given time period, rate of progress to be achieved and required resources for timely completion of the works as per the Contract. On the other hand, the Employer can envisage the tentative time for having potential benefits started to be realized after completion of the works in the Contract. Unforeseen hurdles in most of the construction projects, however, always deprive the Employer of having benefits on time as envisaged. Such hurdles have two types of implications in the Contract; one being the extension of time (EOT) and another the additional cost. In this article, I will shed light on the EOT aspect of the Contract with its meaning and importance. I will then present and analyze the amendments made in Nepalese procurement law with regard to the essence of EOT. Eventually, I will put way a forward for its better understanding and application in the Contracts in Nepalese public construction.

Extension of Time Provision in Construction Contract

Construction projects are planned to be completed as soon as possible within a pre-set time period based on resources required in terms of investment and envisaged benefits from the Employer's perspective. Similarly, the time period defined in the Contract enables the Contractor to assess his resources capability and performance level to complete the works within that time (Bunni, 2005). Setting up a fixed time period in the Contract, therefore, is important for both the parties. In fact, however, all the works are not completed within the envisaged contract period due to various reasons which are beyond the control of the parties. These reasons causing delay events mean that the flexibility is indispensable in the contractual provision. This flexibility is in the form of Extension of Time (EOT) clause in the Contract.

Applicability of EOT in the Contract is attributed to the delays by the Employer and the entities other than the Contractor as well as to the situation beyond the control of the Contractor. Therefore, EOT clause in the Contract provides the contracting parties with the way out for addressing the issues which hinders the Contract to be completed in time as stipulated. Provision of EOT in the Contract benefits for both the parties. The Contractor is relieved from the liquidated damages for the delay which is not due to him and can reprogram his work. In the similar fashion, the Employer can plan its activities as per new contract period as well prevent time for completion becoming 'at large' (SCL, 2017).

The basis of deciding on EOT is the type of risk experienced during the project execution. For employer risk events occurred during construction, the impact is assessed on the construction activities as per approved "Program". Approved Program is a work schedule which is prepared by the Contractor based on the contract period provided in the bidding document and approved by the Employer. The program consists of the critical activities, execution of which if hindered by the risk events, eventually makes the construction project lag behind the schedule and delays the completion of the works. If such risk events are attributable to the Employer, the Contractor is entitled to EOT provided that he fulfills his notice requirements. It is the Contractor who shall inform the Employer about the EOT requirement and submit details as per relevant supporting documents.

Submission requirements to claim EOT by the Contractor mainly consists of the details of cause and effect which potentially results in EOT. Common Employer's risks which hinders the completion of works in time are included in the conditions of contract. Besides, any other event, not attributed to the Contractor's construction activities, requiring additional time for completion is considered to be the foundation for establishing EOT claim.

Provisions of Nepalese Procurement Law

Section 52 of the Public Procurement Act, 2063 (PPA) is the starting point about time for completion of any contract which requires that the Procurement Contract should have time for the performance, though PPA and Public Procurement Regulations (PPR) don't explicitly provide when the Contract period starts as well as provision whether the time can be extended or not. Section 56 of PPA further provides that EOT provision should be as mentioned in the Contract Agreement and be based on either *force majeure* or failure of the public entity to make available the things as per the Contract or other reasonable ground. If the Contractor assumes EOT should be granted, authorized person of the Contractor should apply for this and the competent authority has to make decision as prescribed in PPR.

Section 56 of PPA is further elaborated by PPR. Rule 120 of PPR prescribes that if the contract completion within the stipulated time is not feasible due to occurrence of the situation as mentioned in Section 56 of PPA, the Contractor should submit a letter to the Employer and the Employer should make decision based on assessment as to whether the Contractor tried his best to perform the works, whether the public entity provided the matter as per the Contract, whether the construction works was impeded by any investigation or *force majeure*. Submission of letter by the Contractor and decision by the Employer should be made within the prescribed days. This prescription of days is to avoid the Contract period to become 'time at large' which is quite difficult to decide. Provision of Rule 120 has been amended 6 times so far, consecutively in fourth amendment, sixth amendment, seventh amendment, eighth amendment, ninth amendment and tenth amendment, which are briefly discussed here.

Sixth Amendment

This amendment is applicable only when the reasons referred to in the Contractor's letter are justifiable based on the prevailing situation.

Sub-rule (1) and (5) 0f Rule 120: Letter requesting EOT should be submitted by the Contractor 21 days before the expiration of the terms of the Contract, instead of previous 7 day's provision. Merit of this revision is that it gives more time for the Employer to assess the situation against what has been mentioned in the Contractor's letter. Providing more time helps the Employer to make decision in time. Provision of mandatorily making decision within the Contract period prevents the Contract period to become 'time at large'

Sub-rule (3) and (4) of Rule 120: Previous EOT in term of month from previous provision has been changed into percentage. Threshold of 15%, 25% and more than 25% are set up for bid approving authority, department chief and secretary, respectively. This prevents unnecessary EOT and contributes to timely completion of the Contract. However, if small contracts of 6 month's period is not completed due to a justifiable reason, EOT of even 2 months is required to be approved by the Secretary which unnecessarily exploits resources.

Sub-rule (6) and (7) of Rule 120: These two Sub-Rules provides that EOT should not be granted more than 50% of the Contract period. If such case arises, the Contract should be terminated. This provision is totally against the principles of

EOT. Essential aspect of EOT is that it needs to be granted based on the prevalence of risk and its allocation to the best capable party to manage it. If the Employer thinks appropriate, he can terminate the Contract on convenience at any time as per Section 59 (4) of PPA. Therefore, EOT should not be limited this way as provided in these Sub-rules.

Seventh Amendment

This amendment has addressed two aspects of EOT, i.e. submission of letter by the Contractor and time extension itself.

Sub-rule (1a) of Rule 120: Sub-rule 1 has been superseded by this Sub-rule with the provision that for the Contracts, period of which has expired before the commencement of this Sub-rule, the Contractor should submit a letter requesting EOT within 21 days from the date of effectiveness of this amendment. This new provision has the benefit due to the fact that it seems to be the treatment for all contracts which are not completed in time and are considered to be chronic.

Sub-rule (6) of Rule 120: The added provision in this Sub-rule has overruled the limit of 50% EOT for the Contract which are not completed even after granting EOT 50% or more before the commencement of this Sub-rule. Based on the work progress and remaining works, the Secretary may grant EOT of up to 1 year. Objective of this addition is also the same as that of Sub-rule (1a) to address the problems of chronic contracts.

Eight Amendment

This amendment has only replaced the previously amended Sub-rule (6) of Rule 120.

Sub-rule (6) of Rule 120: Similar kind of 1 year EOT as in previous Sub-rule 6 based on technical report could be provided to the Contractor in case of contracts of which the agreement is signed before 2076 Jeshtha 23 and the work has not been completed provided that all other requirements are fulfilled. This provision has further tried to sort out the problems of chronic contracts. However, this kind of repeated similar changes does not carry the essence of the EOT which needs to be made on reasonable ground. Furthermore, this amendment was commenced on 2076 Shrawan 16, but why the deadline of 2076 Jeshtha 23 for EOT request given is not clear in the document. This amendment has brought the provision of *forfeiture* of performance security, other security and deposit in case of the Contractor for not completing the work within extended time provided pursuant to this Sub-rule.

Ninth Amendment

This amendment has again given the Contractor a chance to request for EOT and has also made additional provision relating to liquidated damage.

Sub-rule (1b) of Rule 120: This newly added Sub-rule provides that if the Contractor fails to submit EOT request letter within 21 days as mentioned in the seventh amendment, EOT could again be requested within 15 days from the commencement of this amendment. This is again not clear why this provision is coming in amendments violating the meaning and importance of EOT in the Contract.

This amendment has added the following sub-rules as well:

Sub-rule (6a) of Rule 120: The decision regarding EOT and forfeiture as mentioned in Sub-rule (6) of the eighth amendment should be made within 60 days. This is again linked to the intention of avoiding the Contract period being "time at large".

Sub-rule (6b) of Rule 120: Liquidated damage is not applicable in case a decision as per Sub-rule (6a) of Rule 120 is made for EOT. However, if the Works is not completed with the extended time period, liquidated damage will be applicable from the date before EOT. These two sentences of this Sub-rule are not compatible to each other. There is

no justifiable answer as to why liquidated damage is applicable in one case and not in other.

Sub-rule (6c) of Rule 120: If the Work is not completed within the time extended as per Sub-rule (4) or Sub-rule (6) due to special circumstances or other justifiable reason and there is an assurance of completing the remaining works, Council of Ministers can decide for required EOT but without making additional financial burden to the public entity. This Sub-rule has further made things quite unclear due to the lack of clear definition of special circumstances or justifiable reason. Further, who is responsible for the assurance of remaining works completion is also not clear in the Sub-rule. Again, what the phrase 'additional financial burden' refers to is totally obscure which might invite dispute between the Employer and the Contractor. This Sub-rule has added a burden to Council of Ministers for deciding on EOT, due to which the public entity might try to avoid of making EOT decision.

Sub-rule (6d) of Rule 120: If the EOT is granted as per Sub-rule (6c) due to the Contractor's default, the Contractor will be ineligible to partake in new public procurement from the date of EOT decision up to the work completion date. This is opposite to the essence of the liquidate damage which requires that if the Work is not completed due to the Contractor's default, the Employer will be hindered from realizing the benefit of the project. In such case, the compensation is reimbursed from the Contractor. But this Sub-rule has taken quite different track of punishing the Contractor.

Sub-rule (6e) of Rule 120: PPMO should be informed of EOT decision by the public entity and PPMO should publish the notice of debarment applied to the Contractor.

Sub-rule (6f) Rule 120: This sub-rule contains punitive measure to the public personnel who does not fulfill his/ her duties as required by this law.

Tenth Amendment

More liberal EOT request letter provision and time threshold of contracts are two major features of this amendment.

Sub-rule (1c) of Rule 120: As per this newly added Sub-rule, if the Contract period is lapsed before the commencement of this amendment and the Contractor was unable to submit a EOT request letter due to any reason, the Contractor can submit to the Employer an EOT request letter within 21 days from the commencement of this amendment. Noticeable here is that there could be any reasons for submitting the EOT request letter.

Sub-rule (6) of Rule 120: Slight change of date from 2076 Jeshtha 23 to 2077 Baishakh 15 has been made in this Sub-rule which has the basis of deciding on EOT.

Sub-rule (6a) of Rule 120: Replacement of previous Sub-rule (6) with this Sub-rule (6) provides the new timeframe of 30 days' and 60 days' timeframe for deciding on EOT as per the submission of EOT request letter. However, if EOT has already been granted as per Sub-rule (6), EOT will not be applicable.

Amendments in a Nutshell

Provisions in above amendments are summarized as below:

i. Submission of EOT request was to be made some days before the completion of contract period, however, changed later four times to make it liberal linking this with the commencement of the respective amendment;
ii. Limitation on the granting EOT period was amended three times starting from 50% of the Contract period through 1 year up to open-dated period by the Council of Ministers;
iii. Competent authority to approve EOT was changed three time from the bid approving authority to the Council of Ministers;
iv. Provision of liquidated damage was unreasonably linked to the EOT.

What Next

It is quite welcoming provision that the liberal provision of EOT request in seventh amendment could be considered as Government's intention to solve the problem of chronic contracts and boost up the construction industries in the country. Similar kind of provision, however, being repeated in the following amendments could have let low (or no)-performing contractors think that they will be spared anyway by such amendments.

EOT is something to be decided on a justifiable basis. However, all amendments seem to be ignoring the basis of granting EOT. Sub-rule (2) of Rule 120 has provided the matters to be considered while deciding on EOT on the one hand. On the other, the amendments have totally missed the provision of Sub-rule (2) of Rule 120. There are a lot of Contracts which are very old, many Contracts are more than five years old, and yet to be completed. If we consider Sub-rule (2) of Rule 120, the question must be asked before deciding on EOT is "are we in a position at the moment to scrutinize whether the situations existed as mentioned in Sub-rule (2) of Rule 120 in the Contract five years ago?". If not, how could it be possible to grant EOT to the Contractor merely on the basis of request for EOT.

Limitation on EOT has further violated the rule of EOT itself. If the risk occurred is not attributable to the Contractor, EOT required due to such risk should be granted without any limit. This is because the Contractor should not be made responsible for anything other than the mistake he has done.

Taking EOT case up to the Council of Ministers might let the public personnel avoid their duty of deciding on EOT. Furthermore, only public personnel are well aware of the situation in the field. Therefore, public personnel up to the Secretary level only should be given the authority to decide on EOT and should make them responsible as well. While deciding on EOT, liquidated damage provision should be reasonably linked.

Liquidate damage is to be decided on the basis of the Contractor's performance and EOT decision. Liquidated damage could be applicable only if the time is extended due to the Contractor's default. In the case of the Employer's risk and thereby EOT, imposition of liquidated damage is not valid.

These repeated amendments on EOT would not convey the good message in to the development sector. Therefore, EOT provision should be amended solely based on its essence and importance so that the capable Contractors could be motivated to complete the Works for the government to be able to realize project benefits in time.

