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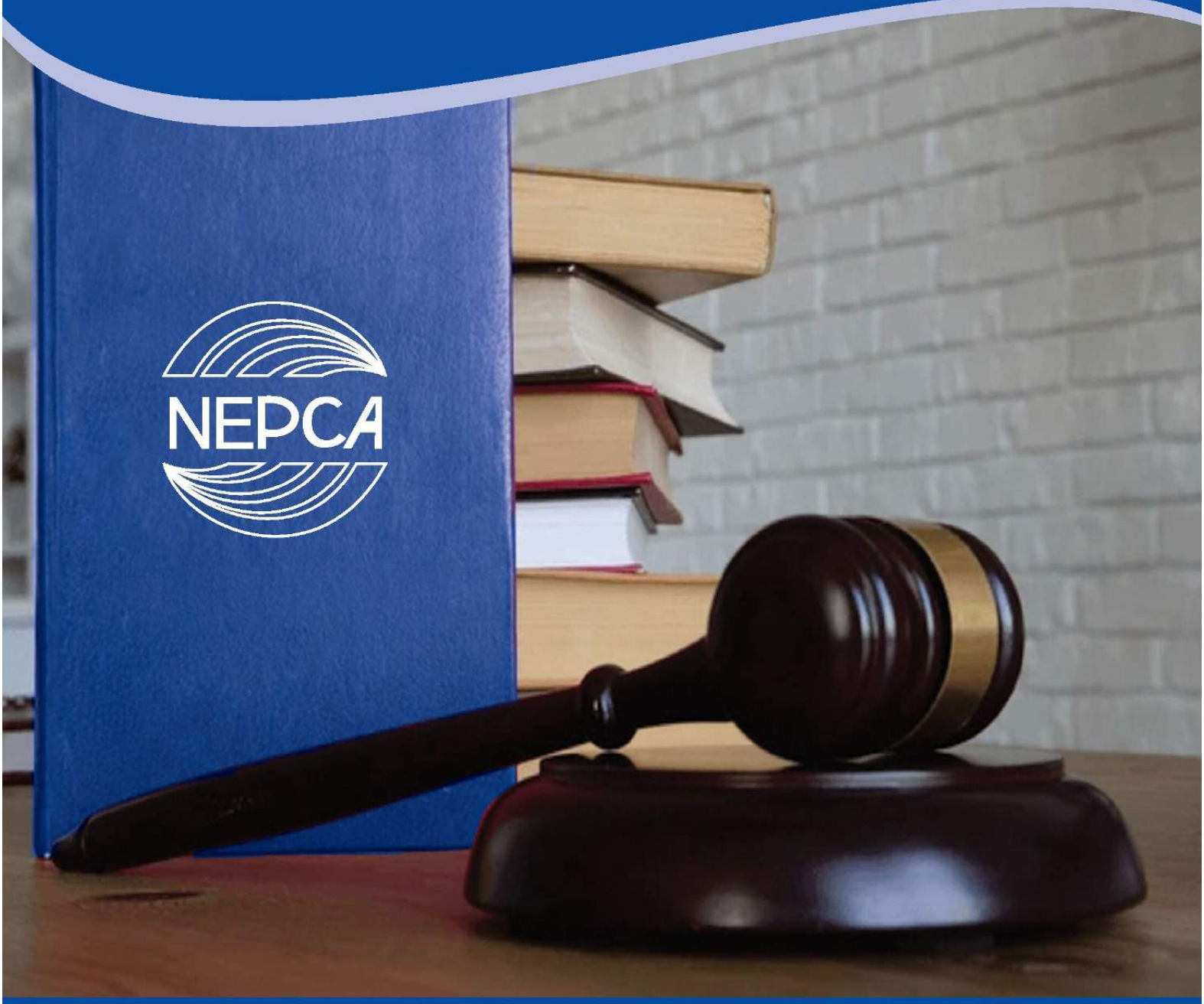
NEPCA INSIGHTS

Resolving Disputes Alternatively



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NEPCA INSIGHTS

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NEPCA AT A GLANCE

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

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

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

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

Main objectives

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

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

Supplementary objectives

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

Organization structure

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

Membership

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

Types of membership

The Council has the following three types of members.

1. Individual Member

   a. Life Member

   b. Ordinary Member

2. Institutional Member

a. Ordinary member

Qualifications for membership

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

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

Services offered

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

Arbitration Facilities

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

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

Arbitrators panel

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

Informational Services

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

Training

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

Amicable settlement for the construction disputes in the perspective of Nepalese Construction Claims

Abhushan Neupane
Civil Engineer
Hydro Solutions Pvt. Ltd.

1. What is an amicable settlement?

An amicable settlement is a process where the parties to a dispute find ways to resolve their differences in a friendly and non-contentious way. To achieve an amicable settlement, the parties need to be willing to make concessions for the sake of reaching an agreement. Without the desire to make an effort to settle a legal case, it will be nearly impossible to achieve an amicable settlement. When parties reach an amicable settlement, they will either do it based on their desire to resolve their dispute or will use the services of a mediator or a lawyer to support them in the process. The Parties shall use their best efforts to settle amicably any dispute, controversy or claim arising out of, or relating to this Purchase Order or the breach, termination or invalidity thereof.

In one of the procedures of amicable settlement of construction disputes an independent third party (as a neutral person), in strict confidentiality, conducts a process to facilitate the parties in settling an existing dispute. The role of the independent third party is to remain independent, to stay at "arms-length", and not to attempt to achieve the best outcome for the one party over the other. Amicable settlement is also a consensual process and there must be a willingness and a mandate by the participants to arrive at an amicable settlement outcome. The parties remain free to withdraw from the amicable settlement procedure at any time and to revert to adjudication, arbitration or litigation, depending on the specific provisions of the construction contract. (Saice, 2021)

2. Methodological setup for amicable settlement in large construction projects in Nepal

In the large construction projects of Nepal, which use FIDIC documents as their contract administrative guide, the Claim process is carried out following Clause 20 (Fidic 1999) or Clause 20 &21 (Fidic 2017). The claim process commences with clauses 20.1, 20.2, 20.3 and 20.4 of Fidic 1999 before the formal Amicable settlement process mentioned in clause 20.5. A similar approach has been prescribed for Fidic 2017 suites and is discussed in the following paragraphs.

During the period specified in the Contract after notice of dissatisfaction withthe DAB decision, amicable settlement procedures have been outlined and practised. However, DAB members do not become involved

in the amicable settlement process. There is no fixed procedure prescribed by FIDIC for an amicable settlement, however, a neutral facilitator who as an independent third party generally assists in the amicable settlement process. Other modes of Alternate Dispute resolution like Conciliation, mediation, and direct negotiation without a facilitator may be the choice. A formal amicable settlement board is not appropriate as it is similar to DAB. The list of possible amicable settlement facilitators could be reached from boards like NEPCA or FIDIC. If the amicable settlement procedure is not successful, the case goes to arbitration as stipulated in Clause 20.5 (amicable settlement of Fidic 1999)

However, in Fidic 2017 suites, after the notice of dissatisfaction (NOD) on a Decision is given, a 28-day cooling-off period is mandatory before referring the Dispute to Arbitration, during which the parties shall attempt to settle the differences amicably (Sub-Clause 21.5). However, FIDIC 2017 has been more proactive for Dispute avoidance as DAB has changed to DAAB (Dispute Avoidance and Adjudication Board), which can assist the contracting parties in Dispute avoidance from the beginning, the procedures mentioned in SC 21.3 (Avoidance of Disputes).

3. Public Procurement Regulation (PPR, 2064) approach for amicable settlement

PPR, 2064 has set the procedure for dispute resolution in rule 129 and rule 135. Although there is no provision of Adjudication in the dispute resolution process, and amicable settlement procedures as specified in FIDIC suites of contract before formal arbitration hearings. However, PPR 2064 has tried to solve the disputes earlier to adjudication and arbitration proceedings.

According to rule 129 (Dispute resolution) of PPR 2064 : (1) The procurement contract shall set forth, inter alia, the matters of dispute to be resolved through mutual consent, process for making application for the settlement of a dispute, meeting to be held for mutual consent and process of making decisions, and such a dispute shall be settled accordingly.

Additionally, according to rule 135 (Resolution of the dispute by arbitration): If any dispute that has arisen between the public entity and the construction entrepreneur, consultant or service provider concerning the implementation of the procurement contract cannot be resolved through the process referred to in Rule 129, action shall be initiated for the resolution of such a dispute by arbitration following the prevailing law. (www.ppmo.gov.np)

4. Introduction to FIDIC Contract Suites&Amicable Settlement Provisions

The FIDIC suite of construction contracts is written and published by the International Federation of Consulting Engineers. The FIDIC acronym stands for the French version of the Federation's name (Federation Internationale des Ingenieurs-Conseil). The best known of the FIDIC contracts are the Red Book (building and engineering works designed by the Employer) and the Yellow Book (M&E, building and engineering works designed by the Contractor). The original edition of the Red Book dates back to 1957. In recent years FIDIC has published many new contracts to complement the suite. The first of the

new contracts was the Orange Book for design, build and turnkey works published in 1995. In 1999 FIDIC published a revised suite of contracts with updated versions of the Red and Yellow books together with a Green Book as the short form of contract and a Silver Book for turnkey contracts. (www.fidic.org)

In December 2017 FIDIC released its second edition of the Conditions of Contracts for Plant and Design Build ("the 2017 Yellow Book"), the Conditions of Contract for Construction (the "2017 Red Book") and the Conditions of Contract for EPC/Turnkey (the "Silver Book"), together the "2017 Contracts". As expected, FIDIC has made substantial amendments to the dispute resolution provisions from the 1999 Red, Yellow, and Silver Books (together with the "1999 Contracts"), and it has addressed the provisions relating to the "binding but not-final" Dispute Adjudication Board ("DAB") decisions which have been the cause of persistent dispute since the 1999 Contracts were released. (https://www.fenwickelliott.com/)

i. Amicable settlement in Fidic 1999

Amicable settlement is a non-adversarial approach to dispute resolution. In FIDIC 1999, once a notice of dissatisfaction has been given under Sub-clause 20.4, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. Sub-Clause 20.5 requires an attempt at an amicable settlement, not less than 56 days after the date of the notice of dissatisfaction.

ii. Amicable settlement in FIDIC 2017

According to Fidic 2017 (Red, Yellow and Silver book), the mandatory amicable settlement period has been reduced from 56 days to 28 days under the 2017 Contracts. Furthermore, where either party fails to comply with a DAB decision, that failure may be referred directly to arbitration and the amicable settlement period will not apply. This clarifies that the parties' obligation to "promptly" comply with a DAB decision means in less than 28 days. (https://www.fenwickelliott.com/)

5. Merits of Amicable Settlement Process

Amicable settlement is part of the interest-based approach to the process of resolving the dispute. The interests of the parties are addressed in such a manner that they have a better understanding of their rights and obligations regarding the dispute so that they can explore many different potential solutions, and understand each other's perspective towards a win-win solution. The Parties could then take the necessary decisions and actions in their best interest (as well as for the project) so that the construction works could proceed without unnecessary costs and delays, including alterations to the works, an extension of time for completion, mitigating measures regarding the works, suspension or cancellation of the works, if necessary. It could also act as a filter to prevent a dispute from escalating further to the more comprehensive procedures. The outcome is usually determined with the Amicable Settlement Facilitator's knowledge and experience in a relatively cheap, fast and robust manner over a short period, and addresses two critical issues:

I. Whether monetary relief is due to the contractor if he is entitled to that (as positive cash flow is the lifeblood of the construction industry); and

II. It allows the parties to take mitigating measures if conditions, circumstances and situations are experienced which are not favourable to the project and their interest. (Saice,2021)

6. Ethical concerns of amicable settlement

The proceedings in Amicable Settlement are confidential with the facilitator (independent third party) unless otherwise required by law. The respective parties may in private sessions with the Amicable Settlement Facilitator disclose information to the Amicable Settlement Facilitator that must remain confidential. The disclosure of such information to the Amicable Settlement Facilitator may be to justify a party's bargaining position or to request the Amicable Settlement Facilitator to raise certain questions to the other party. To achieve common ground, the parties must be free to make admissions and concessions which, if the amicable settlement fails, will not be used against them to their prejudice in the subsequent adjudication, arbitration or litigation proceedings.

7. Conclusion

Construction disputes are inevitable in the large construction projects in Nepal. Thus, the proper procedural approach to minimize or resolve the construction claims is essential. As mandated by both the FIDIC suites of contract and the Public Procurement Monitoring Office of Nepal, it is recommended to apply amicable settlement or mutual consent procedures. Even the Dispute boards or neutral facilitators shall be extensively used to resolve the disputes (as prescribed in Fidic suite 2017 (SC21.3 (avoidance of disputes)) so that the construction activities go smoothly with proper handling of construction claims and disputes. Overall, it will assist proactively in completing any engineering project within Time, Cost and desired quality.