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नेपालमा मध्यस्थताको निर्णय र यसको कार्यान्वयन पक्ष

तुलबहादुर श्रेष्ठ
अधिबक्ता

पृष्ठभुमि

सामान्यतः संलग्न पक्षहरु बीच उत्पन्न भएको करारीय विवाद वा मत भिन्नता मध्यस्थताकालागि प्रस्तुत गरिएकोमा मध्यस्थ वा मध्यस्थहरुले लिखित रुपमा व्यक्त गरेको निष्पक्ष अभिव्यक्तिलाई निर्णय (award) भनिन्छ । पक्षहरुका बीच सम्पन्न सम्झौतामा उल्लेख भए बमोजिम पक्षहरुको सहमतिमा नियुक्ति गरिएको मध्यस्थद्वारा गरिएको निर्णय सामान्यतः अन्तिम र निश्चित हुनु पर्छ । यदि मध्यस्थद्वारा गरिएको निर्णय स्पस्ट र निश्चित नभएमा त्यस्तो निर्णय पक्षहरुका बीच मान्य र वाध्यात्मक नहुन पनि सक्छ । निर्णय गरिनु पर्ने आधारभुत कुरालाई ध्यानमा राखी निर्णय गरिएन भने अन्तिमताको अभाव भएको निर्णय हुने छ । सामान्य अदालतमा प्रस्तुत गरिएको विवादमा सवुद प्रमाणको परीक्षण गरी, आवश्यकता अनुसार विशेषज्ञको राय लिनु पर्नेमा त्यस्तो राय लिई र विवादका पक्षहरुका कानुन व्यवसायीको बहस समेत सुनी निर्णय गरिए जस्तै मध्यस्थ समक्ष प्रस्तुत हुन आएको विवादमा पनि त्यस्ता प्रक्रियाहरुको विद्यमानता रहन्छ । सिद्धान्ततः मध्यस्थको निर्णय अन्तिम हुन्छ । तर मध्यस्थले गरेको कुनै निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३० बमोजिमको अवस्था विद्यमान रहेमा त्यस्तो निर्णय उपर सुनुवाई गरी निर्णय बदर गर्न सक्ने अधिकार सोही दफाले उच्च अदालतलाई प्रदान गरेको छ ।

मध्यस्थाता ऐन, २०५५ बमोजिम पक्षहरुकाबीच उत्पन्न भएका विवाद वा मत भिन्नताहरुको समाधान पक्षहरु आफैँले नियुक्ति गरेको मध्यस्थद्वारा गराउने भनी सम्झौतामा नै उल्लेख गरेको भए सोही बमोजिम मध्यस्थद्वारा समाधान खोजिने छ । आफूद्वारा नियुक्त मध्यस्थद्वारा आफ्ना लागि गरिने निर्णय भएकोले यसको कार्यान्वयन पक्षलाई सामान्य अदालतले गरेको फैसला जसरी लिने गरिएको पाईदैन । मध्यस्थद्वारा गरिने निर्णय र सो को कार्यान्वयनका सम्बन्धमा कतिपय अस्पष्टताका रहेको हुँदा एउटा निश्चित अवधाराणा बनाई कार्यान्वयन पक्षलाई सरल बनाउन सहजिकरण होस भन्ने आशयका साथ यो लेख तयार गर्ने प्रयत्न गरिएको छ ।

(१) **मध्यस्थले निर्णय लिँदा ध्यान पुऱ्याउनु पर्ने कुराहरू :** मध्यस्थले आफू समक्ष पेश गरिएका विवाद वा मतभिन्नताको समाधानका लागि निम्न कुराहरुलाई ध्यान पुऱ्याई निर्णय गर्नु पर्ने कानुनी व्यवस्था छः

- **निर्णय लिनु पर्ने अबधि** : पक्षहरुका बीच भएको सम्झौतामा अन्यथा उल्लेख भएकोमा बाहेक मध्यस्थता ऐन, २०५५ को दफा १७ को उपदफा (७) को अधिनमा रही दफा १४ बमोजिमका

कागजातहरु मध्यस्थ समक्ष पेश भएको साधारणत: एक सय बीस दिन भित्र निर्णय दिनु पर्छ भन्ने कानुनी व्यवस्था गरिएको छ । ऐनको दफा २४ को उक्त अवस्था असाधारण अवस्था हो भनी तथ्य सहित निवेदन गरेमा सो अवधि बढाउन सकिने व्यवस्था गरिएको छ । तर मनासिव माफिकको कारण सहितको अवधि हो वा होइन भन्ने कुरा विवादको तथ्यमा भर पर्ने भएकाले सो कुरालाई समेत ध्यान दिई निर्णय लिनु पर्ने सीमा तोकिएको हुँदा मध्यस्थहरु पनि कानुनी सीमा भित्रै रहनु पर्ने हुन्छ ।

- **बहुमतको निर्णय मान्य :** मध्यस्थहरुको संख्या एक जना वा सो भन्दा बढी भएको अवस्थामा वहुसंख्यकको राय नै मध्यस्थको निर्णय भएको मानिने छ। मध्यस्थहरुको राय भिन्न भै सर्वसम्मती कायम हुन नसकेमा सम्झौतामा अन्यथा उल्लेख भएको अवस्थामा बाहेक अन्य मध्यस्थको राय मध्यस्थको निर्णय मानिन्छ भन्ने कानुनी व्यवस्था छ । कुनै मध्यस्थ मध्यस्थताको निर्णयमा सहमत हुन नसकेमा निजले असहमतिको राय व्यक्त गर्न सक्ने व्यवस्था मध्यस्थता ऐन, २०५५ को दफा २६ मा रहेको छ ।
- **निर्णयमा खुलाउनु पर्ने कुराहरू :** सामान्यत: मध्यस्थले गरेको निर्णयमा मध्यस्थता गर्न सुम्पिएको विवाद वा मत भिन्नताको छोटकरी विवरण, मध्यस्थताको क्षेत्राधिकार उपर कुनै पक्षले प्रश्न उठाएको भए क्षेत्राधिकार भएको ठहर गर्ने आधार, मध्यस्थको ठहर र उक्त ठहरमा पुग्न लिईएका कारण र आधार, भरिभराउ वा क्षतिपूर्ति गरी दिनु पर्ने कुरा वा रकम भरी भराउ गर्नु पर्ने रकममा लाग्ने ब्याज, र उक्त ऐनको दफा ३१ को म्याद भित्र मध्यस्थको निर्णय कार्यान्वयन नभएमा त्यस्तो समय व्यतित भए पछि लाग्ने थप ब्याज दर, मध्यस्थताको निर्णय भएको स्थान र मिति समेत स्पस्ट खुलाउनु पर्ने छ । पक्षहरुका बीच भएको सम्झौतामा अन्य कुरा खुलाउनु पर्ने भनी उल्लेख भएको भएमा त्यस्ता कुराहरु पनि ऐनको दफा २७ बमोजिम खुलाउनु पर्नेछ । तर यसो भन्दैमा अस्पष्ट र अनिश्चित निर्णय गर्न हुँदैन । मध्यस्थको निर्णय ठोस हुनु पर्दछ । यदि शर्तयुक्त निर्णय दिने अवस्था आएमा विकल्पहरुको पनि व्याख्या विश्लेषण गरी स्पस्ट खुलाउनु पर्नेछ ।
- **मध्यस्थको दस्तखत :** मध्यस्थले गरेको निर्णयमा प्रत्येक मध्यस्थले आ-आफ्नो दस्तखत गर्नु पर्छ । दस्तखत गर्न नसक्ने कुनै कारण भएमा त्यस्तो कारण खुलाई बाँकी मध्यस्थले उक्त निर्णयको सक्कल प्रतिमा दस्तखत गर्नु पर्छ ।
- **निर्णय सुनाउनु पर्ने :** मध्यस्थ वा मध्यस्थहरुले निर्णय गरिसकेपछि सो निर्णय पक्षहरु समक्ष पढी सुनाउनु पर्छ। मध्यस्थले गरेको निर्णय सुनाई सके पछि सो निर्णयको एक/एक प्रति सबै पक्षलाई उपलब्ध गराउनु पर्छ । पक्षहरुलाई सुनाईएको निर्णयको प्रतिलिपी बुझाएको निस्सा मिसिल सँलग्न गरी राख्नु पर्छ । निर्णय सुनाउन समय तोकिएकोमा कुनै पक्ष उपस्थित नभएमा वा उपस्थित भए पनि निर्णयको प्रतिलिपी बुझिलिन ईन्कार गरेमा सो कुरा जनाई निर्णयको प्रतिलिपी संलग्न गरी निजलाई सूचना दिनु पर्ने व्यवस्था मध्यस्थता ऐन, २०५५ को दफा २८ ले गरेको छ। यो व्यवस्था वाध्यात्मक व्यवस्था हो ।

■ *लेखक अधिवक्ता हुनुहुन्छ ।*

- **दोहोऱ्याई निर्णय गर्न नहुने :** मध्यस्थता ऐन, २०५५ को दफा ३० बमोजिम उच्च अदालतले दिएको आदेश बाहेक मध्यस्थले आफू समक्ष सुम्पिएको बिषयमा एक पटक निर्णय गरिसकेपछि गणितिय, छपाई, टाईपिङ्ग वा त्यस्तै प्रकृतिका सानातिना त्रुटी सच्याउन र त्यसमा छुट भएको कुरा समावेश गर्न बाहेक निर्णयको मूल सारमा असर पर्ने गरी सोही बिषयमा पुनः अर्को निर्णय गर्नु हुँदैन भन्ने कानुनी व्यवस्था उक्त ऐनको दफा २९को उपदफा (१) मा गरिएको छ। मध्यस्थको निर्णयमा भएको त्रुटी सच्याउन पर्ने भन्ने कुनै पक्षलाई लागेमा निजले निर्णयको प्रतिलिपी पाएको मितिले तीस दिन भित्र मध्यस्थसमक्ष निवेदन दिनु पर्छ। त्यस्तो निवेदन परे पछि मध्यस्थले सो त्रुटी सच्याउन वा छुट भएको कुरा समावेश गर्न मनासिव देखेमा त्यस्तो निवेदन प्राप्त भएको मितिले १५ दिन भित्र त्रुटी सच्याउन वा छुट भएको कुरा समावेश गर्न सक्ने छ। यस्तो निर्णय गर्दा छुट्टै पर्चा खडा गर्नु पर्ने छ। तर निवेदन नपरे पनि मध्यस्थ आफैँले त्यस्तो कुरा सच्याउन आवश्यक ठानेमा निर्णय भएको तीस दिन भित्र पर्चा खडा गरी सच्याई त्यसको जानकारी सम्बन्धित पक्षलाई दिनु पर्ने ब्यबस्था पनि ऐनको दफा २९ को उपदफा (२) मा गरिएको पाईन्छ।
- मध्यस्थले गरेको निर्णयमा कुनै पक्षले दाबी पेश गरेको कुराहरुमध्ये कुनै कुराका सम्बन्धमा मध्यस्थले निर्णय गरेको रहेनछ भने सो कुराका हदसम्म अर्को पक्षको सहमति लिई मध्यस्थले निर्णय गरेको मितिले तीस दिन भित्र सो कुरामा निर्णय हुन निवेदन दिन सक्ने व्यवस्था पनि उक्त ऐनको दफा २९ को उपदफा (३) ले गरेको छ। त्यसरी निवेदन परेमा निवेदन परेको मितिले पैँतालिस दिनभित्र सो हदसम्म सीमित रही पुरक निर्णय गर्न सक्छ। अर्को पक्ष सहमत नभएमा भने निर्णय गर्न बाँकी कुराका सम्बन्धमा पुरक निर्णय गर्न मध्यस्थले सक्दैन। त्यसै गरी मध्यस्थको निर्णयमा कुनै कुरा वा अंश अस्पष्ट भएकाले व्याख्या गर्न कुनै पक्षले अर्को पक्षलाई सूचना दिएमा मध्यस्थको निर्णय भएको मतिले तीस दिनभित्र मध्यस्थ समक्ष अनुरोध गर्न सक्छ। पक्षहरुबाट त्यसरी अनुरोध भै आएमा सो को पैँतालिस दिनभित्र मध्यस्थले अस्पष्ट भएको कुराको व्याख्या गरी स्पष्ट पार्न सक्छ। यस्तो स्थितिमा पनि दुवै पक्षको सहमति हुनु पर्छ। सहमति नभई एकपक्षीय सहमतिका आधारमा अस्पष्ट भएको कुराको ब्याख्या गरी स्पष्ट पार्न सक्तैन भन्ने व्यवस्था पनि सोही ऐनको दफा २९ को उपदफा (४) ले गरेको छ।

(२) निर्णय दिन नहुने अबस्था : बिवाद वा मतभिन्नतासँग मध्यस्थले निर्णय गर्न नहुने बिषय अभिन्न रुपमा गाँसिएको रहेछ भने त्यस्तो बिषयमा निर्णय गर्नु हुँदैन। त्यस्तो बिषय विवाद वा मत भिन्नतासँग अभिन्न रुपमा गाँसिएको भन्ने कुरा सम्झौता वा अन्य कुराहरुबाट देखिएको हुनु पर्छ। आफूले निर्णय गर्न नहुने अवस्था परेमा मध्यस्थले सो कुरा को सूचना सम्बन्धित पक्षहरुलाई दिनु पर्छ। त्यस्तो सूचना प्राप्त गरेकोमा सो प्राप्त गरेको मितिले पैँतिस दिन भित्र सम्बन्धित पक्षले प्रचलित कानुमा जुनसुकै कुरा लेखिएको भएता पनि अदालतमा उजुर गर्न सक्दछ। त्यसरी पक्षहरुबाट उजुरी परेको खण्डमा अदालतले कानुन बमोजिम गरिदिनु पर्दछ भन्ने व्यवस्था ऐनको दफा २५ ले गरेको छ।

(३) निर्णय बदर हुन सक्ने अबस्था : मध्यस्थले गरेको निर्णयमा चित्त नबुने पक्षले निर्णय सुनि पाएको वा निर्णयको सूचना पाएको मितिले पैंतिस दिनभित्र त्यस्तो निर्णय बदर गराउन चाहेमा सम्बन्धित कागजातहरु र निर्णयको प्रतिलिपी समेत संलग्न गरी उच्च अदालत समक्ष निवेदन दिनु पर्छ । निवेदनको प्रतिलिपी मध्यस्थ र सम्बन्धित पक्षलाई दिनु पर्छ । त्यस्तो निवेदन परेमा उच्च अदालतले त्यस्तो निर्णय बदर गर्न वा आवश्यकता अनुसार पुनः निर्णय गर्न आदेश दिन सक्ने छ । यसरी निवेदन दिने पक्षले देहायको कुनै कुरा प्रमाणित गरेमा मात्र उच्च अदालतले मध्यस्थको निर्णय बदर गर्न वा पुनः निर्णय गराउन आदेश दिन सक्दछ अन्यथा सक्दैन भन्ने व्यवस्था मध्यस्थता ऐन,२०५५ का दफा ३० को उपदफा (२) ले गरेको छः

- सम्झौताका कुनै पक्ष सम्झौता गर्दाका बखत कुनै कारणले सम्झौता गर्न असक्षम रहेको वा पक्षहरु जुन मुलुकको कानुनको अधिनमा रहेका छन सो कानुन वा त्यस्तो कानुन स्पस्ट हुन नसकेकोमा नेपाल कानुन बमोजिम सो सम्झौता बमोजिम बैध नरहेको,
- निवेदन गर्ने पक्षलाई मध्यस्थ नियुक्ति गर्नका लागि वा मध्यस्थताको कारवाहीका सम्बन्धमा समयमा नै रितपुर्वक सूचना नदिएको,
- मध्यस्थलाई नसुम्पिएको विवादसँग सम्बन्धित बिषय वा मध्यस्थलाई सुम्पिएको शर्त बिपरित वा मध्यस्थलाई सुम्पिएको क्षेत्र बाहिर गै निर्णय भएको,
- नेपाल कानुन प्रतिकूल सम्झौता भएकोमा बाहेक मध्यस्थताको गठन विधि वा त्यस्तो सम्झौता नभएकोमा यस मध्यस्थता ऐन,२०५५ अनुसार नभएको,
- तर मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (१) अनुसार निवेदन परेकोमा उच्च अदालतले देहायको अवस्थामा मध्यस्थताको निर्णय बदर गर्न सक्ने व्यवस्था सोही ऐनको दफा ३० को उपदफा (३) ले गरेको छ ।
- मध्यस्थले निर्णय गरेको विवाद नेपाल कानुन बमोजिम मध्यस्थद्वारा निरुपण हुन नसक्ने भएमा,
- मध्यस्थले गरेको निर्णय सार्वजनिक हित वा नीति प्रतिकूल भएमा,

(४) मध्यस्थको निर्णयको कार्यान्वयन : सामान्यतः पक्षहरुले मध्यस्थको निर्णयको प्रतिलिपी पाएको पैंतीस दिनभित्र निर्णय कार्यान्वयन गर्नु पर्ने कानुनी व्यवस्था मध्यस्थता ऐन,२०५५ को दफा ३१ मा गरिएको छ ।

- **पक्षहरू आपसमा मिलि गरिने कार्यान्वयन** : मध्यस्थले गरेको निर्णयमा चित्त बुझाई पक्षहरु आफैँले पनि उक्त निर्णयको प्रतिलिपी पाएको मितिले ४५ दिन भित्र कार्यान्वयन गर्न सक्नेछन ।
- **अदालतद्धारा निर्णय कार्यान्वयन :** मध्यस्थता ऐन,२०५५ को दफा ३१ बमोजिम तोकिएको अवधि भित्र निर्णय कार्यान्वयन हुन नसकेमा सो म्याद नाघेको तीस दिनभित्र पक्षले मध्यस्थको निर्णय कार्यान्वयनका लागि सम्बन्धित जिल्ला अदालतमा निवेदन दिन सक्ने छ । त्यसरी निवेदन परेमा जिल्ला अदालतले सो निर्णयलाई आफ्नो फैसला सरह साधारणतः तीस दिनभित्र कार्यान्वयन गरिदिनु पर्ने व्यवस्था सोही ऐनको दफा

३२ मा गरिएको छ । यस प्रयोजनका लागि सम्बन्धित जिल्ला अदालत भन्नाले सम्झौता वा मध्यस्थता हुने ठाँउ तोकिएकोमा सोही ठाँउको र त्यस्तो ठाँउ नतोकिएकोमा विवाद वा मत भिन्नता उत्पन्न भएको वा मध्यस्थताको कारवाही र निर्णय भएको वा साधारणतया कुनै पक्ष वसोवास गरी आएको ठाँउको प्रादेशिक क्षेत्राधिकार भएको जिल्ला अदालत सम्झनु पर्दछ भनी सोही ऐनको दफा २ को खण्ड (ग) मा उल्लेख गरिएको छ ।

- **बिदेशमा भएको निर्णय कार्यान्वयन :** विदेशमा भएको मध्यस्थको निर्णय कार्यान्वयन गराउन चाहने पक्षले सम्बन्धित लिखतहरु संलग्न गरी सम्बन्धित उच्च अदालतमा निवेदन दिनु पर्ने कानुनी व्यवस्था मध्यस्थता ऐन,२०५५ को दफा ३४ को उपदफा (१) र उपदफा (२)को देहाय खण्डहरुको अवस्थामा नेपालमा कार्यान्वयन हुन सक्ने व्यवस्था गरिएको पाईन्छ । दफा ३४ को उपदफा (१) को देहायको लिखतहरु संलग्न गरी निवेदन उच्च अदालत समक्ष दिनु पर्ने छ:

- मध्यस्थताको निर्णयको सक्कल वा त्यसको प्रमाणित प्रीतलिपी प्रति,
- सम्झौताको सक्कल वा त्यसको प्रमाणित प्रतिलिपीको प्रति,
- मध्यस्थको निर्णय नेपाली भाषामा भएको रहेनछ भने सो निर्णयको नेपाली भाषामा भएको औपचारिक अनुवाद । त्यसै गरी दफा ३४ को उपदफा (२) मा भएको व्यवस्था अनुसार विदेशमा भएको मध्यस्थको निर्णयलाई मान्यता दिने तथा कार्यान्वयन गराउने सम्बन्धमा व्यवस्था भएको कुनै सन्धिको नेपाल पक्ष भएको रहेछ भने सो मध्यस्थको निर्णय त्यस्तो सन्धिको व्यवस्था तथा त्यसको पक्ष बन्दा उल्लेख गरिएका शर्तहरुको अधिनमा रही देहायको अवस्थामा मान्यता दिई नेपालमा कार्यान्वयन हुनेछ ।
- सम्झौतामा उल्लेख कानुन तथा कार्यविधि बमोजिम मध्यस्थ नियुक्ति भई निर्णय भएको भएमा,
- पक्षहरुलाई मध्यस्थताको कारवाहीको समयमै जानकारी गराईएको भएमा,
- सम्झौताका शर्तहरु वा मध्यस्थलाई सुम्पिएको विवादहरुमा मात्र सिमित रही निर्णय भएको भएमा,
- जुन मुलुकमा निर्णय भएको हो सो मुलुकको कानुन बमोजिम सो निर्णय पक्षलाई अन्तिम र बन्धनकारी भईसकेको भएमा,
- जुन व्यक्तिले मध्यस्थको निर्णय कार्यान्वयन गराउन निवेदन दिएको हो सो व्यक्तिको मुलुकको कानुनमा वा मध्यस्थता भएको स्थानको मुलुकको कानुनमा नेपालमा भएको मध्यस्थको निर्णय कार्यान्वयन हुन नसक्ने कानुनी व्यवस्था नभएमा,
- निर्णय भएको मितिले नब्बे दिनभित्र निर्णय कार्यान्वयनको लागि निवेदन परेको भएमा, त्यसरी मध्यस्थता ऐन, २०५५ को दफा ३४ को उपदफा (३) मा उपदफा (१) बमोजिम परेको कुनै निवेदनमा सोही ऐनको दफा ३४ को उपदफा (२) बमोजिमका शर्तहरु पुरा भएको छ भन्ने कुरामा उच्च अदालत सन्तुष्ट भएमा सो अदालतले सो निवेदनलाई कार्यान्वयनका लागि सम्बन्धित जिल्ला अदालतमा पठाउनु पर्नेछ । यस दफा ३४

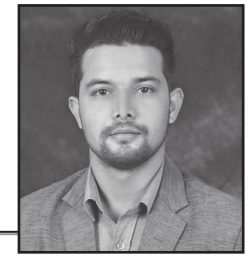
मा अन्यत्र जुनसुकै कुरा लेखिएको भएता पनि जुन विवाद निरुपण भै निर्णय गरिएको हो सो विवाद नेपाल कानुन बमोजिम मध्यस्थद्वारा समाधान हुन नसक्ने प्रकृतिको भएमा र त्यस्तो निर्णयको कार्यान्वयन गर्दा सार्वजनिक नीतिको विरुद्ध हुने भएमा कार्यान्वयन हुन नसक्ने उल्लेख गरिएको छ ।

यसरी विदेशमा भएको मध्यस्थको निर्णय कार्यान्वयन र नेपालमा भएको मध्यस्थको निर्णयको कार्यान्वयन तुलना गर्दा स्वदेशमा गरिएको मध्यस्थ निर्णयको कार्यान्वयन सरल र सहज रुपमा हुने देखिन्छ। मध्यस्थले विदेशमा गरेको निर्णय कायान्वयनका सम्बन्धमा माथि उल्लेखित आधारहरुको पुर्ण पालना गर्न जरुरी भएकोले त्यति सहज नहुन सक्छ ।

(५) ब्याज तिर्नु पर्ने : पक्षहरुले आपसमा गरेको सम्झौतामा अन्यथा व्यवस्था भएकोमा बाहेक कुनै पक्षले अर्को पक्षलाई कुनै रकम बुझाउने गरी मध्यस्थबाट निर्णय भएमा विवाद वा मत भिन्नतासँग सम्बन्धित व्यवसायको प्रकृति समेतको बिचार गरी त्यस्तो कारोवारमा बाणिज्य बैंकले तत्काल अपनाएको ब्याज दर भन्दा बढी नहुने गरी मध्यस्थले तोकी दिएको ब्याज समेत बुझाउनु पर्ने व्यवस्था मध्यस्थता ऐन, २०५५ को दफा ३३ मा गरिएको छ । सो दफामा गरिएको व्यवस्था अनुसार मध्यस्थको निर्णय भएको मिति देखि मध्यस्थको निर्णय कार्यान्वयन गर्नु पर्ने समयावधिसम्मको अवधिको हकमा कुनै ब्याज लाग्दैन । यस किसिमको कानुनी व्यवस्थाबाट हेर्दा मध्यस्थबाट हुने निर्णय छिटो र छरितो तरिकाले सम्पन्न गर्न पक्षहरुको सहयोगको आवश्यकता पर्ने देखिन्छ ।