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Causes-Effects of Contract Delay in Medium Level Construction Projects of Nepal- Cases of Bridges and Municipal Projects

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Introduction

Delay in construction projects is always a serious issue as it has been become a source of dispute between the contracting parties. There have been identified many factors as causes of delay and their impacts (effects) in construction projects. The causes are sometime country specific: law and orders, war and terrorism, inflation in local currency or due to role of Clients in design changes, improper availability of funds, payment delays, unrealistic time durations and political/bureaucratic influences in Pakistan (Gardezi et.al., 2013); even in Engineering, Procurement and Construction (EPC) contracts, there have been delay due to various causes (factors: contractor related, equipment related, design related, project related and material related) in China, where the most critical factor was the contractor related (Nikjow et.al. 2021); finance related causes have been reported for the most critical factor in delay of construction project in India, where other causes are in the list for delay of project are Delay in settlement of claims, contractor's financial difficulties, delay in payment for extra work/variations by owner, late payment from contractor to subcontractor or suppliers, variation orders/changes of scope by owner during construction and changes in design by owner were the highly ranked delay causes (Prasad et.al., 2019). Kabre and Kumar (2019) stated the five categories of causes, namely, related to the Employer, contractor, other interface contractors, force majeure and concurrent delays, which all have the consequences in time extension and cost in Indian construction projects and analyzed the delay with the cause-effect method.

Nepal is facing a major problem in construction industry since a long time such as improper planning, lack of resources and fund, inadequate implementation capacity and efficient technology. Many projects are delayed from its intended completion period due to various reasons. Hence the provision of Extension of Time are legally laid out in Public Procurement Act (PPA), 2063 (Section 56), and Public Procurement Regulation (PPR), 2064 (Rule 120). Besides these, Standard Bidding Document of Public Procurement Monitoring Office (PPMO), Standard Procurement Document (SPD) of the World Bank (WB) and Asian Development Bank (ADB) and International Federation of Consulting Engineers (FIDIC) Books are the other legal documents for procurement execution and time extension.

In this article, the major causes for delayed have been discussed focusing some bridge projects and national pride projects and their effects.

Problem Statement

The needs of construction of bridges are identified for the transportation which are major structure for crossing the rivers in Nepal. The detailed study reports are prepared and considered for the contract. The planning of such construction projects are made based on the assurance of financial resources too. The schedule for completion of theprojects have been made by the implementing agency i.e. Department of Roads, Government of Nepal.

Such implementation schedules of construction have been found some lacks in proper evaluation of required time for all activities of the projects. Also, the Contractor are found lacking in capacity to analyze the project and it's time tocomplete based on his/her resources in terms of manpower, technology and financial resources. As a result, the project

is likely to delay in completion time. In a research conducted of bridges (Suwal and Suwal, 2016), out of 82, 62 (78%) bridges had the time over runs. The cost over runs are found inevitable for such projects due to extension of time.

Causes of such delays have little considered for the upcoming projects as the facts show there are still such delays reported and the project becoming even chronic. Further, the effects of the delays are talked as the project costs onlywhere the service and uses of such project have rarely been addressed.

Objective of Study

Main objective of the research is to assess the cause-effect of the delays in bridge construction. Specific objectivesare as follows:

To identify the causes of delay with extension of time of the project; andTo find the effect of delay in project cost and public usages.

Scope and Limitations

This article is produced based on the principle of causes of delays and effects in project where the cases of few medium projects on bridge constructions projects implemented by DOR and infrastructure projects implemented by Madhyapur Thimi, Bhaktapur and Budhanilakantha Municipality, Kathmandu, which are considered the progress inthe date indicated. The samples are taken into link the causes related to the Employer, Contractor, Consultant and natural/contract itself and their effects on cost of the project. The result of the findings may not be generalized for all projects.

1. Materials and Methods

Study Area

The study covers the NCB contracts of bridge constructions, mainly, under DOR. However, other projects in hydropower and water usages are taken as references. Tadi khola bridge (Nuwakot), Melamchi Water

Supply Project (Sidhupalchowk), Chhorepatan-Nirmalpokhari Road (SNRTP), Kaliaya-Malahai Road (SNRTP), Construction of Sankheswari bridge (Kavre) and Mauwase Bridge, Udaypur, all have some extension of time (EOT) or delays.

Data and Information

Though there are delays in most of the projects including national pride projects (eg. Nagdhunga Tunnel construction, North South Corridors, Madan Bhandari Highway) as of the first trimester progress report (DOR,2023), the delays (extension of time) in the project completion are as shown in Table 1.

Table 1: Bridge Projects Cases under DOR

Projects	Initial duration of completion	Progress	Delay	Remarks
Tadi khola bridge (Nuwakot)	24 Months (12 August, 2015)	April 2018 Phy: 53.9%, Fin. 62.7%	137% (1000 days) (11 April 2018)	Employer: Technical (hydrology) and drawings, IEE and social issues, less supervision Contractor: Quality construction, less performance, technical staffs
*Sankheswari Bridge (Kavre)	22 Days (16 July 2018)	2077.12.22 Phy: 100%, Fin. 91.42%	4345% (956 days) (2077/11/16)	Time schedule issues Employer: Some drawing and technical issues, lack of timely supervision and instruction, over payment Contractor: less performance, LD fully applied (Rs. 5,02,400, 10%), poor quality, lab tests lacking
Mauwase Bridge, Udaypur (MBHP)	33 Months (26 Feb 2023)	Sep 2022 Phy:34.9%, Fin. 31.8%	21% (6.8 months) (Sep 2023 (Estimated)	Employer: Some drawing issue Contractor: less performance, Lab issues, Environmental and Social Issue (Sanitation)

Source: Technical Audit Report, NVC, GON

As the sample study, the delays (extension of time) in the Municipality projects are as shown in Table 2. Table 2: Projects Cases under Madhyapur Thimi, Bhaktapur and Budhanilakantha Municipality, Kathmandu

Projects	Initial Duration, Date of completion	Progress, Delay, Cost Over run	Causes
Construction of Office building Ward 7 Nagadesh, Madhyapur Thimi	13 Month (2075/5/22-2076/8/30), Completed on 2079/3/20	Progress: 100% Delay: 238% (31 Month) Cost Overrun: 36.18%	Employer: Late design approvals and lack of soil investigation, Late payment IPC, late decision of VO Contractor: Quality construction, less performance, technical staffs
Construction of Radiology Block, Nepal Korea Friendship Municipality Hospital, Madhyapur Thimi	4 Month (2077/11/21-2078/2/24) Completed on 2080/3/20	Progress: 100% Delay 625% (25 Month) Cost Overrun: 6.88%	Time schedule issues Employer: Contractor: COVID, Festivals, low performance
Construction of Budhanilkantha Municipality Hospital (Nagar Aspatal)	18 Month (2077/3/7-2078/9/6) Completed on 2080/3/31	Progress: 100% (present 92%) Delay:100% (18 Month) Cost Overrun: 5.64%	Employer: Price Adjustment, Letter of Credit closed, COVID Contractor: COVID, low performance, Scarcity of Material
*Construction of Quarantine Block in Ditthachaur, Ward No. 10, Budhanilakantha	7 days (2077/3/18-2077/3/25) Completed on 2080/3/31	Progress: 97% (present 86%) Delay:15428% (36Month) Cost Overrun: 5.64%	Employer: Unrealistic plan, Land unavailability Contractor: COVID, low performance, Scarcity of Material
Source: Project Reports, Budhanilakantha Municipality and MAdhyapurthimi Municipality			

Analysis

Based on above data and references, causes of delay and effects have been analyzed. The intended completion periods are initially seems unrealistic and prepared in lack of work break down structures. The above information show the project's completion periods are extremely abnormal (*) which have the unrealistic estimation of completion period. In remaining projects are also in delay from 21% to 238% which are also too high. Results have been drawn and discussed as below.

2. Results and Discussions

Based on the above facts, causes of delay and extension of time for project completions are found ranging from few months to 36 months. All projects are silent in provision of Dispute Board (DB)/Dispute Adjudication Board (DAB)as an Alternative Dispute Resolution provisions (ADR).

Causes of Delay

Based on the above information, delays are found as an unavoidable problem which have many possible causes. The causes of delays can be categorized related to the Employer, Contractor, Consultant and Natural/contractual aslisted as below (Table 3).

Table 3: Lists of Causes of the Project's Delay

Employer	Contractor	Consultant	Natural/ Contractual
– Unrealistic plan, – Technical issues: improper study(hydrology, soil) and drawings, – Permissions: IEE and social issues,land unavailability, – Late payment (some over payment), – late decision of variation orders, andPrice adjustment, Letter of Credit closed, – Lack of timely supervision andinstruction.	– Technical Issues: Poor quality construction, improper drains – Low performance, – lack of technical staffs, – Lack of lab tests, poor material quality – Environmental social Issue (Non-compliance like Sanitary, camp, Personal Protection Equipment), – Lack of realistic schedule.	– – Very nominal level or absence of consultant's involvement.	– COVID lockdown, – Festivals, – Scarcity of material.

Effects of Delay

The delay of construction projects itself an impact to the public and Employer that lacks the service of the project intime. It also damages the public image of the project performance.

Most of the variations are to increase the construction cost. As shown in above Table 3, there are multiple effects oncost such as increase in materials prices, interests, additional insurances and financial guaranties. The costs of aboveprojects found / found to be increased by 5% to 36%, where further over

runs are possible as the projects are yet to be completed.

In addition, the management cost is also increased as the project managers and staffs have to be engaged until theproject completes.

So, these effects of delay are to be considered as the results of multiple causes that are mainly related to the Employer, contractor and engineer or consultants which can be analyzed and planned for the minimization or reduction of such impacts on the project. However, the natural or unavoidable causes can be just estimated andprovisioned as the risks and force majeure in the contract documents.

Discussions

A project completion period is based on its activities as it is required to complete technical standards and specifications. There are few contracts signed with a blunder completion period carelessness and to some extent unrealistic, example Shankheswari Bridge of Kavre (completion period of bridge (culvert) of 22 days, which was completed after the delay by 956 days or 435%) and Construction of Quarantine Block in Dithachaur, Ward No. 10,Budhanilakantha (completion period of 7 days, which seems delayed by 36 months or 1528%). The completion period of 4 months for Construction of Radiology Block, Nepal Korea Friendship Municipality Hospital, Madhyapur Thimi seems unrealistic, the project has been completed after the extension of time for 25 months or 625% of intended completion time.

Reasons for delay of construction of the projects as above mentioned are notified by the projects. The Employer and contractors, both are contributing the delay. Lack of detailed investigations (hydrology of Tadi khola bridge, soil investigation in Construction of Office building Ward 7 Nagadesh, Madhyapur Thimi),

However, some of the reasons cited for extension of time are just application with unclear justification, mostly in municipalities. The extension of time or delay are common no matter how their magnitudes are, but are contributingalso in costs.

Employer's failure to fulfill the contractual requirements are getting government's permits (land acquisition and environmental assessment), timely approvals of design and drawings and irregular monitoring and instruction to proceed works. Some time, the payment of works certified by the engineer and delay in decision taken on variation orders, price adjustments and rarely case of closing of opening of the LC accounts for import of good and equipment. Contractor related causes are mainly quality of works and lack of approved skilled man power. The contractor generally employed the engineers and technical staffs at minimum and less experiences than stated in the contract. This might be due to maximum incentives required to pay for more experienced people. The materials of poor quality and lack of efficient testing laboratory are the poor quality management which is always critical in the project. Contractor is also often found lacking to comply the environment management plan and health and safety of the workers. A case of entering into defects liability period (DLP) before starting the construction works and

paying themaximum liquidated damage (LD) was found in Sankheswari bridge project. Same project was signed by the contractor in unrealistic completion period also.

Natural causes are unavoidable and considered as stated in contractual conditions, which may/may not incur the cost for claims, but it has provisions of extension of time. In such case, the LD may not be applicable; however, the project seems to be delayed.

In principle, risks of causes can be estimated at the beginning of the project development (conceptualization) and planning. Once the project is considered for implementation, its detail study has to be conducted properly and accurately with its every break down structures (WBS) and magnitude for construction, so that the effort and required time of the activities of project can be estimated more accurately. Also, a clear provision of an Alternative Dispute Resolution (ADR) as a board could ease such delay by regular inspection and meeting with the parties. As a result, the delay and its magnitudes could be minimized to a minimum amount.

3. Conclusion and Recommendation

In conclusion, the Employer, Contractor and too some extent Consultant (Engineer) can minimize the delay and its cost overruns of the project by taking the above causes of delays except unavoidable reasons. Causes of delay are found in resources (skilled manpower, investment), construction tools and equipment, legal permissions and environmental/social issues, timely payments and timely issuance and approvals of design/drawings.

Employer and contractor, mainly in some cases, are found to be less aware about the project details and required resources and time. Unrealistic planning and schedules are abnormal (totally unachievable) completion time for a project. More accurate is the Detailed Project Report with its WBS, required completion time will be more accurate which minimizes the delay in completion of project.

Employer and Contractor with consultants are also lacking in adoption of teamwork approach instead either looks the loopholes for delay and claims.

Hence, the employer generally can prepare more accurate project reports so that it's required resources, cost, time and risks for timely completion of project where the contractor are equally liable to study the project's requirementswith its cost and time. As far as possible, there should be a realistic approach to be followed by the all parties, so that the project could be completed in time without or with a very nominal variations in time and costs. The parties should implement the project with timely monitoring and evaluation applying the project management tools such as logical framework, S-curve and schedule controlling tools.