(६) मध्यस्थको निर्णय कायान्वयनमा अदालतको न्यायिक सकृयता : सिद्धान्ततः मध्यस्थले गरेको निर्णय अन्तिम हुने विश्वव्यापी प्रचलन रहे तापनि नेपालमा त्यसो भएको पाईंदैन । अधिकांश मध्यस्थको निर्णय उपर उच्च अदालतमा पुनरावेदन गर्ने र उच्च अदालतको फैसला उपर पनि सर्वोच्च अदालतमा समेत रीट लिई जाने अर्थात कानुनले प्रदान गरेका सुविधा उपयोग गर्ने भन्दा कानुनका छिद्र पहिल्याई सर्वोच्च अदालतसम्म जाने परिपाटी विकास भएको छ । यस्तो काम कारबाहीले मध्यस्थताको माध्यमबाट विवादको निरोपण छिटो छरितो तरिकाले हुन्छ भन्ने मध्यस्थताको आधारभूत मान्यतालाई कमजोर बनाई रहेको देख्न सकिन्छ । जसको परिणाम मध्यस्थको निर्णयको महत्व दिन प्रति दिन घट्दोक्रममा रहेको पाईन्छ । मध्यस्थता ऐन, २०५५ को दफा ३० बमोजिम मध्यस्थको निर्णय बदर गर्न सकिने कानुनी व्यवस्था भएता कतिपय विवादहरुको व्याख्या गर्दा मध्यस्थता ऐन, २०५५ को मर्म र भावना विपरति व्याख्या गर्ने गरिएका कारण मध्यस्थको मूल मर्म र भावना लडरखडाउन पुगेको छ र जसका कारण मध्यस्थताको निर्णय कार्यान्वयनमा ढिलाई समेत भै रहेका तथ्यहरु प्रत्यक्षरुपमा देख्न सकिन्छ । मध्यस्थताको काम कारवाहीका रुपमा सकृय संस्थाको रुपमा नेपाल मध्यस्थता परिषदले यस विषयमा उच्च अदालत तथा सर्वोच्च अदालतका माननिय न्यायाधिशहरुसँग अन्तर्कृया गरी छलफल चलाउन कोशिस गरेको भएता पनि सो मध्यस्थता ऐन, २०५५ को मर्म र भावना बमोजिम व्याख्या अझ पनि हुन सकेको पाईदैन । मध्यस्थता ऐन, २०५५ को मर्म र भावनाका आधारमा मध्यस्थहरुद्वारा भएका निर्णयहरुलाई व्यवस्थित र मर्यादित बनाउने गरी सुधारात्मक उपायहरु (corrective measures) को रुपमा मात्र फैसलाहरु हुने गरेमा स्वभाविक रुपमा मध्यस्थता ऐन, २०५५ को असल कार्यान्वयन हुने तर्फ क्रमशः विकाश हुँदै जाने छ भन्ने आशा गर्न सकिन्छ ।

Suitability of Arbitration Act as Lex Arbitri amid COVID-19



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Abstract

Currently, world is reeling under the effect of Novel Coronavirus (the, "**COVID-19**"). The effect of COVID-19 has been felt across all sectors around the world. Due to the travel restrictions and limited mobility, the usual process of resolving dispute being onsite presence of the adjudicator/arbitrator and parties of the dispute has made impractical. This has led arbitrators, arbitral institutions and legislators to identify novel method of conducting the proceedings and rendering the award. This article looks into the challenges of conducting arbitration of dispute between contracting parties pursuant to the Arbitration Act of Nepal, 2055. (the "**Arbitration Act**"). Firstly, this article will give brief outline of best practices adopted by arbitral institutions and states across various jurisdiction for facilitating arbitration during COVID-19. Secondly, it will identify the challenges faced by the parties for conducting arbitration pursuant to the Arbitration Act as *lex loci arbitri* on various aspects namely (a) limitation period (b) conducting proceedings and rendering award due to COVID-19. Finally, this article shed light on the measures that may be necessary for expediting arbitration governed by the Arbitration Act as *lex arbitri*.

Introduction

World is reeling under the effect of Novel Coronavirus (the, "**COVID-19**"). The effect of COVID-19 has been felt across all sectors around the world. Lockdown measures caused the travel restrictions and limited mobility, due to this the usual process of resolving dispute being onsite presence of adjudicator/arbitrator and parties has been impractical during such kind of pandemic situation. This has led arbitrators, arbitral institutions and legislators to identify novel method of conducting the proceedings and rendering the award.

1. **Best Arbitral Practices during COVID-19**

Various jurisdiction and arbitral tribunals have introduced measures conducive to arbitration during COVID-19. These measures include (a) extension of statute of limitation (b) relaxation of procedural formalities of conducting arbitration.

Indian Supreme Court through *suo moto* cognizance has also extended the statute of limitation under various laws (including Indian Arbitration Act) until further notice with immediate effect from March 15, 2020. Turkey has introduced Law No. 7226. This law suspends the statute of limitation applicable to parties under Turkish arbitration law starting from March 13, 2020 (including this date) until 30/4/2020.

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Further arbitral institutions have introduced measures at relaxing the procedural formalities for conducting arbitration. International Chamber of Commerce (ICC) has issued Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic ("**Guidance Note**"). The ICC Guidance Note has suggested that arbitrators has to consult the parties for conducting the arbitration as far as possible by encouraging them for written submissions, submission of evidences electronically, and use of video/conferences. Further, ICC Secretariat has also urged all communications with secretariat has to be done electronically. Guidance Note urges parties to agree options of cyber-protocol while conducting the virtual hearings to ensure safety and uniformity.

Other similar measures includes Seoul Protocol on Video Conferencing in International Arbitration, which provides guidance on conducting online hearings. Similarly, arbitral institutions such as Stockholm Chamber of Commerce (SCC), International Dispute Resolution Centre (IDRC) are using Skype, Zoom for conducting arbitration while Singapore International Arbitration Centre is launching own platform in collaboration with other entities.

2. Suitability of Arbitration Act during COVID-19

A. Limitation Period under the Arbitration Act

The Arbitration Act has prescribed timeline for serving the notice of arbitration, claims, counter-claims and other notices. However, due to lockdown measures imposed by Government of Nepal the parties of a dispute may not be able to meet the timeline prescribed by the Arbitration Act. Supreme Court of Nepal comprising of larger full bench on May 18 in *Maheshwor Shrestha as Plaintiff and the Writ Section of Supreme Court as Respondent* has issued an order (SC Order) and declared the period of lockdown as zero period. The SC Order further held that period from March 22 until relaxation of lockdown will not be counted for the purpose of identifying timeline/statute of limitation of resorting to courts. Further, as per para 65 of SC Order, such benefit should be provided to the arbitration and court administered mediation.

The Arbitration Act has separate timeline for extension of timeline for filing claims, counter-claims and rejoinders. As per Sub-section (4) of Section 14 of the Arbitration Act parties can file for extension of timeline if such inability is due to circumstances beyond the control of parties. It is likely that certain inability of parties will be due to lockdown measures. Para 53 of SC Order has also held that COVID-19 doesn't constitute circumstances beyond control as it has not end and beginning. Therefore SC Order is likely to be applied instead of Sub-section (4) of Section 14 despite independent provision prescribed in Arbitration. Further as per Para 65 (2) (g) of SC Order, parties having more than 30 days for resorting to forums after relaxation of lockdown measures will be entitled to such additional days.

However, it is not clear whether timeline under dispute resolution clause requiring certain time period of negotiation before resorting to arbitration (multi-tier dispute resolution clause) will also be deemed as zero period under the Supreme Court decision.

B. Conducting Proceedings under Arbitration Act

a. *Virtual Hearing, Examinations and Cross-Examination*

Courts across jurisdictions have specifically held that conducting hearing through video conferencing will not be inconsistent with the requirement of due process and equality of parties. In *Eaton Partners LLC v. Azimuth Capital Mgmt. IV Ltd* a U.S. court held that the examination of a

witness by video conference would not constitute deprivation of liberty of fair hearing.

Due to COVID-19 it has not been feasible to conduct on-site hearing. Further due to restrictions on mobility, physical submission of documents and notice has been severely affected. The Arbitration Act doesn't explicitly states that video-conferencing can be adopted for conducting hearing. However, section 19 of the Arbitration Act allows parties to agree on procedure of arbitration if such procedure has not been mentioned in agreement. If parties cannot agree on procedure then arbitrator can determine the procedure applicable to arbitration. This seems to suggest arbitrator will be able to explore option of carrying out hearing through video-conferencing.

Sub-section (5) of Section 19 of the Arbitration Act requires the respondent to ensure attendance of the witness before the arbitral tribunal. However, the wording of *before the tribunal* in Sub-section (5) of Section 19 seems as suggesting physical presence of witness. However, Evidence Act, 2031 (as amended on 2077/02/20) has allowed courts to take oral evidence through video conferencing. Evidence Act has defined courts as including any authority hearing the case. It is likely that arbitral tribunal will also fall under this definition. If this provision is not applicable to arbitral tribunal, then this would adversely affect the examination of witness during pandemic due to limited mobility and travel restrictions. This provision is not conducive to current dispute which is to be resolved by the Arbitration Act as *lex arbitri.*

b. *Serving of Notice*

Section 20 of the Arbitration Act also provides that notice has to be served during the course of arbitration can be served through the telefax, telegram, telex or similar address with telecommunication medium. Further such notice can also be served in address made available by parties to each other or to the arbitral tribunal. This provision of the Arbitration Act is helpful in serving of notices even in the context of COVID-19. In the case of *Nepal Air Service Corporation v. Appellate Court Patan,* the Supreme Court held that "If any party doesn't respond to arbitration and doesn't involve itself in the procedure even after being acknowledged of it, cannot apply to the Appellate Court against the award of the tribunal and such court should not entertain the application. Such application should only be entertained, if the other party hasn't informed about it." Therefore, serving the notice through electronic medium seems to be consistent with Supreme Court jurisprudence.

However, as per Electronic Transactions Act, 2063 (the, "**ETA**") the arbitral documents are not subject to formalities prescribed under it. There will be difficulty in authentication due to lack of authentication protocol for electronically executed arbitral documents like claims, counter-claims. Parties can address these through consensus or through amendment of procedural orders.

c. *Submission of Evidence*

As per Section 14 of the Arbitration Act, parties must furnish the claims and necessary evidences necessary to the claims. This language doesn't require physical submission of evidence. Therefore, parties may be able to submit the electronic documents to arbitral tribunals and other parties of the dispute. However, procedural order issued by arbitral tribunal may have requirement of physical submission of documents. Further as per explanation of section 35 of Evidence Act, 2031 (as amended on 2077/02/20) the records also has been defined to mean digital records stored in electromagnetic or optical medium. This amendment will assist in serving the evidence by parties to the arbitral tribunal in digital medium.

d. *Rendering Award*

Section 17 of the Arbitration Act provides that

arbitrator can determine the proceedings based on consent of parties. Further section 20 of the Act also provides options of sending notices to address shared between parties. These provision of Arbitration Act seems to suggest there is no restriction under the Act for rendering award through video conference after obtaining consent of parties and adoption of such process by the arbitrator. However, as per Sub-section (3) of section 26 of the Arbitration Act, arbitrators are required to provide signature on the award. Due to travel restrictions the signature copy signed by one arbitrator may not easily be circulated. This may invite option of singing such award electronically and circulate to the parties. However, due to lack of authentication protocol such digital signature remains yet to be wide in practice.

3. Recommendations and Conclusions

The Arbitration Act of Nepal, 2055 deemed to be suitable for conducting arbitral proceedings in pandemic context. Further recent amendment made in Evidence Act have also assisted in applying the Arbitration Act as *lex arbitri*. However, due to lack of clarity in provisions of the Arbitration Act and Evidence Act and due to ambiguity of SC Order there is still difficulties in resolving dispute during pandemic. Some provisions like (a) requirement of physical presence of witness (b) lack of clarity of SC order on multi-tier dispute resolution clauses (c) the authentication dilemma of digital signature of parties. Further there are also lack of proper security protocols and guidelines for conducting virtual arbitration under the Arbitration Act.

The lawmakers should streamline the provisions of the Arbitration Act and Evidence Act so that witness can be examined by arbitrators without physical presence of arbitrators. Further Government of Nepal should publish Gazette notification pursuant to Sub-section (2) of Section 72 of ETA. The notification should explore options of removing the lack of applicability of digital signature on arbitral documents in the light of escalating pandemic like COVID-19 cases which has hampered mobility of stakeholders. This will also ensure uniformity of regulating electronic signature in context of arbitration. Arbitral institutions and ad-hoc tribunal should also explore options of cyber and uniform online protocol of conducting arbitration and authenticating documents and notices.

Since the physical presence and mobility is likely to be affected in this new normal, stakeholders need to devise ways of expeditiously resolving the dispute.