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Abbreviations

ADR	: Alternate Dispute Resolution
DB/DAB	: Dispute Board /Dispute Adjudication Board
DLP	: Defects Liabiity Period
DOR	: Departments of Roads
EOT	: Extension of Time
EPC	: Engineering, Procurement and Construction
FIDIC	: International Federation of Consulting Engineers
GON	: Government of Nepal
LD	: Lequidated Damage
NCB	: National Competitive Biddig
PPA, PPR	: Public Procurement Act 2063, Public Procurement Regulation, 2064
PPMO	: Public Procurement Monitoring Office
VO	: Vatition Order
WBS	: Work Breakdown Structure

Interpretation of Contract in Resolving Contractual Disputes

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The Contract is an agreement between two or more parties to do or not to do something enforceable by law. Contracts are an essential aspect of business transactions and legal agreements. They ensure clarity, mutual understanding, and provide a framework for enforcing rights and obligations of the parties in contract. However, in order to fully comprehend the rights and obligations outlined within a contract, one must turn to the process of contract interpretation. This article aims to shed light on the complexities of interpreting contracts in a legal setting to resolve contractual disputes.

As any contract consists of a set of languages to manifest the intentions of parties to the contract regarding their rights, and obligations, it is open to multiple interpretations or are ambiguous in their terms and conditions. Contractual ambiguities exist for numerous reasons, e.g., parties typically lack the knowledge and foresight necessary to anticipate every contingency that might be worth addressing in their agreement. In such cases, the interpretation helps to determine the true intension of the parties in the contract. Interpretation becomes essential when a word or sentence is ambiguous or gives dual meaning. Contract interpretation is crucial if a dispute arises over the terms of the contract or the language and definitions that were used in the contract. If the parties to the contract cannot reach an agreement regarding what the terms mean, it may require to file a lawsuit in order to have the review of the contract by a court of law. Also, when a dispute arises between parties regarding the rights, obligations, or performance under a contract, interpretation is vital in resolving these conflicts. The interpretation clarifies the parties' intentions and helps determine their respective rights and obligations. Clear and consistent interpretation of contracts promotes business certainty. Parties involved in contractual relationships rely on the understanding of their rights and obligations to make informed business decisions. Having a consistent and reliable framework for contract interpretation creates predictability and reduces the risk of confusion or misunderstanding.

Contract interpretation becomes important when unforeseen circumstances arise that were not specifically addressed in the contract. The courts may have to interpret the existing terms of the contract or apply legal principles to determine how the contract should be interpreted in light of these unforeseen circumstances. In order to enforce a contract, the courts need to understand its terms and conditions

accurately. Interpretation helps the courts comprehend the meaning of the contract so that they can apply the appropriate legal principles in determining the rights and liabilities of the parties. Overall, the interpretation of a contract provides clarity, resolves disputes, and ensures that parties are held accountable to the terms of their agreement. It is an essential aspect of contract law that promotes fairness, justice, and predictability in commercial transactions.

The most fundamental tenet regulating the interpretation of contracts is that the interpretation of a contract is the determination of the common intent of the parties (Ottinger, Patrick S., 2000). The interpretation of a contract involves analyzing the terms and conditions used in order to determine the intended meaning and obligations of the parties involved. The goal is to understand the contract's provisions, rights, and responsibilities of each party.Interpretation is usually the label applied to the process of uncovering meaning and seeking to understand an object in a situation where there is some doubt or room for difference of opinion (Mitchell, Catherine, 2007).

The interpretation is to find out the true sense of the words.It is the art of discovering the true meaning of words. Interpretation involves an ascertainment of the meaning of the words and provisions of a contract.Interpretation identifies the meaning of some words or actions, construction their legal effect (Klass, Gregory, 2018). Interpretation of contract gives the meanings to words as near to the intention of the parties to the contract and the law governing the same.Contract interpretation is the process of determining the meaning of the words of a contract. The aim of contract interpretation is to determine the intent of the parties at the time the agreement was made. But achieving this job can be a tough task as the party's intent is often unclear and disputed. The ultimate goal of contract interpretation is to come to a demarcation which most clearly reflects the original intent of the parties who created the contract.

In order to properly interpret a contract, several guiding principles or rules are commonly applied. Although the precise rules may vary by jurisdiction, the following are some general principles that are frequently used to interpret contracts:

1. Literal Rule of Interpretation

In literal rule of interpretation, the words used in a contract is construed 'as it is' to find out the intension of parties. The contract is interpreted focusing the words or sentences used in the contract. If there is one direct or specific meaning of any provision in the contract then there is no need for further interpretation. In other words, it can be said as what contract says and not what contract means. Literal language is used to mean exactly what is written in the contract.The rule of literal interpretation underlines that the primary objective of contract interpretation is to ascertain the intention of the parties based solely on the plain and ordinary meaning of the language of the contract. It holds that the words used in the contract should be taken at face value, without any additional meanings or implications. By adhering strictly to the literal interpretation, it is targeted to respect and uphold the intentions expressed by the parties when forming the contract. This approach ensures certainty, predictability, and the preservation

of freedom to contract. This will not resort to extrinsic evidence or subjective interpretations unless the contract itself is truly unclear or ambiguous.Moreover, it may consider the surrounding circumstances and the intentions of the parties if the literal interpretation would lead to an absurd or commercially unreasonable outcome. In such case, the interpretation of contract attracts other rule of interpretation.

The literal rule of interpretation is also known as Plain Meaning Rule of Interpretation or Grammatical Rule of Interpretation. The plain meaning rule is a fundamental principle employed in contract interpretation. It suggests that if the contract's language is clear and unambiguous, the effect to the plain and ordinary meaning of the terms used is given. Under this rule, external evidence or subsequent conduct is generally irrelevant unless a literal interpretation would lead to an absurd or illogical outcome.Contract document should be construed according to the ordinary grammatical meaning of the words used therein, and without reference to anything which has previously passed between the parties to it (Mitchell, Catherine, 2007).

2. Rule of Reasonable Construction

Rule of Reasonable Constructionis also known as “ut res magis valeat quampereat” in Latin or cannon of construction implies that a contract must be construed reasonably. A contract must be so construed as to make it effective and operative. Where a clause admits of two meanings one shall rather understand it in the one with which it may have some effect than in the meaning with which it could not produce any (Vogenauer, Stefan, 2007).

In interpreting the terms of the contract, the ordinary sense of the words is to be construed unless it leads to absurdity with the rest of the contract and the purpose of entering of the contract. The words used should be understood in their natural, ordinary or popular sense. An undefined term contained in a contract should be given its plain, ordinary and popular meaning.A well-drafted contract ensures that all parties involved understand their responsibilities and promotes the smooth execution of the agreement. However, disputes can arise when the terms of a contract are ambiguous or open to interpretation. In such cases, the rule of reasonable construction comes into play as an essential principle in contract law. The rule of reasonable construction is a principle to interpret contractual terms when their meaning is unclear or ambiguity. Under this rule, it is aimed to find the interpretation that is most consistent with the intentions of the contracting parties while also encompassing common sense and fairness. It allows parties to protect their interests based on the reasonable understanding of the contract. When a contract contains ambiguous terms, the rule of reasonable construction requires to be considered various factors in determining the appropriate interpretation. The language used, the context of the contract, the parties' intentions, industry customs, and the practical construction of similar contract terms are examined. This approach ensures that the interpretation aligns with the objectives and expectations of the parties involved in the agreement. Contract is to be interpreted in a manner which is understood by a reasonable person. Words should be construed in general sense and not literal. Words should be assigned meaning

which is generally assigned to them. While interpreting the words or contract, it is advisable to consider the background and the knowledge available on the basis of which the contract is entered into by the parties. If the words and terms in the contract are not used to give special or technical meaning, the words and terms are explained or understood in their ordinary meaning.

The rule of reasonable construction plays a crucial role in maintaining contractual certainty and fairness. By striving to ascertain the intentions of the parties and giving effect to their reasonable expectations, the rule helps promote predictability, stability, and trust in contractual relationships. It provides a mechanism to resolve disputes and ambiguities, reducing the need for prolonged litigation and encouraging parties to negotiate and find common ground in interpreting their contractual obligations. The rule of reasonable construction is a vital tool in the interpretation of contracts. It allows to determine the intent of the parties, resolve uncertainties, and give effect to reasonable expectations. By promoting fairness, certainty, and predictability in contractual relationships, this rule encourages parties to negotiate, enter into agreements, and conduct business transactions with confidence. Ultimately, the rule of reasonable construction contributes to the stability and integrity of the legal framework that governs the commercial interactions.

3. Parol Evidence Rule

The term "parol" is derived from the Anglo-Norman Frenchparol or parole, meaning "word of mouth" or "verbal". The parol evidence rule is a rule in the Anglo-American common law that governs what kinds of evidence parties to a contract dispute can introduce when trying to determine the specific terms of a contract. The parol evidence rule excludes extrinsic evidence that would contradict, vary, add to or subtract from the term of a written document. Parole or extrinsic evidence is evidence of the intent of the parties other than the express provisions of the contract itself. Specific examples include the following:

- Previous oral or written understandings or agreements between the parties, such as records of the negotiations leading to contract formation. This category also includes letters and other written forms of communications.
- Course of performance and course of dealing.
- Customs and trade practices of the industry.

Only when the contract is not clear does parole evidence become important to resolve the ambiguity by determining the intent of the parties.If a contract is in writing and final to at least one term (integrated), parol or extrinsic evidence will generally be excluded.However, there are a number of exceptions to this general rule. These include partially integrated contracts, agreements with separate consideration, in order to resolve ambiguities, or to establish contract defenses.

At its core, the Parol Evidence Rule prevents the introduction of extrinsic evidence that contradicts or adds to the terms of a fully integrated written contract. In simpler terms, if parties have reduced their

agreement to writing, the rule restricts the use of prior oral or written statements made outside of the written contract to modify or vary the terms of the agreement. While the rule may seem straightforward, its application can be nuanced, and exceptions exist.

There are several key elements to consider when assessing the applicability of the Parol Evidence Rule. Firstly, it applies only when the parties have entered into a complete and final written agreement. This means that the contract must encompass all relevant terms and explicitly state the intentions of the parties. If this requirement is not fulfilled, the rule may not bar extrinsic evidence. Secondly, the Parol Evidence Rule prohibits the introduction of evidence regarding prior or contemporaneous oral or written statements that contradict the terms of the written contract. The rule seeks to prioritize the final written document as the most reliable reflection of the parties' intent, encouraging parties to be thorough and accurate in their contract drafting.

However, it is crucial to note that the Parol Evidence Rule is not without exceptions. Courts recognize certain situations where the introduction of extrinsic evidence is allowed, even if it contradicts or adds to the written contract. Some common exceptions include:

i. Ambiguities - If the terms of the written contract are ambiguous or unclear, extrinsic evidence may be admitted to clarify the intended meaning of the contract. When the terms of a written contract are susceptible of more than one meaning, or there is uncertainty or ambiguity as to its provisions, or the intent of the parties cannot be ascertained from the language employed, or fraud is alleged, parol evidence is admissible to clarify the ambiguity, show the intention of the parties, or prove fraud (Ottinger Patrick S, 2000).

ii. Fraud, Mistake, or Duress - Evidence of fraud, mistake, or duress that influenced the formation of the contract may be admissible, allowing parties to challenge the written terms.

iii. Subsequent Modifications - If the parties execute a subsequent agreement that modifies the original contract, extrinsic evidence can be introduced to prove this modification.

iv. Collateral Agreements - Evidence of additional negotiations or agreements that are separate from the written contract, often referred to as collateral agreements, may be allowed if they do not contradict but supplement the written terms.

The Parol Evidence Rule serves as an important tool in contract interpretation, aiming to maintain the sanctity and integrity of written agreements. By limiting the influence of prior statements and negotiations, it promotes certainty and fairness in contractual relationships. However, it is crucial for legal practitioners and parties involved in contract disputes to be aware of the exceptions to this rule, as they play a significant role in shaping the outcomes of contract litigation.

4. Contra Preferentum Rule

The phrase 'contra proferentem' in Latin translates to against the offeror which can be further interpreted to "guilt of the drafter". If the contract is ambiguous and has conflicting provisions or likely to give dual interpretations, such words, terms or contractual clauses are interpreted in the favor of the party, who has not drafted the contract, i.e., benefit of a doubt goes against the contract drafter.

There is a maxim in Latin that 'ambiguitas contra stipulatoremest' which means an ambiguity is construed against the drafter. A canon of contract construction that dictates that vague or ambiguous terms or provisions should be interpreted in the manner most favorable to the position of the party other than the one who drafted the document.In case of doubt, the agreement is interpreted against the one who has stipulated, and in favour of the one who has contracted the obligation (Vogenauer, Stefan, 2007).

This rule requires that the meaning of an ambiguous contract provision be interpreted against the drafter. The drafter is the party that had the opportunity to make the provision clear, and the drafter bears the burden of failure to do so.The rule cannot be successfully invoked simply because one party does not agree with the other party's interpretation of a particular contract provision. The provision in question must be determined to be ambiguous, i.e., the provision must be susceptible to more than one reasonable meaning before it can be interpreted against the party that drafted it.

As long as the claimant's interpretation is reasonable and does not conflict with other provisions of the contract, it does not matter that the drafter also has a reasonable interpretation of the provision. After all, the word ambiguous means subject to more than one reasonable meaning. Therefore, the meaning of the provision will be interpreted against the drafter by acceptance of the claimant's interpretation, even though the drafter's interpretation is also reasonable.

However, it is important to note that contra preferentum is not always applied. There are exceptions to its application, such as when the language is unambiguous, or when the drafter is a government entity with a superior understanding of the purpose and intent behind the provision.

Contra preferentum is a legal doctrine used to interpret contractual language. It places the responsibility of clarity on the party who drafted the document and aims to protect the interests of those who may be at a disadvantage.English law, French and German law treat the contra proferentem rule as a rule of last resort which is meant to be subsidiary to the other rules and maxims of interpretation. Contra preferentumrule requires interpretative doubt or ambiguity. It is, however, not entirely clear whether the rule is triggered as soon as the language of a particular standard term is ambiguous or whether it only comes into play if the term remains ambiguous once all the other interpretative devices have been exhausted (Vogenauer, Stefan, 2007).

5. Ejusdem Generis Rule

The Ejusdem Generis rule is a legal principle employed in the interpretation of contracts. Ejusdem Generis is a Latin phrase means “of the same kind or species”. When particular words pertaining to a class, category or genus are followed by general words, general words are construed as limited to things of the same kind as those specified.This rule is used when specific words or terms are followed by more general or vague terms in a list or series. It helps to determine the scope and limit the general terms by reference to the preceding specific words. In essence, the rule narrows down the meaning of the general words by construing them in the context of the specific words that precede them.It provides a logical framework to interpret statutes and contracts where there might be uncertainty or need for clarification.

According to Black’s Law Dictionary, the Ejusdem Generis doctrine provides that where general words follow an enumeration of persons or things, by words of particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned (Ottinger, Parick S., 2000)

The rule assumes that when specific words or terms are grouped together, they share a common characteristic or quality. Consequently, when a general term follows these specific words, it is presumed to encompass only things or concepts of the same nature or kind as those specific terms. It prevents the general words from being too broadly interpreted and restricts them to the same class or category as the specific terms.

To illustrate the application of the Ejusdem Generis rule, consider the following example: "TheProject Manager, Engineer & other persons shall reach at construction site by 8 am on each working day." In this case, the specific terms ‘Project Manager’, and ‘Engineer’ fall under the category of common persons. The subsequent general term "other persons" would be interpreted to mean persons of the same nature or kind as project manager, and engineer rather than any persons of the town.

However, it is important to note that the Ejusdem Generis rule is not absolute and may not always apply in every circumstance. Courts consider the contextand purpose of the contract while applying this rule. If the intention of the parties in contract is clear or the context suggests otherwise, the rule might be set aside.

6. Whole Contract Is To Be Considered

For a written contract, it is inevitable to read the entire contract and all attachments in order to discover the true intention(Sriporm, Chalermwut, 2016). The entire contract should be read thoroughly to gain a holistic understanding of its provisions, structure, and purpose. Attention should be paid to the definitions section, as well as any specific clauses or schedules that may be relevant.Contract should be read as a whole, and the interpretation should be based on all the clauses read together. The words of a contract are to be reject, indeed the whole provisions, if they are inconsistent with what one assumes to

be the main purpose of the contract.Contracts should be interpreted in a way that gives effect to all of its provisions and avoids rendering any part of it meaningless or redundant. Analyze how different clauses are interconnected and how they collectively address the parties' rights, obligations, and intentions.

7. Preceding Practices and Customs of the Parties

When the true intention of the parties cannot be discovered from the written agreements or thecircumstances under which the agreements were concluded, observations should be made on theprevious practices and normal customs between the parties. Latter agreements usually follow the path set by the ones made prior and as such the true intention in question can be derived from the same (Sriporm, Chalermwut, 2016).

8. Commercial Object

Commercial object or function of the clause in question and its relationship to the contract as a whole will be relevant in resolving any ambiguity in the wording of a contract.

9. Contextual Interpretation

While the plain meaning rule is essential, it is also crucial to consider the context in which the contract was formed. This includes examining the background, purpose,subject matter, and surrounding circumstances. The court will take into account the commercial context, industry practices, and the reasonable expectations of the parties to determine the intended meaning of ambiguous or unclear provisions.

10. Course of Performance, Course of Dealing, and Usage of Trade

The course of performance, course of dealing, and usage of trade may be considered to interpret contractual terms. Course of performance refers to the conduct of the parties in performing the contract, while course of dealing relates to past transactions between the parties. Usage of trade refers to commonly accepted practices or customs within a particular industry. These factors help establish the parties' understanding and expectations of how the contract should be interpreted.

11. Aids of Interpretation

A contract may apart from the rules, be interpreted based on the parts of the contract like title, recital, definitions, schedules, pre-contractual documents, etc. The help of these aids to interpret the contract is taken only when words of a contract is ambiguous or unclear. These aids are to be carefully analyzed to ensure a fair and accurate understanding of the parties' intentions when interpreting contractual agreements.

i. Title

Every contract entered into has a title which gives out the purpose of the contract just by going through it. Title of a contract is used to interpret the nature of the contract at first glance.

ii. Recital

Recital defines the object and purpose of the contract. It is an introduction to a contract and gives the basis of coming together of the parties. If there is a conflict in the clauses of the contract, the recital gives an idea as to coming together of the parties and can be decided on that basis.

iii. Definition

Definitions in a contract assign meaning to the words being used in the contract and help in eliminating the ambiguity in the contract.Definitions are preamble to the clause. Definition can be used in construing the clauses but only where there is ambiguity in the clause.

iv. Schedules

Documents which form annexures or schedules of the contract may be read to understand and interpret the words and the contract.

v. Pre-contractual Documents

Any document executed before the entering or execution of the contract will form the basis of intent of the parties in case of ambiguity, e.g., Initial Environmental Examination (IEE), Environmental Impact Assessment (EIA), Social Impact Assessment (SIA), etc.

12. Extrinsic Evidence

In some cases, when contract terms remain unclear even after applying the rules mentioned above, courts may allow the introduction of extrinsic evidence. Extrinsic evidence includes evidence outside the contract itself, such as oral statements, previous negotiations, or other documents. However, it is important to note that many contracts contain integration clauses, which limit the admissibility of extrinsic evidence.The courts will usually exclude extrinsic evidence that contradicts or adds to the terms of the written contract.

13. National Civil Code, 2074

Section 515 of the National Civil Code, 2074 has depicted some laws to interpret the contract as follows:

i. A contract shall be interpreted according to the common intention of its parties.

ii. If the intention cannot be established, a contract shall be interpreted according to the meaning of general understanding that a reasonable person of the same prudence as a party to the contract would give to it in normal circumstances.

iii. If one party to a contract knows or is deemed to know a statement and conduct of the other party, the contract shall be interpreted according to the intention of such a party.

iv. The terms and expressions used in a contract shall be interpreted in the light of the entire contract or the context in which such terms and expressions are used.

v. A contract shall be interpreted in a manner so that all the terms used in the contract are given effect without separating some terms from others.

14. Conclusion

At the onset, it was noted that the most fundamental principle which regulates the interpretation of contracts is that the "interpretation of a contract isthe determination of the common intent of the parties". Interpreting contracts involves a meticulous analysis of the language used, the context surrounding the agreement, and the intentions of the parties involved. The objective approach, the plain meaning rule, contextual interpretation, rules of construction, and various other indicators all play crucial roles in determining the true intent of a contract. Understanding the intricacies of contract interpretation is vital for businesses and individuals alike to ensure that contractual obligations and rights are enforced in a fair and just manner. It is important to note that the above rules are not exhaustive, and the interpretation of a contract can also be influenced by other factors, such as statutory laws and case precedents specific to the jurisdiction in question.

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An Overview of Arbitration as an Alternative Means for Resolving Disputes in Nepal

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1 General Background

The development of international arbitration can be traced back to the Jay Treaty-1794, between United Kingdom (UK) and the United States of America (USA), which established three arbitral commissions to settle questions and claims arising out of the American Revolution. In the 19th century, many arbitral agreements were concluded by which ad hoc arbitration tribunals were established to deal with specific cases or to handle a great number of claims. Most significant was the Alabama Claims Arbitration under the Treaty of Washington-1871, by which the USA and UK agreed to settle claims arising from the failure of Great Britain to maintain its neutrality during the American Civil War.

Mixed arbitral commissions often were used in the 19th century to settle claims for the compensation of injuries to aliens for which justice could not be obtained in foreign courts. Such was the purpose of a convention in 1868 between the USA and Mexico, by which claims of citizens of each country arising from the Civil War were settled. Boundary disputes between states were also settled by arbitration. Notable example is the boundary dispute between India and Pakistan in Rann of Kutch in the year 1968.

The Hague Convention, 1989 established a Permanent Court of Arbitration, composed of a panel of jurists appointed by the member governments, from which the litigant governments select the arbitrators. The International Court of Arbitration (established in 1923), which was originally planned for the settlement of disputes between states, has offered its services for the arbitration of controversies between states and individuals or corporations. By the beginning of the 21st century, the court had arbitrated more than 10,000 disputes.

Arbitration can be traced back to the system of 'Panchayat' in Nepal. Panchayat was the informal tribunal of five gentlemen chosen from among the villagers to render an impartial decision in the settlement of disputes between the members of villages. Since early times the decisions of Panchayats were acceptable and binding on the parties. Panchayat as private tribunal was a different system of arbitration and was, however,subordinate to a regular court of law. In the Lichhavi era, the Panchali which was also known as Pancha Sava, was empowered to decide disputes at the local level. This form of dispute settlement

mechanism that was practiced for a long period should be considered as the foundation of the concept of arbitration in Nepal's context.

Before the enactment of general legislation on commercial arbitration in 1981, statutory provisions of commercial arbitration were found in a scattered form in different legislation with different purposes. Such a provision first appeared in Section 9 of the current Development Board Act-1957 which provided for the resolution of a dispute under a contract to which the Board is a party. This type of arbitration is termed compulsory arbitration. Therefore, parties are forced to follow the rules set out in the statute. The objective behind introducing such an arbitral process may be looked at in the context of inviting foreign capital and technology. The Arbitration Act of 1981 was superseded by the Arbitration Act of 1999 and is the prevailing general law on commercial arbitration. Furthermore, it was made in line with the UNCITRAL Model law. On the basis of this new act, the Supreme Court of Nepal has promulgated the Arbitration (Court Procedure) Rules, 2002 relating to court procedure in order to promote arbitration in Nepal.

2. Kinds of Arbitration

On the basis of the nature of arbitration, it can be differentiated to various kinds of arbitration. Such as, ad hoc arbitration, institutional arbitration, voluntary arbitration, compulsory arbitration, judicial arbitration etc. A few kinds of arbitration are as follows:

2.1 Ad Hoc Arbitration

It is a form of arbitration where the parties and the arbitrators independently determine the procedure without the involvement of an arbitral institution. An ad hoc arbitration may be more beneficial than institutional arbitration as in the institutional arbitration the administrative fees (for their services, use of facilities or even printing and binding costs, etc.) can be very high.

2.2 Institutional Arbitration

An Institutional Arbitration is an arbitration which is organized and administered by an arbitration institution. In an institutional arbitration, parties decide to incorporate the rules of a recognized arbitration institution, and adopt the institution as the appointing authority. The arbitration is then conducted under the supervision of that institution. Institutional Arbitration are also termed as permanent arbitration bodies, such as International Chamber of Commerce (ICC) International Court of Arbitration, Singapore International Arbitration Centre (SIAC), International Centre for the Settlement of Investment Disputes (ICSID), Nepal Council of Arbitration (NEPCA).

The difference between an ad hoc arbitration and institutional arbitration is that; a party can delay proceedings in an ad hoc arbitration by, for example, refusing to agree on the appointment of a particular arbitrator, whereas, in an institutional arbitration, deadlines are set for such decisions to be made and the arbitral body may have powers to intervene in the absence of agreement between the parties. An

example, ICC 2021 rules on Arbitration Proceeding enables ICC International Court of Arbitration to step in where parties fail to agree. It happens in the appointment of arbitrators or on number of arbitrators. There is also a deadline period of 30 days to challenge the appointment of arbitrator.

2.3 Voluntary Arbitration

Voluntary arbitration is arbitration performed by the agreement of the parties. ArbitrationAct, 1999 has provided this kind of arbitration which is very useful for commercial disputesettlement.

2.4 Compulsory Arbitration

Arbitration is required by law or forced by law on the parties.This is also termed statutory arbitration. Government contracts are held on the basis of a statutory arbitration clause which can be classified in this category. Privatization Act, 1994 andForeign Investment and Technology Transfer Act (FITTA),2019 are some examples of laws thatrequire disputes in certain conditions (if not resolved by mutual discussion or negation, or if not resolved within certain time) to be compulsorily referred to arbitration and to be decidedunder arbitration law of Nepal, or under UNCITRAL rules.

2.5 Judicial Arbitration

Judicial arbitration is court-referred arbitration that is final unless a party objects to the award. Arbitration Act, 1999 provides for this kind of court-referred arbitration .

2.6 Arb-Med

Arb-Med occurs when arbitration is under process and at the same time when parties are ready for an amicable settlement, a mediation process is initiated. Here, the arbitrator has no decisivepower and he/she need to follow and facilitate mediation. Arbitration Act, 1999 also mentions this notion .

3. Advantages of Arbitration

An existing dispute can be referred to arbitration by means of a submission agreement between the parties. In contrast to mediation, a party cannot unilaterally withdraw from arbitration.Arbitration is essentially a paid private trial, in other words, a method to resolve disputes without going to court. Parties will submit the dispute to a third-party neutral arbitrator rather than the courts. The main advantages of arbitration, over the court proceedings, can be summarized as follows :

3.1 Neutrality

Parties are free to choose a neutral arbitral venue when drafting their arbitration clause. Also, once a dispute has arisen, parties have the ability to appoint independent arbitrators of their choice to form a neutral tribunal.

3.2 Flexibility

Arbitration permits the parties to agree on the procedures they wish to apply to their arbitration.