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कोरोना भाईरस (कोभिड-१९) को संक्रमणको कारण लक डाउन जारी भएको अवधिमा करार संझौता, मध्यस्थता तथा कर कानूनमा असर

राजेश काफ्ले
अधिवक्ता

विश्वभर फैलिएको कोरोना भाइरसको महामारी नियन्त्रणका लागि संसारभरका सरकारहरू हाल प्रयासरत छन । नेपालमा पनि सरकार आफै कोरोना संकरमण नियन्त्रणका लागि जुटी रहेको छ । कोरोना भाइरस संक्रमण नफैलिन दिनको लागि विश्वभरका देशले जस्तै नेपाल सरकारले पनि मिति २०७६/१२/११ गतेवाट लकडाउन वन्दावन्दिलाई शुरुगरी मिति २०७७ जेष्ठ ३२ गते सम्म पुऱ्याएको छ ।

यसरी भएको वन्दावन्दिको कारण सर्म्पुण उद्योग, व्यापार, पेशा, व्यवसाय देखि सवै सामाजिक, आर्थिक, धार्मिक गतिविधि ठप्प प्रायः छन् । जस्ले गर्दा सवै नेपाली नागरिक अभावमा परेका छन । त्यति मात्र होइन, जीवन वाँच्नको लागि खानपानको व्यवस्था समेत नहुँदा धेरै मानिसहरूमा मानसिक समस्या समेत वढिरहेको छ भने सरकार आफैले नेपालराज्य भित्र कोभिड-१९ को भयावह अवस्थालाई मध्यनजर गरि स्वस्थ्य संकटकालको घोषण समेत गर्न गई रहेको अवस्था विद्यमान रहेको छ ।

सरकार भनेको नागरिकहरूको अभिभावक हो । नागरिकको जिवन रक्षा गर्नु सरकारको प्रथमः संवैधानिक, कानूनी र न्यायिक दायित्व हो । यस्तो दायित्वबाट सरकार कदापी पनि पन्छिन मिल्दैन । यस्तो वन्दा वन्दिको कारणले गर्दा मानिसहरूको कुनै आय आर्जनको काम हुन सकेको छैन । मानिसहरूले काम पाएका छैनन । जस्का कारण मानिस भोक भोकै मर्नु पर्ने अवस्था उत्पपन्न भएको छ ।

यस्तो विकराल एवं संकटपुर्ण अवस्थामा मानव जिवन रक्षा गर्न कठिन भएको कुरमा दुईमत छैन । नागरिकको जिवन रक्षाको लागी सरकार गम्भिर हुन पर्ने, नागरिकहरूलाई वांच्नको लागी औषधी र खानाका लागी राहात उपलव्ध गराउनु पर्ने अवस्था छ ।

यसरी सर्म्पुण देश नै लकडाउन/वन्दावन्दि/शुन्य र स्वस्थ्य संकटकाल लागु भएको अवस्थामा मानिसहरू एक ठाउँवाट अर्को ठाउमा जान सक्ने अवस्था नभएकोले करार संझौता अनुसार करारका पक्षहरूले गर्नु पर्ने कतिपय काम कारवाहीमा असर पुग्न जाने प्रष्ट देखिन्छ ।

तोकिएको समयमा करार संझौता बमोजिम काम गर्न नसक्दा संझौताको पक्षहरूलाई ठुलो आर्थिक हानी नोक्सानी पुग्न जाने अवस्था रहेको छ । कोरोना भाईरस (कोभिड-१९) को संक्रमणवाट उत्पन्न यो असहज परिस्थितिको कारण करार संझौताका पक्षहरूको विच गर्नु पर्ने कामका विषयमा विवादहरू उत्पन्न हुने अवस्था रहेको छ । कतिपय संझौतामा यस्तो महामारी रोगको विषयलाई करारका पक्षको काबूवाहिरको परिस्थिती मानी संझौता भएको वखत नै करारका

शर्तमा उल्लिखित भएको अवस्थामा सोही शर्त अनुसार व्याख्या र विवेचना हुन सक्ने अवस्था छ । अर्कोतर्फ यस महामारीको विषयमा संभौताको शर्तमा उल्लेख नभएको अवस्थामा करारका पक्षहरू आफुले कुनै गल्ती नै नगरी उत्पन्न असहज परिस्थितीका कारण काम गर्न असंभव भएको अवस्था हुंदा फ्रष्टेसन अफ कन्ट्रयाक्टको आधारमा कतिपय करार संभौता रद्ध हुने अवस्था रहेको छ ।

कोरोना भाईरस (कोभिड-१९) को संक्रमणवाट उत्पन्न यो असहज परिस्थितिको कारण करारका पक्षहरूका विचमा भएका विभिन्न विषयमा भएको करार संभैतामा यस्तो प्रकृतीको विवाद उत्पन्न हुने अवस्था छन । करार संभौताको कामको प्रकृती र विषय बस्तुलाई प्रचलित करार कानून तथा करार संभौताको शर्त अनुसार पक्षहरूको विचमा उत्पन्न हुने यस्तो विवादको न्यायपुर्ण र उचित तथा तर्कसंगत तवरबाट व्याख्या र विवेचना गरी विवादको समाधान गर्नु पर्ने अवस्था विवाद सामाधान गर्ने निकायको रूपमा कानून बमोजिम गठित मध्यस्थ ट्राईवुलन, अड्डा अदालतबाट गर्नु पर्ने देखिन्छ ।

अवदेखि पक्षहरूका विचमा नयां करार संभौता तयार गर्दा कोरोना भाईरस (कोभिड-१९) जस्ता रोग महामारीको विषयमा फौर्स मेजर शर्तमा नै यो विषयमा स्पष्ट उल्लेख गर्नु पर्ने अवस्था रहन्छ । भोलीका दिन यस्तो परिस्थिती उत्पन्न भएमा पक्षहरूले सोही शर्त अनुसार करार संभौताको व्याख्या विवेचना गरी आफ्नो करारीय दायित्व पुरा गर्नु पर्ने हो होईन स्पष्ट हुन सक्ने हुन्छ र सोही अनुसार कानून बमोजिम गठित मध्यस्थ ट्राईवुलन, अड्डा अदालतबाट व्याख्या गर्न पनि द्विविधा नरहने प्रष्ट देखिन्छ ।

करार संभौतामा उत्पन्न हुने कतिपय विवादहरू आपसी सहमतिमा गरिएकेमा वाहेक अन्य विवादको हकमा कानून बमोजिम गठित मध्यस्थ ट्राईवुलन, अड्डा अदालतबाटनै गर्नु पर्ने हुंदा करार बमोजिम विवादको निप्टारा गर्नको लागी मध्यस्थ नियुक्तिको विषय लगायत मुद्धा गर्नु पर्ने हद्म्यादको विषयमा पनि केही कानूनी अपठ्यारोहरू देखिन्छ ।

यस विषयमा हामी कानून व्यवसायी तथा अदालतका विचमा व्यापक छलफल भै यस्तो कानूनी अप्ठ्यारोहरूको निराकरण तत्काल गर्नु पर्ने महसुस गरी कोरोना भाईरस (कोभिड-१९) को संक्रमणवाट उत्पन्न यो असहज परिस्थितिको कारण अन्य सवै विषय लगायत यस्तै प्रकृतीका करारका पक्षहरूका विचमा भएका विभिन्न विषयको करार संभैतामा यस्तो प्रकृतीको विवाद उत्पन्न भै मुद्धा गर्नु पर्ने कारण परेमा हद्म्याद, म्याद तथा तारेख गुज्रेमा वन्दा वन्दी खुलेको मितिले बाटोको म्याद वाहेक ३० दिन भित्र त्यस्तो हद्म्याद, म्याद तथा तारेख थमाउन पाउने व्यवस्थाको सिद्धान्त प्रतिपादन एवं नजिर श्री सर्वोच्च अदालत, वृहत पुर्ण ईजलासबाट विगत एक महिना अघि कायम भएको छ (फैसला मिति २०७७।२।१५) ।

यसरी करार संभौतामा देखिएका धेरै कानूनी समस्याहरू केही हद सम्म समाधान भए पनि भोलीका दिनमा करारका पक्षहरू विच देखिने विवादहरू सोही अवस्थामा मुद्धा परेका वखत मध्यस्थता ट्राईवुलन तथा अड्डा अदालतबाट विवादको समाधान गर्नु पर्ने देखिन्छ ।

यसै गरी कर संवन्धि विषयमा पनि नेपाल सरकार, आन्तरिक राजस्व विभागले वन्दा वन्दिको म्याद २०७७ जेष्ठ ३२ गते सम्म कायम रहेको अवस्थामा समय शिमा तोकी उक्त मितिवाट जम्मा ७ तथा १५ दिनको समय अर्थात मिति २०७७ असार ७ र १५ गते भित्रे कर वुझउन आउनु भनी जारी गरेको सुचना कुनै पनि दृष्टिकोणवाट कानुन तथा न्याय संगत छैन । यस

कोरोना महामारीको वेला नेपाली जनताको वाँच्न पाउने मौलिक तथा संवैधानिक, कानुनी हक अधिकारहरूको हनन भएको छ ।

कर भनेको राज्यको आयको प्रमुख श्रोत हो । कर भनेको निर्वाध रूपमा देशमा प्रचलित कर कानून बमोजिम आफुले गरि आएको उद्योग, व्यापार, पेशा, व्यवसाय गरी आय आर्जन गरेको अवस्थामा प्रचलित कर कानुन वमोजिम कर तिर्ने वुझाउने सवै नागकिरको कानूनी र नैतिक दुवै कर्तव्य एवं दायित्व हो । हाल विश्वव्यापी रूपमा फैलिएको कोरोना भाईरस (कोभिड-१९) को संक्रमणवाट उत्पन्न असहज परिस्थितिको कारण नेपाल सरकारले लकडाउन मिति २०७७ जेष्ठ ३२ गते सम्म कायम राखेको कारण सर्म्पुण देश नै लकडाउन/वन्दावन्दि/शुन्य र स्वस्थ्य संकटकाल लागु भएको अवस्थामा मानिसहरू एक ठाउँवाट अर्को ठाउमा जान सक्ने अवस्था नभएकोले राजश्व कर वुझाउनको लागि करदाताको प्राय सवै कार्यालयहरू वन्द अवस्थामा रहेको, कर्मचारीहरू समेत काममा नगएकोले गर्दा मिति २०७७ असार ७ तथा १५ गते भित्र कर वुझाउने कार्य असंभव भएको स्पष्ट हुदाँ हुदै विपक्षी विभागले सो तथ्यगत कुराको नजर अन्दाज गरी कर वुझउनको लागि म्याद तोकि सुचना जारी गर्नु, नवुझाए जरिवाना, शुल्क, व्याज र थप दस्तुर समेत लगाउने भन्ने कार्य गलत छन ।

आन्तरिक राजश्व विभागको मूल्य अभिवृद्धि कर, आयकर, अन्तः शुल्क, शिक्षा सेवा शुल्क, टेलिफोन स्वामित्व शुल्क र दुर संचार सेवा दस्तुर लगायतका विवरण र करहरू वुझाउन मिति २०७७ जेष्ठ २५ र जेष्ठ मसान्त सम्म समय थप गरिएकोमा उक्त अवधि पुनः मिति २०७७ असार ७ र १५ गते सम्म थप गरी उक्त मिति भित्र कर विवरण र कर वुझाउने वेबसाईट www.ird.gov.np मा प्रकासित सुचना र सोसंग सम्वन्धित भए गरेका सम्पुर्ण निर्णयहरू तथा पत्रपत्रिका प्रकासित सूचना कार्यन्वयन नगरी नेपाल सरकारद्धारा लकडाउन/वन्दावन्दि र स्वस्थ्य संकटकाल पुर्णरूपमा खुल्ला/समाप्त भई व्यापार व्यवसाय निर्वाध रूपमा गर्न पाउने अवस्था सृजना भई सो भएको उक्त मितिले बाटोको म्याद वाहेक १ महिना भित्र प्रचलित कर कानुन वमोजिम कर असुलउपर गर्ने लगायतका कानुनी प्रकृयाहरू अगाडी वढाउन व्यवस्था नेपाल सरकारले मिलाउनु पर्ने उचित हुने देखिन्छ भनी श्री सर्वोच्च अदालतबाट नेपाल सरकार, आन्तरिक राजस्व विभागको नाममा आदेश भएको छ (आदेश मिति २०७७।२।२८ र मिति २०७७।३।१) ।

COVID-19: Challenges and Opportunities for Small and Medium Enterprises (SMEs) of Nepal

Ananda Ranabhat
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The COVID-19 is a global pandemic infecting millions of people around the world and bringing world economic activities almost stagnant. Nepal is no exception to this pandemic, currently struggling hard with limited health facilities and resources. Falling under the list of the least developed country, Nepal is having a hard time coping with widespread fear and possible outbreak. Impact of COVID-19 will cause serious devastation in the Nepalese economy which seemed to be on the bright side of its revival after the 2015 Earthquake followed by Indian blockade. As the crisis is ramping up in the nation, the already vulnerable economy is facing serious challenges along with the small and medium scale enterprises (SMEs).

Small and Medium Enterprises (SMEs) are one of the important tiers of the national economy with significant contribution as well as in job creation. According to the Industrial Enterprise Act 2016, the business other than the micro and cottage industry with maximum fixed assets up to NRs 100 million are described as small while those with fixed assets between NRs 100 million and NRs 250 million are described as medium enterprises.

Small and Medium Enterprises (SMEs), being a major player in most economies, particularly play a significant role in developing countries. They account for the majority of businesses worldwide and are an important contributor to create jobs and global economic development. They represent about 90% of businesses and more than 50% of employment worldwide whereas, formal SMEs contribute up to 40% of national income (GDP) in emerging economies (World Bank, 2019). In the context of Nepal, SMEs have contributed 22 percent to the country's gross domestic product (GDP) and have created 1.7 million jobs (Nepal Rastra Bank, 2076). NRB report also mentions that till the end of fiscal year 2074/75, there are a total of 275,433 registered SMEs. These enterprises are extensively working on different sectors such as agriculture, poultry, travel, hotel and hospitality, handicrafts, and goods and services, etc

Challenges for SMEs

As it is way too early to predict how deeply the COVID-19 pandemic will impact our economy but with no doubt, SMEs will face a range of challenges that will depend on how our policymakers react to the crisis today.

1. Lack of Working Capital/Liquidity Crisis: SMEs generally have small cash reserves in comparison to the big business houses. The initial capital of most of the SMEs in Nepal are from ancestral property- 33%, own savings- 26%, from the bank and several financial institutions- 22% and rest from other sources (Nepal Rastra Bank, 2076). The immediate operation would

depend upon its financial position and balance sheet. In addition to the lower demand and higher costs due to safety measures, SMEs will face challenges responding to production with credit and liquidity constraints. A fresh fund as a working capital should be injected to almost all the SMEs, which will work as a jumpstart to their operations.