3.3 Time and cost-efficiency

Due to the flexibility and finality of arbitration proceedings, resolving disputes through arbitration may often be quicker and cheaper than resolution through court litigation or other means of dispute resolution.

3.4 Confidentiality

Arbitration hearings are conducted in private and awards are, under normal circumstances, not published. Therefore, disputes will not be revealed to the public and where possible business relationships can be maintained.

3.5 Enforceability

Enforcement of foreign court judgments can be difficult in the absence of an appropriate bilateral treaty. Under the New York Convention signed by more than 150 jurisdictions, each of the Convention parties undertake to recognize and enforce arbitral awards made in other signatory countries.

3.6 Final and Binding

Arbitration awards are usually final and not subject to review on the merits, meaning prolonged court appeal procedures can generally be avoided.

4. Existing Legal Framework of Arbitration in Nepal

The general law of domestic commercial arbitration originated in Nepal with the Arbitration Act,

1981. Under this act, any disputes of a commercial nature arising out of agreements may be settled by arbitration as provided for in such agreements. If the agreement that provided for arbitration fails to provide rules to determine the number of arbitrators or to provide the rules governing substantive or procedural law, the provisions of the Arbitration Act, 1981 would apply as default legal rules. This act provided that if the parties to the agreement fail to appoint an arbitrator under the agreement or the arbitration agreement is silent in this regard, any party is empowered to file an application at the District Court asking for the appointment of an arbitrator. Arbitration Act, 1981 has been succeeded by Arbitration Act, 1999.

4.1 Arbitration Act, 1999

The 1999 act is mostly influenced by UNCITRAL Model Law. An arbitration agreement is defined as “an agreement between the parties to refer present or future disputes arising in respect of a defined legal relationship whether it is contractual or not” . It is mandatory for the parties to submit their dispute in front of the arbitrator if it is so provided in the arbitration agreement or arbitration clause. This provision broadens the scope of arbitration in Nepal. Court referred arbitration applies when a dispute is of both a commercial and a civil nature. Therefore, disputes of civil nature, which are not of commercial in nature, cannot be resolved through court referred arbitration.

Generally, an award given by an arbitrator that is produced through fraud, bribery or other malpractice provides an appropriate reason to make the award universally void by the court, but this Act is directly silent in this regard. Though, there are other sections of this legislation to curb this problem. This Act provides that to protect the public interest and public policy, the court has the power to quash the award if it is against the public interest or policy. Major provisions of Arbitration Act, 1999 are as follows:

4.1.1 Disputes to be settled through Arbitration

Chapter II of the Act has provisions related to the matters which can be referred to the arbitration for settlement of disputes. In case any agreement provides for the settlement of disputes through arbitration, the disputes connected with that agreement or with issues coming under that agreement shall be settled through arbitration according to the procedure prescribed in that agreement, if any, and if not, according to this Act .

Notwithstanding anything contained in Sub-section (1), in case of concerned parties to a civil suit of a commercial nature which has been filed in a court and which may be settled through arbitration according to prevailing laws, file an application for its settlement through arbitration, such dispute shall also be settled through arbitration.

4.1.2 Number of Arbitrator

The number of arbitrators is as specified in the agreement. In case the agreement does not specify the number of arbitrators, there shall ordinarily be three arbitrators. In case the number of arbitrators appointed under the agreement is an even one, it shall be turned into an odd one by designating an additional arbitrator chosen by them as the presiding arbitrator.

4.1.3 Appointment of Arbitrator

Notwithstanding otherwise contained in the agreement, the process of appointing arbitrators must be started within 30 days from the date when the reason for the settlement of a dispute through arbitration arises. In case the agreement mentions the names of arbitrators, they themselves shall be recognized as having been appointed as arbitrators . In case the agreement has made any separate provision for the appointment of arbitrators, arbitrators shall be appointed accordingly . Notwithstanding otherwise contained in the agreement, each party shall appoint one arbitrator each and the arbitrators shall appoint the third arbitrator who shall work as the chief arbitrator .

4.1.4 Appointment of Arbitrators by Court:

Any party may submit an application to the Appellate Court for the appointment of arbitrators in the following circumstances : (a) In case no arbitrator can be appointed upon following the procedure contained in the agreement. (b) In case the agreement does not mention anything about the appointment of arbitrators.

The application to be filed pursuant to Sub-section (1) must explicitly mention the full name, address, occupation and the field of specialization of at least three persons who can be appointed as arbitrator, and also be accompanied by a copy of the agreement . Upon receiving of an application pursuant to Sub-section (1), the Appellate Court shall notify all the parties and shall appoint arbitrators from the persons proposed by them in the case of consensus in that connection, and in the case of fail to consensus, the persons deemed appropriate by the Appellate Court, within 60 days from the date of receipt of the application. The decision taken by the court in that manner shall be final .

4.1.5 Power of the Arbitrator

The powers of the arbitrator shall be as follows, except when otherwise provided for in the agreement :

a) To direct the concerned parties to appear before him/her to submit documents, and record their statements as required.

b) To record statements of the witness.

c) To appoint expert and seek their opinion or cause examination on any specific issue.

d) In case party is a foreign national so that the decision pronounced by the arbitrator is not likely to be implement for that reason, to obtain a bank guarantee or any other appropriate guarantee as determined by the arbitrator.

e) To inspect the concerned place, object, product, structure, production process or any other related matter which are connected with the dispute on the request of the parties or on his/her own initiative if he/she so deems appropriate, and in case there is any material or object which is likely to be destroyed or damaged, to sell them in consultation with the parties, and keep the sale proceeds as a deposit.

f) To exercise any specific power conferred by the parties.

g) To issue preliminary orders, or interim or inter locating orders in respect to any matter connected with the dispute on the request of any party, or take a conditional decision.

h) To issue certified copy of document.

i) To exercise the other power conferred by this Act.

Any party which is not satisfied with the order issued by the arbitrator pursuant to Clause (g) of Sub-section (1) may submit an application to the appellate court within 15 days, and the decision made by the Appellate Court shall be final.

4.1.6 Implementation of Award

The concerned parties shall be under obligation to implement the award of the arbitrator within 45 days from the date when they receive a copy thereof.

4.1.7 Implementation of Award by Court

If an award cannot be implemented within the time limit prescribed in Section 31 of this Act, the concerned party may file a petition to the District Court within 30 days from the date of expiry of the time limit prescribed for that purpose to implement the award. In case such a petition is filed, the District Court shall implement the award ordinarily within 30 days as if it was its own judgment.

4.1.8 Implementation of Award Taken in a Foreign Country

A party which willing to implement an award made in foreign country in Nepal shall submit an application to the Appellate Court along with the documents like the original or certified copy of the arbitrator's award and the original or certified copy of the agreement. In case the arbitrators' award is not in the Nepali Language, an official translation thereof in Nepali language.

If in case Nepal is a party to any treaty which provides for recognition and implementation of decisions taken by arbitrators in foreign countries, any decision taken by an arbitrator after the commencement of this act within the area of the foreign country which is a party to that treaty shall be recognized and implemented in Nepal in the following circumstances subject to the provisions of that treaty and the conditions mentioned at the time of entering into the treaty.

a) In case the arbitrator has been appointed and award made according to the laws and procedure mentioned in the agreement.

b) In case the parties had been notified about the arbitration proceedings in time.

c) In case the decision has been taken according to the conditions mentioned in the agreement or upon confining only to the subject matters referred to the arbitrator.

d) In case the decision has become final and binding on the parties according to the laws of the country where the decision has been taken.

e) In case the laws of the country of the petitioner or the laws of the country where arbitration proceedings have been conducted, do not contain provision under which arbitration award taken in Nepal cannot be implemented.

f) In case the application has been filed for the implementation of the award within 90 days from the date of awards.

In case the Appellate Court is satisfied that the conditions mentioned have been fulfilled in an application filed, it shall forward the award to the District Court for its implementations. Notwithstanding anything

contained in this Section, no award made by an arbitrator in a foreign country shall be implemented in the circumstances in case the awarded settled dispute cannot be settled through arbitration under the laws of Nepal and in case the implementation of the award is detrimental to the public policy.

4.2 Arbitration (Court Procedure) Rules, 2002

The rules deal with the procedural matters relating to the Arbitration Act, 1999. The Supreme Court of Nepal prepared this rule after having such rule making power delegated. The rules clarify and prescribe the provisions in respect of court fees, arbitration panels, interim orders, annulment and enforcement of foreign and domestic awards etc. that helps to facilitate the arbitration process.

4.3 Development Board Act, 1956

Any dispute arising out of any contract with the Board or relating to its performance, if provided in such contract is to be referred to arbitration for settlement and shall be settled by an arbitrator appointed under such contract. The act has further provided that no court of law shall have jurisdiction to hear or decide upon such dispute. The Act states that, the arbitrator shall have powers to procure and examine witness and evidence, summon witnesses and order submission of documents in respect of thedispute referred to him/her under Sub-section (1) for decision.

The Act further states that, the award given by the arbitrator shall be final and binding upon the parties. It further provides that on a petition moved by an aggrieved party, the appellate court may annul the award on the ground of manifest misconduct or that the award is perverse showing bad faith on the part of the arbitrator or the award is patently arbitrary or that the award on the face of it is contrary to law. The Act empowers the court to appoint another arbitrator where an award has been annulled.

4.4 Nepal Airlines Corporation Act, 1963

In case there arise any dispute regarding agreements in between among the Board, General Manager or other officials or employees of the Corporation, it shall be decided upon solely by an arbitrator designated by Government of Nepal (GoN) . The arbitrator shall have such powers as are enjoyed by a court of law in respect to examination of witnesses, collecting evidence, summoning parties to the dispute and procuring documents relating to the dispute referred to him/her for decision under Sub-section (1) . The decision of the arbitrator shall be final and shall be binding on both parties .

4.5 Nepal Petroleum Act, 1983

Any dispute, between GoN and contractor, relating to a petroleum agreement which cannot be amicably resolved shall be settled by arbitration.

4.6 Privatization Act, 1994

If any dispute arises, in respect of any matter contained in the privatization agreement entered into between GoN and the party participating in the privatization, such dispute shall be resolved through

mutual consultation among concerned parties . If the dispute is not resolved pursuant to Sub-Section (1), such dispute, with the consent of both parties, may be referred to arbitration. The arbitration for resolving the dispute shall be conducted in accordance with existing laws relating to arbitration or the Rules of Arbitration of the UNCITRAL . The venue of arbitration shall be Kathmandu and prevailing laws of Nepal shall be applied in the process of arbitration .

4.7 Local Self-Government Act, 1999

The arbitration is conducted by local authority bodies, through arbitration board, for the settlement of disputes relating to the allocation of natural resources, land use, domestic violence etc. under the power conferred to them by the Act. Arbitration under this act has been expanded to the local government level and is very different to commercial arbitration.

4.8 Bank and Financial Institution Act (BAFIA), 2017

The Act has made the Nepal Rastra Bank as an arbitrator able to decide upon disputes arising between licensed financial institutions. Its decision is binding and final in this regard.

4.9 Foreign Investment and Technology Transfer Act (FITTA), 2019

The Actrequire disputes in certain conditions (if not resolved by mutual discussion or negation, or if not resolved within certain time) to be compulsorily referred to arbitration and to be decidedunder arbitration law of Nepal, or under UNCITRAL rules.

5. International Instruments of Arbitration

UNCITRAL Model Law of Arbitration, 1985; UNCITRAL Arbitration Rules, 1976; International Chambers of Commerce (ICC) Rules of Arbitration, 1998; International Center for Settlement of Investment Dispute (ICSID) Rules of Procedure for Arbitration Proceeding, 1984; Arbitration Rules of London Court of International Arbitration, 2014; Australian Center for International Center for Commercial Arbitration Rules, 2016; Singapore International Arbitration Rules, 2016 etc. are major international instruments for arbitration and its best practices.

5.1 The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1976

It provides comprehensive guideline of arbitration. The process of arbitration has been mentioned in details, which covers arbitral process, model of arbitration clause, appointment of arbitrators and the conduct of arbitral proceedings and effect and interpretation of the award etc. It has different version; i.e. (i) the 1976 version; (ii) the 2010 revised version; and (iii) the 2013 version. It incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration.

5.2 International Center for Settlement of Investment Dispute (ICSID) Rules of Procedure for Arbitration Proceeding, 1984

ICSID is a public international organization established by a multilateral treaty, the ICSID Convention-1965, between States and Nationals of Other States. It provides services on state-to-state disputes under investment treaties and free trade agreements, and as an administrative registry. Each case is considered by an independent Conciliation Commission or Arbitral Tribunal, after hearing evidence and legal arguments from the parties. Rules of Procedure for Arbitration Proceeding mentions about establishment of tribunal, working of the tribunal, written and oral procedure, particular procedure, award, and interpretation, revision and annulment of procedure etc.

5.3 International Chambers of Commerce (ICC) Rules of Arbitration, 1998

ICC was founded in the aftermath of the First World War, which supports to make standard in commercial law. International Chamber of Commerce Arbitration Rules 1998 covers commencement of arbitration, establishment of arbitral tribunal, arbitrage procedures, award, costs and miscellaneous provisions. It has statutes of the International Court of Arbitration of the ICC in its annex.

5.4 Arbitration Rules of London Court of International Arbitration, 2014

London Court of International Arbitration is one of the international institutions for commercial dispute resolution, which is available to all contracting parties, without any membership requirements. LCIA Arbitration Rules, 2014 mentions detail provision of arbitration proceeding.

5.5 The Australian Center for International Commercial Arbitration Rules, 2016

Australian Center for International Commercial Arbitration is specialized dispute resolution institutions, which is not-for-profit organization. It provides arbitration, mediation and conciliation services. ACICA Rules, 2016 mentions detail process of arbitration. It has also issued Emergency Arbitrator Provisions and Expedited Arbitration Rules.

5.6 Singapore International Arbitration Centre (SIAC) Rules, 2016

SIAC is a not-for-profit international arbitration institution which provides case management services to parties from all over the world. Based in Singapore, SIAC administers arbitrations under its own rules of arbitration and the UNCITRAL Arbitration Rules. It was established on 1 July 1991 and is located at, Maxwell Chambers. SIAC arbitration awards have been enforced in many jurisdictions including Australia, China, India, Indonesia, Thailand, UK, USA and Vietnam, and amongst other New York Convention signatories.The SIAC Rules 2016 is the primary rule of arbitration at the SIAC. The SIAC Rules 2016 supersede the SIAC Rules of 2013. SIAC IA Rules 2017 is a specialized set of rules to address the unique issues present in the conduct of international investment arbitration.

6. Judicial Practices Relating to (Commercial) Arbitration in Nepal

After the inception of arbitration provisions in the Development Board Act, 1956 the application and use of arbitration process came into practice. However, no specific case law is found until the enactment of the Arbitration Act, 1981. From early 1993 we encounter cases relating to arbitration (almost all of commercial) under cases heading as Certiorari, Transactions, Compensation, Mandamus plus Certiorari, or claims for reimbursements, etc. Some of the representative cases in commercial arbitration are as follows:

6.1 Department of Roads, Babarmahal v. Arbitral Tribunal comprising of Mr. Sureshman Shrestha, Ms. Kamala Upreti and Mr. Narendra Kumar Shrestha & othrs., 2077, Decision No. 10586.

Established Principles: The Hon'ble Supreme Court (SC) held that the Hon'ble Appellate Court has the authority to invalidate an arbitral award and revert the matter back to arbitration only under the circumstances given under Section 30(2) of the Arbitration Act, 2055.

6.2 Yakshyadhoj Karki v. High Court Patan and others, 2076, Decision No. 10369.

Established Principles: The SC held that, when an arbitration clause is included in a contract, the same is severable from the main contract and remains enforceable until disputes pertaining to the contract or performance of the contract have been resolved. SC also stated that, Behavior of one party, general communications or one-sided offer cannot be deemed to have amended the contract. If parties have not agreed to resolve disputes through arbitration, Section 3 of the Arbitration Act, 2055 in relation to resolution of disputes through arbitration would not be applicable.

6.3 Adv. Devendra Pradhan (on behalf of Hanil Engineering & Construction Co. Ltd.) v. Appellate Court, Patan, 2075; Decision No. 10138.

Established Principle: The SC held that,

- A dispute resolution clause is considered to be a separate contractual agreement in terms of the doctrine of severability, and the arbitration clause is not affected by the status of the main contract.
- The parties are free to choose separate substantive and procedural laws for the purpose of the arbitration clause. If the parties choose the law of one country for substantive part of a contract, it shall not be understood that the parties have chosen the law of the same country for procedural and appointment related matters.
- Where the contract provides that disputes shall be settled through amicable settlement, the parties must attempt to amicably resolve the dispute as envisioned by the contract.

- Initiating arbitration proceeding or giving of an award overlooking the provision requiring the parties to first attempt dispute resolution through amicable settlement is contrary to the intention of the contract in terms of which the parties were to first attempt amicable settlement. (Note: This is in relation to multi-tiered dispute resolution clauses i.e. dispute resolution clauses that stipulate recourse to one or more alternative dispute resolution methods before arbitration can be initiated). Separate notices should be served for separate matters as prescribed by the law. The arbitral award shall lose its validity if the notice requirements have not been adequately fulfilled. If one of the parties has not been given sufficient opportunity to be heard, the same is contrary to the principles of natural justice and the resultant arbitral award is not enforceable.

Applied Law: Sections 34(2)(a) and (b), and Section 16(3) Arbitration Act, 2055; Article V.1.b and Article V.1.d of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958

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

Established Principle: An Arbitration Agreement is deemed to be constituted in the following situations:

- agreement between the parties to resolve dispute through arbitration as per Section 3(a) of the Arbitration Act, 2055 within the contract, or;
- through a separate agreement, or;
- when parties exchange written communications deciding to submit the dispute to arbitration, or;
- when Respondent submits its Statement of Defense in response to Statement of Claim submitted by Claimant without protesting arbitration as the dispute settlement mechanism.

The SC also held that in the absence of the above-mentioned conditions, an agreement between parties to resolve any dispute themselves cannot be construed to mean that the parties had an intention to resolve the dispute through arbitration.

6.5 Raju K.C. on behalf of Nepal Air Service Corporation v. Appellate Court Patan, 2067, Decision No. 8523.

Established Principle: The Hon'ble Supreme Court held that if any party refuses to participate in the arbitration proceeding despite receiving notice of the same, such party cannot approach the Hon'ble Appellate Court in order to invalidate the arbitral award on the ground of non-issuance of notice.

6.6 Bhanu Prasad Acharya on behalf of NepalGovernment, Ministry of Finance V.Damodar Ropeways and ConstructionCompany et al., 2067; Decision No. 8368.

Established Principle: The SC, inter alia, held the following:

- Validity of an arbitral award cannot be determined in the same manner as other cases. In terms of factual interpretation, the arbitral tribunal is to be considered well informed and knowledgeable.
- The SC needs to conduct judicial examination of the arbitral award and decision of the Hon'ble Appellate Court to ascertain if the conditions under Section 21(2) of the Arbitration Act, 2038 have been met.
- When both parties have clearly established and agreed on certain aspects, the decision maker should not create a dispute out of such matters.
- The process of dispute resolution through arbitration is an informal and alternate process within the larger judicial process. An arbitral award must be supported by established facts, corroborating evidence and the written language of the contract. Interpretation based on prevalent laws and established principles should only be done when the contract is unclear or silent.

6.7 Bikram Pandey on behalf of Kalika, Kanchanjangha JV. V. Ministry of Physical Planning and Construction, Department of Road et al., 2067; Decision No. 8437.

Established Principle: The SC held the following:

- The UNCITRAL Rules become applicable in a manner similar to provisions of a contract when parties have opted to resolve disputes through arbitration in accordance with the UNCITRAL Rules, and these Rules are only applicable to the arbitration proceeding.
- The UNCITRAL Rules do not apply in a manner similar to laws and the scope of the same can be restricted by the parties through mutual consent.
- The provision of the UNCITRAL Rules whereby a party may request the secretary general of the Permanent Court of Arbitration to designate the appointing authority is not a restrictive provision. The parties are free to approach the national Hon'ble Appellate Court pursuant to the national law for appointment of arbitrators.

6.8 Department of Road et al. V. Waiba Construction Co. Pvt. Ltd., Samakhusi, Kathmandu et al., 2067; Decision No. 8479.

Established Principle: The SC held that, where the dispute is to be resolved through arbitration, the court cannot enter into factual questions, consider evidence and provide a decision in a manner similar to a

normal case. Further, the Hon'ble Supreme Court also held that where there has not been any grave error in law, the court cannot invalidate an arbitral award.

6.9 Manjit Singh on behalf of Bakhtawar Singh V. Kankai Irrigation Project, Irrigation Department et al., 2067; Decision No. 8397.

Established Principle: The SC held that laws of Nepal are not substituted by applicable rules in relation to international commercial disputes and that the provisions of Arbitration Act, 2038 would remain applicable. Further, it was held that the Hon'ble Appellate Court, in arbitration matters derives its authority from Section 21(2).

6.10 Umakant Jha V. Appellate Court, Patan, 2066; Decision No. 8156.

Established Principle: The SC held that the Hon'ble Appellate Court only has a correctional jurisdiction pursuant to Section 30 of the Arbitration Act, 2055. The SC also held that the question of limitation period is purely a legal question and can arise at any stage.

6.11 Anil Goyal on behalf of Varun Beverage Pvt. Ltd. V. National Marketing and Sales Pvt. Ltd. et al., 2066; Decision No. 8097.

Established Principle: The SC held that the decision of the arbitral tribunal in relation to an agreement which is connected to and cannot exist without the main contract, does not exceed the jurisdiction of the tribunal. Further, the SC also held that when a party has already implemented the arbitral award and the decision of the Hon'ble Appellate Court upholding such award, then the same cannot be challenged through writ jurisdiction of the SC.

7. Conclusion

When making contract, every factual situation arising in future cannot be incorporated. Which indicates that parties must be aware in making subject of contract and arbitration clause. Otherwise, one party may become vulnerable. To address this problem when making arbitration clause before or after arising the dispute there must include on clause saying that arbitrator has given the consent by both or all party to act under the principle of "ex aqua et bono" and amiable compositor if need in future course of time which may arise by the cause of unclear or insufficient provisions or contract or procedural or substantive aspect of law.

Despite the few drawbacks of commercial arbitration, it is popular in domestic as well as international commercial dispute resolution. It would be better to adopt uniform and harmonize way of arbitration standards and enforcement of award to facilitate transactional nature of business activity to achieve 'comparative advantage' from business transaction.To understand the continuum of ADR, once the

arbitration method is adopted in arbitration agreement or clause, there will be no flexibility to follow other way of dispute settlement unless both or all parties gave consent to do so. To settle the commercial disputes the ADR like commercial mediation is also increasingly used now.

The Arbitration Act 1999 has efficient provisions that assist in resolution of Commercial Disputes. However, the act is not free from shortcomings. Principles, Philosophy and definitions of terminologies related to arbitration are not clearly mentioned in the existing arbitration act. For example, the term 'Commercial Arbitration' is not defined by law which produces uncertainty. So, it needs to be defined by law with UNCITRAL Model law. Also, one shortcoming of the Arbitration Act is that, an award given by fraud or corruption can be controlled under "public policy" clause. This clause provides ground to the court of law for invalidate an award indirectly. Rather, it would be healthier to add one sub-clause expressly to invalidate the award by court if the arbitrator gives award by fraud or corruption.

Writ jurisdiction in commercial arbitration should not be entertained by Supreme Court in the name of alternative remedy. Also, delay on finality regarding arbitration award made by arbitrator should be avoided. Delay in decision creates the high cost. It should be reduced by speedy proceeding and schedule hearing by arbitrators. Code of conduct should be made in line with international accepted standard. Court mediation and arbitration is necessary for the disputing parties. Also, law should be clear in regard to court appointed umpire and third arbitrator.

Glimpse on Arbitration in the Digital Age: Worldwide Challenges and Opportunities

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Introduction

In the digital age, arbitration, a time-honored dispute resolution method, undergoes transformative changes driven by technological advancements. These shifts bring both challenges and opportunities, prompting a reassessment of traditional approaches. This exploration delves into the evolving landscape of arbitration, focusing on jurisdictional complexities, the impact of electronic evidence, cybersecurity concerns, and promising innovations like Online Dispute Resolution (ODR) platforms and blockchain technology. Challenges include navigating jurisdictional intricacies, ensuring the reliability of electronic evidence, addressing cybersecurity vulnerabilities, and enforcing awards in a diverse legal landscape. Striking a balance between the efficiency of digital proceedings and the preservation of fairness becomes crucial, especially with the adoption of virtual hearings and online document submission. However, these challenges also open doors to opportunities, such as leveraging ODR platforms and blockchain technology, while collaborations among arbitration institutions and the integration of AI in case analysis further contribute to reshaping the arbitration landscape in the digital era.

Challenges in the Digital Age

In the contemporary digital landscape, arbitration faces a myriad of challenges, necessitating a thorough reassessment of traditional methodologies. One prominent challenge stems from jurisdictional complexities that emerge as a result of digital transactions traversing geographical boundaries. When parties engage in operations across diverse countries, intricate legal considerations come to the forefront. This complexity demands a critical examination of the jurisdictional challenges inherent in arbitration. The enforcement of awards on a global scale becomes a formidable task, amplified by the absence of a unified enforcement mechanism and the diverse legal frameworks that exist worldwide.

Another significant challenge in the digital age is the heightened reliance on electronic evidence, bringing forth issues related to its authenticity, admissibility, and susceptibility to manipulation. As arbitration proceedings increasingly rely on digital evidence, ensuring its reliability becomes a paramount concern. This necessitates a meticulous examination of the provenance and integrity of electronic evidence.

Admissibility criteria must evolve to accommodate the nuances of digital data, acknowledging its potential for manipulation. Thus, a secure foundation for arbitration is imperative, ensuring the trustworthiness of the evidence presented in proceedings.

Cybersecurity concerns constitute a pressing challenge as well, given the vulnerability of digital systems to cyber threats. These threats pose potential risks to the security and confidentiality of arbitration proceedings and the resulting awards. The pervasive nature of cyber threats underscores the need for a reassessment of protective measures within the context of arbitration. Safeguarding the integrity and confidentiality of the arbitration process becomes paramount, demanding innovative approaches to fortify the system against cyber vulnerabilities.

In addition to these challenges, navigating the enforcement of awards in the digital age presents a complex landscape due to the diversity of legal regimes. The enforcement process becomes intricate and multifaceted, requiring a harmonization effort or the development of innovative solutions to overcome the challenges inherent in enforcing awards across diverse jurisdictions. The absence of a unified enforcement mechanism accentuates the need for a comprehensive and adaptive approach to ensure the efficacy of arbitration in the dynamic and evolving digital landscapes.