2. **Disruption in the Supply Chain**: Over two-thirds of the trade around the world occurs through global value chains (GVCs), in which production crosses at least one border before final assembly (WB, 2019). With the continuity of movement restriction, the situation further exacerbates as Nepalese SMEs are unable to deliver their finished goods to the market. As our industry relies on China and India for processed and unprocessed raw material, it will be a tough fight for SMEs to survive on the competitive market with all these restrictions and hindrances.

3. Limited demand in the Market/Demand shock: The economic damage caused by the COVID-19 pandemic is largely driven by a fall in demand, meaning that there are no consumers to purchase the goods and services available in the consumer market. The heavily affected sector from this dynamic is the travel, tourism, and hospitality sectors. The demand for non-essential goods and services will also decline as remittance is also about to fall, affecting the purchasing power of the consumers.

4. Rejuvenating Work Environment: Work from home may not be viable for most SMEs other than technology-based enterprises. It will be very challenging to maintain social distance and other precaution measures in our SMEs which is far beyond our practice and culture. Thus, maintaining standard health protocol and personal protective measures of the workforce will be costlier as well as challenging.

Opportunities for SMEs

1. Transformation into Technology based platform business: Many SMEs have innovatively responded to this lockdown. For instance, a food delivery company creates a separate unit to deliver daily essential products such as groceries and medical items. Likewise, the judiciary system in china is going online for filings and hearings are increasingly digitalized. Enterprises can now use digital platforms for marketing, advertisement, and even sell their product and services which benefits them to reduce their product cost and other expenses. Furthermore, digitalization will create opportunities for SMEs to get involved in the Global Value Chain which eventually helps them to achieve a greater milestone.

2. Reinvent the business plan through Market Research: The most promising thing is to be safe and create a safer work environment, retain manpower- retained during a hard time are always productive- and survival of business in this tough period. SMEs should focus on market research with a recent database regarding what the world needs and what it produces. For example, to remain on the competitive market, enterprises producing wearables and cloth related items can switch to mask and personal protective logistic production. Market research with fresh data combined with digitalization will take SMEs to the silver lining.

3. SMEs to reflect inward to make critical analysis of their enterprises: The regular work routine disrupted by the pandemic can be a great opportunity for SMEs to introspect on their strategies and business plan. They can take a strong and bold decision to address the crisis by adopting several countermeasures. They can prepare for the worst-case scenario by cutting off unwanted expenses and layoffs. For SMEs, it is the perfect time for technical and financial audit,

performance evaluation, and adopt the best suitable strategies and plan.

Immediate Response for SMEs

1. Nepal Government should consider on reduction of tax rates and taxable income, offering tax credits, social security contributions and early repayments of tax refunds in order to assure uninterrupted and smooth operation for SMEs.
2. Government should provide refinancing facilities, procedural ease in taking loans and flexibility in their repayment for the survival of SMEs.
3. General public or customer, being one of the important stakes of SMEs, can also contribute by several ways such as:
   - Utilizing and promoting local product and services.
   - Writing positive reviews about them on social platform.
   - Connecting with SMEs through social media and give them a shout.

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1. NEPCA Activities till Ashad 31, 2076/77

1.1 NEPCA 11th Executive Committee: The NEPCA 26th Annual General Meeting was held on 2076/10/18 at Nepal Bar Council building, Kupondol, Lalitpur. The AGM has elected the 11th Executive Committee members as follows:

1.	Mr. Dhurva Raj Bhattarai	- Chairperson
2.	Mr. Birendra Bahadur Deoja	- Immediate Past President
3.	Mr. Bipulendra Chakravartty	- Vice – Chairman
4.	Mr. Baburam Dahal	- General Secretary
5.	Mr. Bhoj Raj Regmi	- Secretary
6.	Ms. Gosai K.C.	- Treasurer
7.	Prof. Khem Dallakoti	- Member
8.	Mr. Matrika Prasad Niraula	- Member
9.	Dr. Rajendra Prasad Adhikary	- Member
10.	Mr. Shailendra Kumar Dahal	- Member
11.	Mr. Gyanendra Prasad Kayastha	- Member

1.2 NEPCA Activities

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

a. Membership Scrutiny Committee

i.	Mr. Baburam Dahal	- Coordinator
ii.	Mr. Bhoj Raj Regmi	- Member
iii.	Mr. Shailendra Kumar Dahal	- Member

The committee is responsible for scrutinizing the applications for the NEPCA membership and forwards the recommended list for the endorsement of the executive committee.

b. Arbitrator/Adjudicator/DB Appointment Committee

i.	Mr. Dhurva Raj Bhattarai	- Coordinator
ii.	Mr. Gosai K.C.	- Member
iii.	Mr. Murali Prasad Sharma	- Member

The committee is responsible for the appointment of Arbitrator or Adjudicator or DB member for the disputed cases where there is provision of Appointing Authority as NEPCA.

c. Panelist Committee

i.	Mr. Birendra Bahaur Deoja	- Coordinator
ii.	Mr. Bhoj Raj Regmi	- Member
iii.	Mr. Khem Dallakoti	- Member

This committee is responsible for scrutinizing the applications for the NEPCA Panelist and forwards the recommended list for the endorsement of the executive committee.

d. Publication Committee

i.	Dr. Rajendra Prasad Adhikari	- Coordinator
ii.	Mr. Baburam Dahal	- Member
iii.	Mr. Matrika Prasad Niraula	- Member
iv.	Mr. Gyanendra Prasad Kayastha	- Member

The committee is responsible for performing work related to publication of NEPCA bulletin and journal.

2. Report of the Webinar on COVID-19 & Constriction Projects Organized by NEPCA on 23rd May 2020

Background

After outbreak of Corona virus (COVID-19) from Wuhan, China in November 2019, it spread globally and the World Health Organization (WHO) declared it as a "global pandemic". Except few, countries around the globe implemented lockdown measures, which impose restriction on movement and international flights. Exercising the power conferred by Section 2(1) of the Infectious Disease, Act, 2020 (1964), the Government of Nepal also enforced lockdown measures in the country with effect from 11 Chaitra 2077 (24 March 2020) and is continuing to the date of the webinar (i.e. 23rd May 2020). Due to lockdown, global economy has been badly effected and Nepal is not an exception of this. In this background, Nepal Council of Arbitration (NEPCA) organized a webinar on ***COVID-19 and Construction Projects (International and National Perspectives)*** on 23rd May 2020 with an objective of bringing the issues of related impact on construction activities caused by COVID-19 in front of the major stakeholders for necessary clarity and to continue discussions from different perspectives. However, more focus has been given to contractual matters.

Proceedings of the webinar

At the beginning of the event, Mr. Dhruva Raj Bhattarai, Senior Engineer and Chairperson, NEPCA welcomed all the participants linked through the web and highlighted the purpose and importance of the webinar in the context of COVID-19. He expressed his hope that this webinar would help the government, contracting parties and the persons involved in dispute resolution process to understand the critical nature of the construction projects and contract implementation scenario during and after COVID-19. Similarly, as the moderator, Mr. Baburam Dahal, Advocate and Secretary-General, NEPCA introduced the dignitaries: Mr. Surya Nath Upadhyaya, former Chairperson, NEPCA and former Chief Commissioner for Investigation of Abuse of Authority (CIAA), Mr. Birendra Bahadur Deoja, Immediate Past President, NEPCA and former Secretary, Government of Nepal, Mr. Yuba Raj Sharma, Former President, Nepal Engineers Association and Executive Member, NEPCA, Professor Khem Nath Dallakoti, Executive Member, NEPCA and Mr. Shailendra Dahal, Senior Advocate and Executive Member, NEPCA as panelist to this webinar. Thereafter Professor Rajendra P. Adhikari, Former General Secretary and Executive Member, NEPCA made presentation on the theme of the webinar.

After presentation, there held discussion session. In discussion session, about 70 questions and remarks were made by the participants. The raised issues along with the list of participants will be provided inthe full text of the webinar reportto bepublished in the website of NEPCA. As an organizer, NEPCAacknowledged the active participation of many more in this program through its Facebook page. At the end of the program,Mr. Bipulendra Chakraborty, Senior Advocate and Vice-Chair, NEPCA giving his remarks declared that the program has been over. The program was facilitated by Ms. Dina Manandhar, Executive Director, NEPCA.

Synopsis of The Presentation

Dr. Rajendra P. Adhikari made presentation on the topic **COVID-19 and Construction Projects** (International and National Perspectives). Reviewing the measures adopted by the countries such as New Zealand, Australia, Malaysia and India as a response to COVID-19 and its effect on construction sector of the respective country. Dr. Adhikari highlighted the relevant contractual matters in the context of Nepal and COVID-19. Key issues of the presentation are given below:

(a) Have construction activities halted due to lockdown?

Exercising the power conferred by Section 2(1) of the Infectious Disease Act, 2020 (1964), the Government of Nepal enforced lockdown measures in the country with effect from 11 Chaitra 2077 (24 March 2020) and is continuing to date of webinar. Naturally free movements have been disrupted, however, there is no formal declaration for closure of construction sites and construction related activities. The government version is that it is facilitating for operation of construction activities and issuing necessary instructions to its relevant entities, however, most of the construction projects are facing difficulties in continuing their construction activities. Particularly supply chain and cash flow are disrupted. ***In the absence of clear guidance of the competent authority, construction activities are not formally halted though disruption is there.***

(b) What sort of impact is there in construction activities?

Particularly following areas are related to construction experience impact of COVID-19:

(i) Supply chain disruptions – Quarry/river based materials, locally manufactured materials & foreign materials.

(ii) Material costs–foreign exchange, credit difficulties, and price hike (or due to decreased demand price might have gone down).

(iii) Transportation costs– availability, timing and costs.

(iv) Labor costs–social distancing, health & hygiene (masks, sanitizer, hand wash, disinfection etc.) lodging & food, leave (quarantine & isolation), loss of productivity etc.

(v) Cash flow & financing the project (Bank and financial institutions).

(vi) Insurance.

Emphasis was given in the presentation to set milestones to improve health & safety status of construction workers taking COVID-19 as opportunity. ***Construction is linked up with various actors, hence need to identify and document the impact seen or experience by a particular project due to COVID-19.***

(c) What are possible contractual issues?

Following possible contractual issues were highlighted:

(i) Has suspension notice ben issued?
(ii) Has COVID-19 caused delays?
(iii) Can or should the existing terms of the contract be renegotiated?
(iv) Are there any clauses covering force majeure, termination or frustration?
(v) How can the adverse effects of COVID-19 be mitigated?
(vi) What are the relevant notice provisions?

Project chief, consultant and contractor are required to confirm and analyze the above maters and their applicability in the project.

(d) What are the relevant documents to refer?

The documents, *interalia, mentioned below* are more relevant for interpreting the effect of COVID-19 in construction activities:

(i) Public Procurement Act, 2063 (PPA 2063) and Public Procurement Rules, 2064 (PPR 2064).

(ii) Signed contract document – based on Standard Bidding Document (SBD) issued by Public Procurement Monitoring Office (PPMO) for the projects run by government funding, FIDIC Redbook, 1999 (FIDIC 1999), or Harmonized version, for most of the large and international contracts and other as applicable.

(iii) Muluki Civil(Code) Act, 2074

Require to understand the basic contractual provisions that are relevant and applicable to the specific project environment.

(e) Can COVID-19 be treated ad Special Circumstances (विशेष परिस्थिति)?

PPA 2063 has defined special circumstance as "a circumstance resulted from a natural or divine calamity such as drought, no rainfall, deluge, earthquake, flood, landslide and fire and from an epidemic or unforeseen or unexpected special circumstance, and this term also includes a circumstance such as war or internal conflict."[1](Section 2(n)) Whereas the Section 66(1) has foreseen the applicability of this provision to procurement and is silent on the matter related to ongoing contract. The Section 2(n) says:

"Notwithstanding anything contained elsewhere in this Act, if the occurrence of a special circumstance results in the situation where the public entity will sustain further loss, damage if procurement is not made immediately, the public entity may make, or cause to be made, procurement immediately."[2]

The concerned counsel or contract manager require to establish and demonstrate the fact to explain this event as Special Circumstances.

(f) Can COVID-19 be treated ad force majeure (कावु वाहिरको परिस्थिति)?

Clause 61.1 of the SBD (Procurement of Works, NCB, Single Stage: Two-envelope Bidding Procedure, Procurement of Value above NRS 20 million, Aug 2019), for example, defines *the force majeure* as an exceptional event or circumstance,

(a) which is beyond a Party's control;

(b) which such Party could not reasonably have provided against before entering into the Contract;

(c) which, having arisen, such Party could not reasonably have avoided or overcome; and

(d) which is not substantially attributable to the other Party.