These challenges, however, do not exist in isolation; they are intertwined with the ongoing digital transformation of arbitration proceedings. As the digital age progresses, striking a balance between the efficiency afforded by digital tools and the preservation of procedural fairness becomes paramount. The adoption of virtual hearings and online document submission, while offering more accessible and streamlined adjudication processes, also introduces concerns about potential compromises to in-person dynamics, impacting communication quality and witness credibility assessment.

Yet, within these challenges lies a realm of opportunities. Online Dispute Resolution (ODR) platforms emerge as a promising alternative to traditional arbitration. Leveraging technology, ODR platforms streamline and democratize conflict resolution, offering flexibility to parties engaged in dispute resolution processes without the constraints of physical proximity. Furthermore, blockchain technology, with its decentralized and tamper-resistant nature, holds significant promise in addressing issues related to evidence authenticity and security in arbitration proceedings. The immutable nature of blockchain ensures the integrity of evidence, reducing the risk of manipulation and enhancing the credibility of the arbitral process.

Smart contracts, powered by blockchain technology, represent another transformative aspect of the digital age in arbitration. These self-executing contracts can automate various aspects of dispute resolution, providing a transparent and efficient mechanism for enforcing contractual obligations. By embedding the terms of an arbitration agreement into a smart contract, parties can automate the initiation of arbitration proceedings and the execution of awards, minimizing the need for manual intervention and reducing the potential for disputes over the enforcement process. The use of blockchain

and smart contracts not only accelerates the arbitration process but also fosters greater trust among parties, as the technology ensures the integrity and enforceability of contractual commitments.

In brief, while the digitalization of arbitration proceedings introduces a complex interplay of challenges, it also opens avenues for innovative solutions. Striking the right balance between leveraging digital tools for efficiency and safeguarding procedural fairness is essential. As the digital age progresses, embracing innovative solutions such as ODR platforms, blockchain technology, and global collaboration among arbitration institutions can revolutionize the landscape of dispute resolution. Achieving equilibrium between technological advancements and upholding fundamental arbitration principles is crucial for successfully navigating this dynamic landscape.

Balancing Efficiency and Fairness in Digital Proceedings

In the realm of digital arbitration, achieving a delicate equilibrium between efficiency and fairness is imperative. One avenue through which this balance is sought is the adoption of virtual hearings, a practice that facilitates remote participation, thereby alleviating logistical constraints and enhancing accessibility in the adjudication process. However, this shift raises concerns about the potential erosion of in-person dynamics, with apprehensions surrounding the impact on communication quality and the nuanced assessment of witness credibility.

A significant paradigm shift is evident in the realm of online document submission, introducing a transformative approach to evidence presentation. While expediting administrative processes, this shift demands robust mechanisms for authenticating digital evidence and mitigating the inherent risks of tampering. The expediency offered by online document submission is undeniable, yet careful scrutiny is indispensable to ensure the legal validity and authenticity of electronic signatures, underlining the importance of maintaining the integrity of the arbitration process.

Central to this endeavor is the overarching need to strike a balance between the expediency ushered in by digital tools and the preservation of procedural integrity. This delicate equilibrium is crucial in fostering trust within the arbitration process, as efficiency gains should not come at the cost of compromising procedural fairness and transparency. These considerations stand as crucial cornerstones in upholding the credibility of the arbitration system. As the digital age propels arbitration into new frontiers, navigating these challenges requires a thoughtful and nuanced approach that ensures the benefits of technological advancements are harnessed without jeopardizing the fundamental principles that underpin a robust and trustworthy arbitration framework.

Opportunities in the Digital Age

In the dynamic landscape of the digital age, numerous opportunities emerge to revolutionize the field of arbitration. One notable avenue is the advent of Online Dispute Resolution (ODR) platforms, which present a compelling alternative to traditional arbitration. By harnessing technology, these platforms

streamline and democratize conflict resolution, providing parties with unprecedented flexibility to engage in dispute resolution processes free from physical constraints. This not only promotes accessibility but also fosters inclusivity, making dispute resolution more readily available to a diverse range of participants.

Another transformative opportunity arises with the integration of blockchain technology. Recognized for its decentralized and tamper-resistant nature, blockchain holds significant promise in addressing critical issues related to evidence authenticity and security in arbitration proceedings. The immutable nature of blockchain ensures the integrity of evidence, mitigating the risk of manipulation and thereby enhancing the overall credibility of the arbitral process. This technology presents a forward-looking solution to the challenges associated with electronic evidence, marking a substantial leap towards a more secure and trustworthy arbitration framework.

Central to the digital age's transformative impact on arbitration is the introduction of smart contracts, powered by blockchain technology. These self-executing contracts have the potential to automate various facets of dispute resolution, providing a transparent and efficient mechanism for enforcing contractual obligations. By embedding the terms of an arbitration agreement into a smart contract, parties can streamline the initiation of arbitration proceedings and the execution of awards, minimizing the need for manual intervention. This not only accelerates the arbitration process but also instills greater trust among involved parties, as the technology ensures the integrity and enforceability of contractual commitments.

In essence, these opportunities in the digital age signify a paradigm shift in arbitration, offering innovative solutions that enhance efficiency, accessibility, and credibility. ODR platforms democratize access to dispute resolution, blockchain technology fortifies evidence integrity, and smart contracts streamline and automate arbitration processes. As these digital advancements continue to unfold, they hold the potential to reshape the arbitration landscape, providing a more dynamic, accessible, and trustworthy framework for resolving disputes in our ever-evolving global context.

Innovations through Technology Collaboration

In the era of technological collaboration, innovative advancements are transforming the landscape of arbitration. A pivotal breakthrough is witnessed with the integration of Artificial Intelligence (AI) in case analysis, significantly enhancing the capabilities of arbitrators. AI plays a crucial role in processing vast volumes of case-related data, assisting arbitrators in a more efficient evaluation of evidence. Machine learning algorithms, a cornerstone of AI, excel in identifying patterns, trends, and relevant precedents, thereby enriching the analytical capabilities of arbitrators. This not only expedites the information retrieval process but also ensures a comprehensive consideration of factors, leading to more informed and consistent arbitration outcomes.

Moreover, the digital age facilitates unprecedented collaboration among arbitration institutions globally, ushering in a new era of standardized practices and rules. Technology serves as a catalyst, allowing these institutions to streamline processes, share best practices, and foster a more cohesive framework within the arbitration community. The collaborative approach reflects the adaptability of the arbitration field to contemporary advancements, emphasizing the potential for technology-driven initiatives to strengthen the foundations of the arbitration process on a global scale. As arbitration institutions leverage digital tools to enhance communication, share insights, and establish common practices, the result is an arbitration landscape characterized by heightened consistency, predictability, and efficiency, further solidifying its relevance in a rapidly evolving world.

Conclusion

As we navigate the evolving landscape of arbitration in the digital age, it becomes evident that this intersection holds both challenges and opportunities. Addressing jurisdictional complexities, ensuring the security of electronic evidence, and adapting to the nuances of digital proceedings emerge as pivotal considerations. However, amidst these challenges lie promising avenues for improvement. The integration of Online Dispute Resolution (ODR) platforms, blockchain technology, Artificial Intelligence (AI) tools, and global collaboration among arbitration institutions presents an array of opportunities to enhance the efficiency, accessibility, and credibility of arbitration processes. Striking a delicate balance between embracing technological advancements and upholding the fundamental principles of arbitration is essential for successfully navigating this dynamic terrain. The ongoing transformation reflects a proactive response to the digital age, underscoring the resilience and adaptability of the arbitration field. As these innovations continue to unfold, they hold the potential to shape a future where arbitration is not only more efficient and accessible but also retains the fundamental principles that underpin its credibility and trustworthiness in resolving disputes on a global scale.

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The Evolution of Arbitration Frameworks in Asia: Trends, Challenges, and Opportunities

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Introduction

Arbitration, as a method of dispute resolution, has undergone a fascinating evolution in Asia, tracing its roots through diverse legal traditions and economic transformations. This article embarks on a comprehensive journey through time, unraveling the historical development of arbitration practices across various Asian countries. It sheds light on the contemporary trends shaping arbitration frameworks, while simultaneously exploring the multifaceted challenges that confront the region. From cultural nuances to enforcement hurdles, and the imperative for harmonization, this examination sets the stage for a nuanced understanding of the opportunities that lie ahead for the continued growth and improvement of arbitration in Asia.

Historical Development

The historical development of arbitration practices in Asia unveils a rich tapestry that intertwines ancient traditions with modern legal systems. From the Silk Road to contemporary economic powerhouses, the region has been a cradle for diverse arbitration mechanisms. The article delves into specific examples, such as the ancient Chinese method of 'Dai Yan,' juxtaposed against the modern arbitral institutions that have emerged in countries like Singapore and Hong Kong. By tracing this historical trajectory, we gain insights into how cultural and legal influences have shaped the arbitration landscape, setting the stage for the current dynamics.

In China, the ancient practice of 'Dai Yan' showcased a sophisticated arbitration system that blended legal principles with Confucian ethics, emphasizing harmony and fairness. This historical precedent laid the foundation for the region's inclination towards alternative dispute resolution. Moving forward, the spread of Islamic civilization throughout Central and Southeast Asia brought forth the concept of "Sulh," a form of arbitration embedded in Islamic jurisprudence, further contributing to the rich diversity of arbitration practices.

The colonial era marked a significant juncture as Western legal traditions were introduced to Asia, influencing the evolution of arbitration. British colonial rule, for instance, saw the establishment of arbitration mechanisms in India, blending indigenous practices with Western legal concepts. The post-colonial period witnessed the emergence of independent nations shaping their arbitration frameworks, often drawing upon historical practices as they established modern legal systems.

As Asia transitioned into the 20th century, the demand for more structured and standardized arbitration processes grew with increasing international trade. Jurisdictions like Japan, Singapore, and Hong Kong became pivotal players in the region, fostering the growth of institutional arbitration. The establishment of institutions such as the Japan Commercial Arbitration Association (JCAA) and the Singapore International Arbitration Centre (SIAC) reflected a shift towards a more formalized and internationally recognized arbitration landscape.

The historical development of arbitration in Asia is a multifaceted narrative that showcases the adaptability of the region's legal systems. This rich history not only provides insights into the roots of contemporary practices but also underscores the enduring importance of arbitration as a culturally embedded and globally relevant means of resolving disputes in Asia.

Contemporary Trends

As Asia assumes a central role in the global economy, the trends in arbitration frameworks are dynamic and reflective of the region's economic vibrancy. The article explores the rise of Asia as a hub for international arbitration, examining the increasing preference for arbitration clauses in commercial agreements. Notably, the surge in complex cross-border disputes and the growing popularity of institutional arbitration in key jurisdictions highlight the region's commitment to providing efficient and impartial dispute resolution mechanisms. The examination extends to the role of technology in arbitration, with online platforms and virtual hearings gaining prominence, revolutionizing traditional practices and enhancing accessibility.

Within the kaleidoscope of Asia's contemporary arbitration landscape, dynamic trends are orchestrating a profound transformation in the way disputes are resolved. The 21st century has witnessed an unparalleled surge in the adoption of arbitration clauses, as businesses across sectors gravitate towards the flexibility and neutrality that arbitration offers over traditional litigation. Particularly striking is the ascendancy of institutional arbitration, exemplified by the prominence of institutions like the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC). These institutions not only provide a structured framework for arbitration proceedings but also contribute to the standardization of practices, reinforcing Asia's allure as a global arbitration hub. Simultaneously, the integration of technological tools, from online case management platforms to virtual hearings, reflects the region's commitment to embracing innovation, ensuring that arbitration in Asia remains not only efficient and impartial but also on the cutting edge of technological advancements. The

Belt and Road Initiative further catalyzes contemporary trends, propelling Asia into a central role for resolving intricate cross-border disputes arising from the vast infrastructure projects associated with this transformative initiative.

Moreover, the burgeoning reliance on arbitration extends beyond regional borders, drawing parties from around the world to choose Asia as their preferred dispute resolution venue. This global appeal is further amplified by the region's strategic geographical location, economic dynamism, and the increasing recognition of Asian institutions on the international stage. As the Belt and Road Initiative ushers in a new era of complex international transactions, the demand for efficient and sophisticated dispute resolution mechanisms continues to escalate, positioning Asia as not only a regional but a global leader in contemporary arbitration trends. The convergence of these trends underscores the adaptability and resilience of Asia's arbitration landscape, marking it as a pivotal player in shaping the future of international dispute resolution.

Challenges Faced by the Region

While Asia's arbitration landscape flourishes, it is not devoid of challenges. Cultural differences, deeply rooted in diverse legal traditions and societal norms, present hurdles that demand careful consideration. The article delves into these nuances, analyzing how cultural factors impact arbitration proceedings and enforcement. Enforcement issues, often arising due to disparities in legal systems, call for innovative solutions to ensure the effectiveness of arbitral awards. Harmonization of arbitration laws across the region is another challenge, as disparities in legal frameworks can impede the seamless resolution of disputes. These challenges serve as critical points of reflection for stakeholders invested in the continued growth of arbitration in Asia.