And Clause 61(2) has elaborated it as:

"*Force Majeure* may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

1 "विशेष परिस्थिति" भन्नाले सुख्खा, अनावृष्टि, अतिवृष्टि, भुकम्प, बाढी, पहिरो, आगलागी जस्ता प्राकृतिक वा दैवी प्रकोप तथा महामारी वा आकस्मिक वा अप्रत्याशित विशेष कारणबाट सृजित परिस्थिति सम्झनु पर्छ र सो शब्दले युद्ध वा आन्तरिक द्वन्द्व जस्ता परिस्थितिलाई समेत जनाउनेछ। (दफा २(ढ))

2 विशेष परिस्थिति उत्पन्न भई तत्काल खरिद नगर्दा सार्वजनिक निकायलाई थप हानी नोक्सानी हुने अवस्था आई परेमा सार्वजनिक निकायले तत्काल खरिद गर्न वा गराउन सक्नेछ। (दफा ६६ (१))

(a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;

(b) rebellion, terrorism, sabotage by persons other than the Contractor's Personnel, revolution, insurrection, military or usurped power, or civil war;

(c) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel;

(d) munitions of war, explosive materials, ionizing radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; and

(e) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."

There are similar provisions in FIDIC Redbook, 1999 and the relevant clause is 19.1. This provision requires to give notice within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure (SBD Clause 62; FIDIC Redbook Clause 19(2)) and there is also a duty to minimize delay, using reasonable endeavors to minimize delay in the performance of the Contract (SBD Clause 63; FIDIC Redbook 1999 Clause 19(3)).

If the Contractor is prevented from performing his obligations, of which notice has been given, then the Contractor shall be entitled to contractor's claim subject to SBD Clause 30 (Procedures for Disputes) and FIDIC Redbook, 1999 Clause 20.1 (Contractor's Claim).

Though either Party may not be interested to terminate the Contract but SBD Clause 66(1) and FIDIC Redbook, 1999 19(6) provide exit for Optional Termination if the work progress is prevented for a continuous period of 90 days (84 days;FIDIC Redbook, 1999) or for multiple periods which total more than 150 days (140 days;FIDIC Redbook, 1999). ***The concerned counsel or contract manager require to establish and demonstrate the fact and to follow the procedure to prove this event as Force Majeure.***

(g) Can COVID-19 be treated as Changes in Law/Legislation (कानुनमा भएको परिवर्तन) **?**

For example, according to the SBD referred in this report, the Contractor shall comply with the applicable laws (Clause 8.1). FIDIC Redbook, 1999 has a Clause 13(7) for Adjustment for Changes in Legislation which allows adjustment in the Contract Price if there is change in the Law of the Country (including the introduction of new Laws and the repeal or modification or existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.

It is also essential to refer the 10th amendment of PPR dated 15 Baisakh 2077 (27 April 20202).***The situation requires critical analysis of the situation, the use of contract document and the nature of the contract agreement (agreement with domestic contractor or an international).***

(h) What's about the applicability of contract law?

Section 531(1) of Muliki Civil(Code) Act, 2074 (MCCA 2074) releases party from contractual performance if there is fundamental change in the condition after signing the contract and Section 531(2) defines the condition that termed as fundamental change in the condition. However, Section 531(3) has clearly stated that the difficulty in performance and if the performance of the contract is likely to decrease the profit or incur losses, such conditions cannot be termed as fundamental change in the condition. Additionally, Section 531(4) has provided the parties ground to talk to review or change the conditions of contract unless otherwise stated in the contract. ***The parties are required to understand the intention and provision of the Act in the context of COVID-19 scenario.***

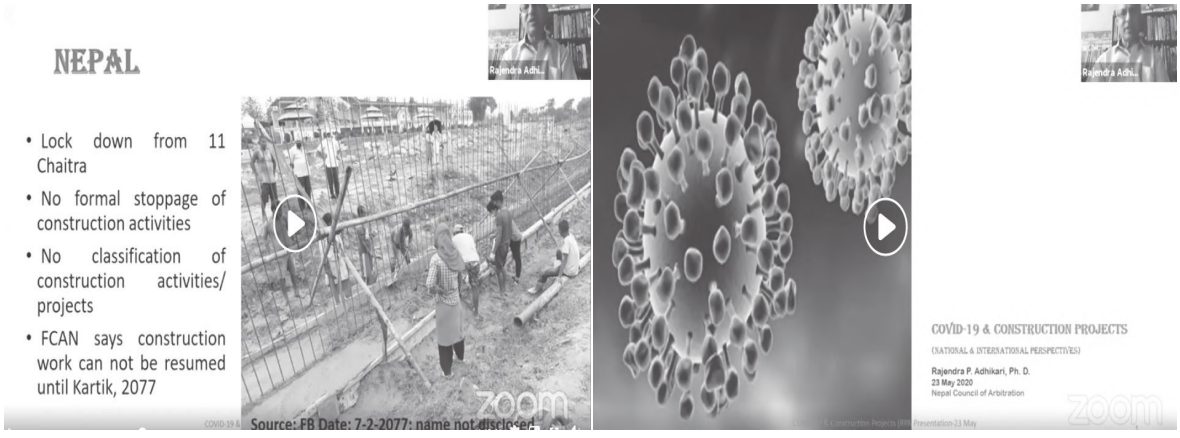
3. Seminars & Trainings

1. On 3 to 8 September, 2019, NEPCA conducted one week training on Construction Management and Dispute Settlement at NEPCA training hall, Kupondole, Lalitpur. All together 60 participants were participated on the training program. Law practitioners, Government Officials, Private Companies and Individual Professionals also took part in training. NEPCA General Secretary Gyanendra Prasad Kayastha distributed the certificate to the participants. Finally training closed by farewell dinner.

2. On May 23, 2020 (10 Jestha, 2077), Nepal Council of Arbitration organized an Online Webinar titled as "COVID 19 and Construction Project: National and International Perspective" for its valued members. Key policy makers, CEOs, and senior management executives, project management specialists, contract specialists, arbitrators, senior officer from bureaucracy, senior lawyer, engineers and contractors were participated in the webinar. Officially, webinar started with welcome remarks by chairman of

NEPCA, Er. Dhurva Raj Bhattarai focusing on the purpose and importance of webinar. Mr. Baburam Dahal, General Secretary moderated the session. Dr. Rajendra Prasad Adhikari, Former General Secretary and Executive Member of NEPCA made key presentation on the subject. At the end Mr. Bipulendra Chakraborty, Senior Advocate and Vice-Chair of NEPCA declared the end of the program along with his remarks. The total of 121 numbers of participants from different field participated in the webinar with keen interest.

The objective of webinar was to discuss about the matter related to COVID 19 and its impact on construction activities before its major stakeholders for necessary clarity regarding contractual matters. This webinar was served as the platform to discuss issues and challenges facing by the projects during lockdown phase in project development, their contract modality and contract execution.



3. On May 10, 2020 viewing the condition of COVID 19 pandemic, NEPCA organized online EC meeting through ZOOM application regarding how NEPCA's activities can be proceed ahead in this critical conditions.

4. On May 12, 2020, Publication Sub-committee Online meeting was held through ZOOM application. The objective of meeting was to set the required criteria for Call for Application for the authors for bulletin publication of NEPCA, 2020.

5. On June 6, 2020, Publication Sub-committee Online meeting was held through ZOOM application to review the incoming articles submitted by the interested candidates and also to know about the progress of Publication Activities.

Panel List of NEPCA

S.N	Name	Profession	Address
1	Bhoop Dhoj Adhikari	Former Chief Judge, Appellate Court/ Advocate	Old Baneshwor, Kathmandu
2	Bindeshwor Yadav	Engineer	Mid Baneshwor, Kathmandu
3	Bipulendra Chakarvartty	Senior Advocate	Tintoliya,Biratnagar
4	Birendra Bahadur Deoja	Engineer	Old Baneshwor, Kathmandu
5	Birendra Mahaseth	Engineer	Jwagal, Lalitpur
6	Babu Ram Dahal	Advocate	Anamnagar, Kathmandu
7	Bhoj Raj Regmi	Engineer	Baluwatar, Kathmandu
8	Dev Narayan Yadav	Engineer	Shantinagar, Kathmandu
9	Dhruva R. Bhattarai	Engineer	Gyaneshwor, Kathmandu
10	Dinker Sharma	Engineer	Mandikhatar, Kathmandu
11	Dipak NathChalise	Engineer	Maligaun, Kathmandu
12	Durga Prasad Osti	Engineer	Baneshwor, Kathmandu
13	Gyanendra Prasad Kayastha	Engineer	Sanepa,Lalitpur
14	Gokul Prasad Burlakoti	Advocate	Babarmahal, Kathmandu
15	Hari Ram Koirala	Engineer	Kalanki, Kathmandu
16	Hari Prasad Sharma	Engineer	Baudha, Kathmandu
17	Indu Sharma Dhakal	Engineer	Mahankal, Kathmandu
18	Kanak Bikram Thapa, Professor	Former Dean/ Advocate/Professor	Ratopul, Kathmandu
19	Keshav Bahadur Thapa	Engineer	Bishalnagar, Kathmandu
20	Khem Nath Dallakoti, Professor	Engineer/ Professor	Sanepa, Lalitpur
21	Madhab Prasad Paudel	Former Secretary, Ministry of Law/Chairman, Nepal Law Commission	Jagritinagar, Kathmandu
22	MahendraNath Sharma	Engineer	Battisputali, Kathmandu
23	Mohan Man Gurung	Engineer/ Advocate	Bagbazar, Kathmandu
24	Narayan Datt Sharma	Advocate/ Engineer	Gyaneshwor, Kathmandu
25	Narayan Prasad Koirala	Advocate/ Engineer	Shantinagar, Kathmandu
26	Narendra Kumar Shrestha	Former Deputy Attorney General/ Advocate	NayaBaneshwor, Kathmandu
27	Naveen Mangal Joshi	Engineer	Kobahal Tole, Lalitpur
28	Niranjan Paudel	Engineer	Baluwatar, Kathmandu
29	Poorna Das Shrestha	Engineer	Balkot, Bhaktapur
30	Rajendra Kishore Kshatri	Advocate	Lainchour, Kathmandu
31	Rajendra Niraula	Engineer	Balkhu, Kathmandu
32	Rajendra Prasad Kayastha	Engineer	Maharajgunj, Kathmandu
33	Rajendra Prasad Adhikari, Ph. D.	Project/ Construction Management Specialist/ Advocate/Professor	Chandol, Kathmandu
34	Ram Kumar Lamsal	Engineer	Bhimsengola, New Baneshwor
35	Rameswhor Prasad Kalwar	Engineer/ Advocate	Balkhu, Kathmandu
36	Sanjeev Koirala	Engineer	Balkumari, Lalitpur
37	Satya Narayan Shah	Engineer	Imadol, Lalitpur
38	Shambhu Thapa	Senior Advocate	Koteshwor, Kathmandu
39	Shree Prasad Pandit	Senior Advocate/ Former Registrar, Supreme Court	Anamnagar, Kathmandu
40	SomNathPaudel	Engineer	Teku, Kathmandu
41	Subhash Chandra Verma	Engineer	Gottatar, Kathmandu
42	Suresh Kumar Regmi	Engineer	Maligaun, Kathmandu
43	SuyraNath Upadhyay	Former CIAA Chief / Advocate	Budhanilkantha, Kathmandu
44	Tulasi Bhatt	Senior Advocate	Anamnagar, Kathmandu
45	Tul Bahadur Shrestha	Advocate	Anamnagar, Kathmandu
46	Udaya Nepali Shrestha	Former Vice-Chairman, Law Reform Commission/ Former Secretary of Ministry of Law	Satdobato, Lalitpur
47	Varun P. Shrestha	Engineer	Baneshwor, Kathmandu

NEPCA Life Member

S.N	Name	Profession
1	Ajaya Kumar Pokharel	Engineer
2	Amar Jibi Ghimire	Advocate
3	Amber Prasad Pant	Senior Advocate
4	Amod Kumar Adhikari	Engineer
5	Anil Kumar Sinha	Judge, Supreme Court
6	Anup Kumar Upadhyay	Engineer
7	Awatar Neupane	Advocate
8	Babu Ram Dahal	Advocate
9	Badan Lal Nyachhyon	Engineer
10	Bal Bahadur Parajuli, Ph. D.	Engineer
11	Bala Krishna Niraula	Engineer
12	Bala Ram K.C.	Former Judge, Supreme Court
13	Balaram Shrestha	Engineer
14	Bedh Kantha Yogal	Engineer
15	Bhagawan Shrestha	Engineer
16	Bharat Bahadur Karki	Senior Advocate
17	Bharat Kumar Lakai	Advocate
18	Bharat Prasad Adhikari	Advocate
19	Bhava Nath Dahal	Auditor
20	Bhim Prasad Upadhyay	Engineer
21	Bhoj Raj Regmi	Engineer
22	Bhola Chatkuli	Engineer
23	Bhoop Dhoj Adhikari	Former Chief Judge, Appellate Court/Advocate
24	Bhupendra Chandra Bhatta	Engineer
25	Bhupendra Gauchan	Engineer
26	Bikash Man Singh Dangol	Engineer
27	Bimal Prasad Dhungel	Advocate
28	Bimal Subedi	Judge, High Court
29	Bindeshwar Yadav	Engineer

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30	Bipulendra Chakravartty	Senior Advocate
31	Birendra Bahadur Deoja	Engineer
32	Birendra Mahaseth	Engineer
33	Bishnu mani Adhikari	Senior Advocate
34	Bishnu Om Baade	Engineer
35	Bishwadeep Adhikari, Ph. D.	Senior Advocate
36	Bodhari Raj Pandey	Former Judge, Supreme Court
37	Chabbi Lal Ghimire	Advocate
38	Chandeshwor Shrestha	Senior Advocate
39	Deo Narayan Yadav	Engineer
40	Dhruva Raj Bhattarai	Engineer
41	Dhundi Raj Dahal	Engineer
42	Digambar Jha	Engineer
43	Dilli Raman Dahal	Advocate
44	Dilli Raman Niraula	Engineer
45	Dinesh Kumar Karky	Former Judge, Appellate Court
46	Dinesh Raj Manandhar	Engineer
47	Dinker Sharma	Engineer
48	Dipak Nath Chalise	Engineer
49	Dipendra Shrestha	Engineer
50	Durga Prasad Osti	Engineer
51	Dwarika Nath Dhungel	Social Sciences Researcher
52	Fanendra Raj Joshi	Engineer
53	Gauri Dhakal	Former Judge, Supreme Court
54	Girish Chand	Engineer
55	Gokul Prasad Burlakoti	Advocate
56	Gopal Siwakoti, Ph. D.	Senior Advocate
57	Gosai K.C Bhandari	HR Management/ Environment Specialist
58	Govinda Kumar Shrestha	Former Judge, Appellate Court

S.N	Name	Profession
59	Govinda Prasad Parajuli	Former Chief Judge, Appellate Court
60	Govinda Raj Kharel	Advocate
61	Gyanendra Prasad Kayastha	Engineer
62	Hari Bahadur Basnet	Former Judge, High Court
63	Hari Bhakta Shrestha	Engineer
64	Hari Narayan Yadav	Engineer
65	Hari Prasad Dhakal	Engineer
66	Hari Prasad Sharma	Engineer
67	Hari Ram Koirala	Engineer
68	Hari Ram Koirala	Former Chief Judge, Appellatte Court
69	Harihar Dahal	Senior Advocate
70	Hariom Prasad Shrivastav	Engineer
71	Hum Nath Koirala	Construction Entrepreneur
72	I. P. Pradhan	Engineer
73	Ishwar Prasad Tiwari	Engineer
74	Ishwori Prasad Paudyal	Election Commissioner
75	Jagadish Dahal	Advocate
76	Jaya Mangal Prasad	Senior Advocate
77	Jayandra Shrestha	Adviser/Finance
78	Jayaram Shrestha	Advocate
79	Jivendra Jha	Engineer
80	Kamal Kumar Shrestha	Joint Secretary
81	Kamal Raj Pande	Engineer
82	Kanak Bikram Thapa, Professor	Former Dean/Advocate/Professor
83	Kedar Man Shrestha	Engineer
84	Kedar Prasad Koirala	Advocate
85	Keshari Raj Pandit	Former Chief Judge, Appellate Court/Former Executive Director of National Judicial Academy

S.N	Name	Profession
86	Keshav Bahadur Thapa	Engineer
87	Keshav Prasad Ghimire	Engineer
88	Keshav Prasad Mainali	Advocate
89	Keshav Prasad Pokharel	Engineer
90	Khem Nath Dallakoti, Professor	Engineer/Professor
91	Khem Prasad Dahal	Accountant
92	Kishor Babu Aryal	Engineer
93	Komal Natha Atreya	Engineer
94	Krishna Sharan Chakhun	Engineer
95	Kul Ratna Bhurtyal, Ph.D	Former Chief Judge, High Court
96	Kumar Sharma Acharya, Ph.D	Senior Advocate
97	Lal Krishna K.C.	Engineer
98	Lava Raj Bhattarai	Engineer
99	Laxman Krishna Malla	Engineer
100	Laxman Prasad Mainali	Former Secretary
101	Lekh Man Singh Bhandhari	Engineer
102	Lok Bahadur Karki	Advocate
103	Madan Gopal Maleku	Engineer
104	Madan Shankar Shrestha	Engineer
105	Madhab Prasad Paudel	Former Secretary, Ministry of Law/Chairman, Nepal Law Commission
106	Madhav Belbase	Engineer
107	Madhav Das Shrestha	Advocate
108	Madhav Prasad Khakurel	Engineer
109	Madhusudan Pratap Malla	Engineer
110	Mahendra Bahadur Gurung	Engineer
111	Mahendra Kumar Yadav	Engineer
112	Mahendra Narayan Yadav	Engineer
113	Mahendra Nath Sharma	Engineer
114	Mahesh Bahadur Pradhan	Engineer

S.N	Name	Profession
115	Mahesh Kumar Agrawal	Enterpreteur
116	Manoj Kumar Sharma	Engineer
117	Manoj Kumar yadav	Engineer/ Advocate
118	Matrika Prasad Niraula	Senior Advocate
119	Meen Raj Gyawali	Engineer
120	Min Bahadur Rayamajhee	Former Chief Judge, Supreme Court
121	Mitra Baral	Engineer
122	Mohan Man Gurung	Engineer/Advocate
123	Mohan Raj Panta	Engineer
124	Mukunda Sharma Paudel	Senior Advocate
125	Murali Prasad Sharma	Advocate
126	Nagendra Nath Gyawali	Engineer
127	Nagendra Raj Sitoula	Engineer
128	Narayan Datt Sharma	Engineer/Advocate
129	Narayan Prasad Koirala	Engineer/ Advocate
130	Narendra Bahadur Chand	Engineer
131	Narendra Kumar Baral	Engineer
132	Narendra Kumar K.C	Senior Advocate
133	Narendra Kumar Shrestha	Former Deputy Attorney General/ Advocate
134	Naveen Mangal Joshi	Engineer
135	Niaz Ahmad	Engineer
136	Niranjan Prasad Chalise	Engineer
137	Om Narayan Sharma	Engineer
138	Poorna Das Shrestha	Engineer
139	Prabhu Krishna Koirala	Advocate
140	Prajesh Bikram Thapa	Engineer
141	Prakash Jung Shah	Engineer
142	Prakash Poudel	Engineer
143	Prativa Neupane	Advocate

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144	Purna Man Shakya	Senior Advocate
145	Purnendu Narayan Singh	Engineer
146	Purusottam Kumar Shahi	Engineer
147	Puspa Raj Pandey	Advocate
148	Radheshyam Adhikari	Senior Advocate
149	Raghab Lal Vaidya	Senior Advocate
150	Rajan Adhikari	Advocate
151	Rajan Raj Pandey	Engineer
152	Rajendra Kishore Kshatri	Advocate
153	Rajendra Kumar Bhandhari	Former Judge, Supreme Court
154	Rajendra Niraula	Engineer
155	Rajendra Prasad Adhikari, Ph. D.	Project/Construction Management Specialist/Advocate/Professor
156	Rajendra Prasad Kayastha	Engineer
157	Rajendra Prasad Yadav	Engineer
158	Ram Prasad Acharya	Advocate
159	Ram Prasad Gautam	Advocate
160	Ram Prasad Shrestha	Senior Advocate
161	Ram Prasad Silwal	Engineer
162	Ram Shanker Khadka	Advocate
163	Ramesh Kumar Ghimrie	Advocate
164	Ramesh Prasad Rijal	Engineer
165	Ramesh Raj Satyal	Auditor
166	Rameshwar Lamichhane	Engineer
167	Rameshwar Prasad Kalwar	Engineer
168	Ravi Sharma Aryal, Ph.D	Professor/Advocate
169	Resham Raj Regmi	Advocate
170	Rishi Kesh Sharma	Engineer
171	Rishi Ram Sharma Neupane	Engineer
172	Roshan Soti	Engineer
173	Rudra Prasad Sitaula	Advocate

S.N	Name	Profession
174	Rupak Rajbhandari	Engineer
175	Sahadev Prasad Bastola	Former Judge, High Court
176	Sajan Ram Bhandary	Senior Advocate
177	Sanjeev Koirala	Engineer
178	Santosh Kumar Pokharel	Engineer
179	Sarb Dev Prasad	Engineer
180	Saroj Chandra Pandit	Engineer
181	Saroj Kumar Upadhaya	Engineer
182	Satya Narayan Shah	Engineer
183	Shailendra Kumar Dahal	Senior Advocate
184	Shaligram Parajuli	Engineer
185	Shambhu Thapa	Senior Advocate
186	Sharada Prasad Sharma	Engineer
187	Sharda Shrestha	Former Judge, Supreme Court
188	Sher Bahadur Karki	Advocate
189	Shishir Koirala	Engineer
190	Shital Babu Regmee	Engineer
191	Shiva Kumar Basnet	Engineer
192	Shiva Prasad Sharma Paudel	Engineer
193	Shiva Prasad Uprety	Engineer
194	Shree Prasad Agrahari	Engineer
195	Shree Prasad Pandit	Former Registrar, Supreme Court /Senior Advocate
196	Shyam Bahadur Karki	Engineer
197	Shyam Bahadur Pradhan	Former Judge, High Court
198	Shyam Prasad Kharel	Engineer
199	Siddha Prasad Lamichanne	Advocate
200	Som Bahadur Thapa	Advocate
201	Som Nath Poudel	Engineer
202	Subash Kumar Mishra	Engineer
203	Subhash Chandra Verma	Engineer

S.N	Name	Profession
204	Subhod Kumar Karna	Chartered Accountant
205	Sujan Lopchan	Advocate
206	Suman Kumar Rai	Advocate
207	Suman Prasad Sharma	Engineer
208	Suman Rayamajhi	Chartered Accountant
209	Sunil Bahadur Malla	Engineer
210	Sunil Ghaju	Engineer
211	Sunil Kumar Dhungel	Engineer (Electrical)
212	Sunil Man Shakya	Advocate
213	Suresh Chitrakar	Engineer
214	Suresh Kumar Regmi	Engineer
215	Suresh Kumar Sharma	Engineer
216	Suresh Man Shrestha	Former Secretary, Ministry of Law and Justice/Advocate
217	Surya Dev Thapa	Engineer
218	Surya Nath Upadhyay	Former Chief, Commission for Investigation of Abuse of Authority/Advocate
219	Surya Prasad Koirala	Advocate
220	Sushil Bhatta	Engineer
221	Tara Dev Joshi	Advocate
222	Tara Nath Sapkota	Engineer
223	Tej Raj Bhatta	Engineer
224	Tek Nath Achraya	Chartered Accountant
225	Thaneshwar Kafle (Rajesh)	Advocate
226	Tilak Prasad Rijal	Advocate
227	Trilochan Gautam	Senior Advocate
228	Tul Bahadur Shrestha	Advocate
229	Tulasi Bhatta	Senior Advocate
230	Udaya Nepali Shrestha	Former Vice-Chairman, Law Reform Commission
231	Uddhav Prasad Kadariya	Tax Counselor

S.N	Name	Profession
232	Uma Kanta Jha	Engineer
233	Umesh Jha	Engineer
234	Upendra Dev Bhatta	Engineer
235	Upendra Rja Upreti	Advocate/Engineer
236	Varun P. Shrestha	Engineer
237	Vinod Prasad Dhungel	Former Judge
238	Vishnu Bahadur Singh	Engineer

S.N	Name	Profession
239	Vishwa Nath Khanal	Engineer
240	Yadav Adhikari	Nepal Police
241	Yagya Deo Bhatt	Engineer
242	Yajna Man Tamrakar	Engineer
243	Yaksha Dhoj Karki	Construction Entrepreneur
244	Yoganand Yadav	Engineer
245	Yubaraj Snagroula	Senior Advocate

NEPCA Ordinary Members

S.N.	Name	Profession
1	Abhi Man Das Mulmi	Engineer
2	Ajay Adhikari	Engineer
3	Ambika Prasad Upadhay	Engineer
4	Ananta Acharya	Engineer
5	Babu Lal Agrawal	Engineer
6	Bharati Prasad Sharma	Engineer
7	Chet Nath Ghimire	Advocate
8	Deepak Man Singh Shrestha	Engineer
9	Devendra Shrestha	Architect
10	Gouri Shankar Agrawal	Engineer
11	Guru Bhakta Niroula Sharma	Advocate
12	Ishwor Bhatta	Engineer
13	Kalyan Gyawali	Engineer
14	Kamala Upreti -Chhetri	Advocate
15	Kashi Raj Dahal	Former Chief, Administrative Court
16	Laxman Prasad Adhikari	Engineer
17	Mahendra Kanta Mainali	Senior Advocate
18	Narendra Kumar Dahal	
19	Pawan Karki	Engineer
20	Pramesh Tripathi	Engineer
21	Pramod Krishna Adhikari	Engineer

S.N.	Name	Profession
22	Puskar Pokhrel	Advocate
23	Rabindra Nath Shrestha	Engineer
24	Rabindra Shah	Engineer
25	Raj Narayan Yadav	Engineer
26	Rajeev Pradhan	Engineer
27	Ram Chandra Bhattarai, Ph. D.	Economist, Lecture TU
28	Sadhu Ram Sapkota	Advocate
29	Santosh K.Pokharel	Engineer
30	Satyendra Sakya	Engineer
31	Shankar Prasad Agrawal	Advocate
32	Shankar Prasad Yadav	Engineer
33	Shant Raj Sharma	Financial Analyst
34	Shiva Ram K.C	Engineer
35	Sital Kumar Karki	Advocate
36	Temba Lama Sherpa	Engineer
37	Federation of Contractors' Association of Nepal (FCAN)	Representative

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