However, amidst the flourishing arbitration landscape in Asia, a spectrum of challenges casts shadows over its seamless progression. Cultural diversity, deeply rooted in distinct legal traditions and societal norms, poses a nuanced challenge, influencing arbitration proceedings and necessitating a delicate approach to dispute resolution. Enforcement hurdles, exacerbated by variations in legal systems among Asian nations, present a formidable barrier to the effective implementation of arbitral awards, demanding innovative solutions for cross-border recognition. Additionally, the need for harmonization across diverse legal frameworks within the region remains pressing, as disparities in arbitration laws may impede the seamless resolution of disputes. These challenges underscore the intricate balancing act required to harmonize regional practices while ensuring the credibility and efficiency of arbitration in Asia. As the region grapples with these complexities, stakeholders are prompted to navigate a careful path towards a more integrated and effective arbitration landscape.

Opportunities for Growth and Improvement

In the face of challenges, Asia's arbitration landscape brims with opportunities for growth and improvement. The article explores how regional economic developments play a pivotal role in fostering

an environment conducive to arbitration. The Belt and Road Initiative, for instance, has spurred a surge in infrastructure projects, creating a fertile ground for arbitration. International collaborations, such as the increasing recognition of the Singapore Convention on Mediation, offer opportunities to streamline enforcement procedures and enhance the credibility of arbitral awards across borders. Moreover, the role of institutions in shaping arbitration in Asia cannot be overstated. This section examines the contribution of institutions like the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) in establishing the region as a preferred destination for arbitration.

Amidst the challenges, Asia's arbitration landscape presents fertile ground for growth and improvement. The burgeoning regional economic developments, particularly driven by initiatives like the Belt and Road, offer a compelling opportunity for increased arbitration activity. International collaborations, exemplified by the ratification of the Singapore Convention on Mediation, provide a pathway for streamlining enforcement procedures and bolstering the credibility of arbitral awards across borders. Strengthening regional institutions tailored to the unique challenges of the diverse Asian landscape, fostering a culture of arbitration awareness, embracing transparency, and incorporating global best practices are key opportunities. By seizing these prospects, Asia has the potential to not only enhance the efficiency of dispute resolution mechanisms but also solidify its position as a trailblazer in the global arbitration arena, offering a conducive environment for businesses and investors alike.

Conclusion

As the curtain falls on this exploration of the evolution of arbitration frameworks in Asia, it is evident that the region stands at the nexus of tradition and innovation, navigating challenges and seizing opportunities with resilience. The historical journey, from ancient practices to modern institutions, underscores the adaptability and dynamism inherent in Asian arbitration. The contemporary trends paint a picture of a region poised to play a leading role in the global arbitration arena. Challenges, though formidable, are catalysts for growth, prompting a reevaluation of practices and the adoption of progressive solutions. Opportunities for improvement pave the way for a future where arbitration in Asia not only meets international standards but sets them, fostering a climate of trust and efficiency for businesses and nations alike. The evolution continues, promising a vibrant and ever-evolving landscape for arbitration in the diverse and dynamic continent of Asia.

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Double Stands of The Supreme Court on the Context of Arbitration, Nepal: Contradiction

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Background

Unless Parties prevail, no possible Arbitrator or Arbitration because disputes are raised from parties which is the ground of tribunal as well. Arbitrator or Arbitration, excluding criminal case or disputes; it is concentrated on the disputes of Commerce, Development, Construction, Industrial, Trade, else.

Method of dispute resolution is prescribed in the certain procedures having concerned Arbitral Procedures Regulations of Nepal Council of Arbitration (NEPCA) 2016 and Arbitration Act 1999.

It is referred Arbitrator or Arbitration through the method of dispute settlement in Contract Base conferred by Arbitration Act 1999 Section 3(1) , Parties Base is having regarded to Arbitration Act 1999 Section 3(2) and Court Base is also concerned to Arbitration Act 1999, Section 7(a)(b) . Besides, absence of Court Jurisdiction is also prevailed that indicates the gravity of Arbitrator or Arbitration, Court Jurisdiction is banned in Arbitration Act 1999, Section 39. But, it can be entertained Court Jurisdiction conferred by Arbitration Act 1999 Section 30 (2) (a) (b) (c), (3) (a) (b).

Unless it cancels [voids] awards relating Arbitration Act 1999 Section 30(2) (a) (b) (c), (3) (a) (b), Obligation of Awards shall be mandatory.

Actor of judgment in arbitration of tribunal is compulsion having involved institution, individual, agency, law practitioner, engineer, jurist, judge, construction contractor etc., Statute of the Nepal Council of Arbitration (NEPCA) 1991 Section 6(a) injects or enlist experts in the involvement:

"...NEPCA Any institution, individual, agency, law practitioner, engineer, jurist, judge, construction contractor etc., directly or indirectly engaged in the activities and proceedings relating to arbitration shall be eligible for the membership of the Council..." [1]

Multi-dimension in experts are enlisted to decide disputes that is foundation of impartial or perfect decision in Arbitration.

The concept of arbitration is basically concerned dispute settlement to Development, Construction, Industrial, Trade and Others having mentioned in the preamble of Statute of the Nepal Council of Arbitration (NEPCA) 1991:

1 Statute of the Nepal Council of Arbitration (NEPCA) 1991 (With the Third Amendment, 2020), Section 6(a) , Nepal Council of Arbitration, Kathmandu, Nepal, P.4

"...disputes of development, construction, industrial, trade and other nature which are to be resolved through arbitration." [2]

It is mentioned and amplified - Arbitration Act 1999 - dispute relating commercial based civil disputes or cases are in jurisdiction of Arbitration:

"...commercial based civil dispute have to settle by arbitration." [3]

Furthermore, though, it is not regular court which is alternative process or approach to justice having linked to Arbitral Procedures Regulations of Nepal Council of Arbitration (NEPCA) 2016, Section(55) (1) (2) :

"...Settlement of Dispute through Consensus: (1) Notwithstanding anything contained elsewhere in this Chapter, if the parties agree to settle the disputes through consensus or other measures prior to making a final award, they may request the arbitration with points of agreement. (2) If the request made by the parties pursuant to Sub-Rule (1) is deemed appropriate by the arbitrator, he or she may declare the closure of arbitral proceedings by keeping a record of the disputes..." [4]

In addition to aforementioned stance, The Constitution of Nepal, Article 127(2) permits or guarantees arbitration as an alternative dispute method because which is an alternative approach of resolution for settlement to disputes:

"In addition to the courts ... other bodies as required may be formed to pursue alternative dispute settlement methods." [5]

Supreme Court Double Stands [Opinion] onto Arbitration

Supreme Court has Double Stands onto Arbitrator or Arbitration: it prefers to Arbitrator or Arbitration on the contrary it interprets Court Supremacy to settlement Disputes or Cases which is contradiction or paradox. Dilemmas of stands are seen or prevailed.

a. Justification of Awards and Jurisdiction of Arbitration

Supreme Court of Nepal makes decisions in favor on the behalf of Arbitrator and Arbitration; it is made stronger the status of Arbitrator and Arbitration in different disputes or cases.

b. Justification of the Jurisdiction of Courts [High Court and Supreme Court]

Supreme Court of Nepal makes decisions (opinions) to cease to exist Arbitrator and Arbitration; it is concentrated onto shunt to the jurisdiction of Arbitrator and Arbitration in different disputes or cases consequently, which leads and permits the jurisdiction of Courts. Furthermore High Court is permitted the jurisdiction in some conditions as per Arbitration Act 1999 Section 30 (1) (2) (3) and Supreme Court is also allowed the extra-ordinary power to hearing legal and constitutional disputes or issues in accordance with The Constitution Article 133(1)(2).

2 Ibid P.1

3 Gyaindra Bahadur Shrestha, Arbitration Act 1999, Section 3(2), Collection of Act Part-2, Pairavi Publication, Kathmandu, P. 511

4 Arbitral Procedures Regulations of Nepal Council of Arbitration (NEPCA) 2016, Section (55) (1) (2) Nepal Council of Arbitration, Kathmandu, Nepal, P.42

5 The Constitution of Nepal (English Version), Law Books Management Board, Kathmandu P.87

Justification of Awards and Jurisdiction of Arbitration

Supreme Court of Nepal makes decisions on the behalf of Arbitrator and Arbitration; the decision prefers and strengthens to Arbitration or Arbitration on the context of different disputes or cases which are mentioned as follows;

1. On the case of parties Appellant/Defendant, Authorized Representative Manager, Rakesh Kumar of The Oriental Insurance Company Ltd., Katmandu Metropolitan City-23, Kantipath, Kathmandu. Vs. Respondent/Plaintiff, Ramkrishna Rawal, Rupandehi District, Siddhartanagau Municipality-6, Gallamandi :

"... as it is ascended dispute among parties of contract, they can settle by the forum of Arbitrator as per contract and ignore or oust Court Jurisdiction besides Court cannot exercise or entertain its Jurisdiction in the condition...when parties agree to resolve dispute by arbitration in contract, they cannot file the claim or case in court against the contract which is the anti-contract, estoppel, breach of contract as well… Court should not registered -the case or claim-and decide without the study of existing law and terms of contract because it cannot be delivered justice in fast and easy after long process of court decision in cancellation and refer to redecide by the tribunal of arbitrator which impacts on its trustworthiness…if it is resolved dispute of those who invest, they are in no time, they may entertain experts having chosen by themselves consequently justice in award is possible in the hearing: in this is the ground of Arbitration Act relating commercial disputes in international assumption and practice …"[6]

2. On the case of parties Petitioner Including Road Department Vs. Defendant : Waiba Construction Pvt. Ltd., Including Samakhusee, Kathmandu having concerned Dispute Content in the Jurisdiction of Arbitrator or Arbitration which has preferred and strengthened to Arbitrator and Arbitration:

" …Court is not permitted to verify fact and examine award of Arbitrator on the context of dispute

which are allowed final right [Authority] to Arbitrator because Arbitrator is the best and last judge… " [7]

3. On the case of parties of Petitioner: Authorised Raju K.C., Director of Nepal Airlines Cooperation Vs. Defendant: Including Appellate Court, Patan, Lalitpur :

"…it is jurisdiction of Arbitration because the claim or dispute of matter having concerned to agency contract…" [8]

4. On the case of parties of Petitioner: Krishnachandra Jha, General Manager of Krishi Samagree Santhan, Pradhan Karlaya,Teku, KuleShwor Vs. Defendant: Including Dinesh Bhakta Shrestha, Proprietor of Milimili Enterprises, Kathmandu Metropolitan City Ward -11, Kamaladi, authorized Representative of Singapur based Sumit Prakash Asia Pvt.Ltd.:

6 www.suprecourt.gov.np Nepal Kanoon Patrika [NKP] 2066, Vol.2 , Decision No.8078

7 Ibid 2067, Vol.: 52 Decision No. 8479

8 Ibid 2067, Vol.: 52, Decision No. 8523

"...award of arbitrator is confirmed and finalized having regarded on the dispute of Fact and Law unless it prevails exception - because parties are bonded themselves in their mutual consent..." [9]

On the case of parties of Petitioner: National Construction Company, Nepal, Kathmandu District, Kathmandu Metropolitan City, Ward No. 11, Bhadrakali Plaza Vs. Defendant: including Appellate Court Patan, Lalitpur:

"...as parties confirm Arbitrator to settle dispute in contract, no Party can ignore to deform or collapse tribunal of Arbitrator...in the breach of contract by one party, agreement of arbitrate and arbitration clause never void... any party cannot frustrate agreement to arbitrate..." [10]

c. Justification of the Jurisdiction of Court[High Court and Supreme Court]

Supreme Court of Nepal makes decisions on the behalf of Arbitrator and Arbitration; it is concentrated onto shunt of Arbitrator and Arbitration in different disputes or cases consequently that permits and magnifies the jurisdiction of High Court and Supreme Court.

1. On the case of parties: Petitioner : Umakant Jha, Director General, Mahakali Sinchai Pariyojana Vibhag, Mahendranagar Vs. Respodent: Including Appellate Court, Patan :

" ...it has been made provision of the jurisdiction of court to examine award of Arbitration..." [11]

2. On the case of parties Petitioner: Krishi Samagri Company Limited, Pradhan Karyalaya, Kathmandu Vs. Defendant: Including Appellate Court, Patan.

"... if Arbitrator interprets contract against terms of contract, which is the subject or issue of Contract Law hereinafter Court can decide on the dispute...Appellate Court has the Jurisdiction to review and revise on the decision of Arbitrator as per Arbitration Act 1999 and if it is confiscated or extorted property of parties on the lapse or loophole of the act, the court can entertain extra-ordinary power to guarantee according to The Constitution..." [12]

3. On the case of parties: Petitioner: Bikram Pandey, Authorised Representative of Kalika Swochchhanda and Kanchajanga J.V., Kathmandu District, Kathmandu Metropolitan City, Ward No. 4, Maharajganj Vs. Defendant: Including Ministry of Physical Planning and Construction, Road Department :

"... Appellate Court has power to appoint Arbitration if it is not appointed Arbitration whether mentioned and prescribed or not in contract having related to the Provision of Arbitration Act 1999 Section 7[1][a][b]... " [13]

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9 Ibid 2059, Vol.: 44, Decision No. 7089
10 Ibid 2065, Vol.: 50, Decision No. 7933
11 Ibid 2066, Vol.: 51, Decision No. 8156
12 Ibid 2064, Vol.: 49, Decision No. 7905
13 Ibid 2067 Vol.52 Decision No. 8437

Conclusion

Overload and burden of disputes or cases in Courts and the use of expertise in the extent of proper are essence which are grounds for the relevancy of Arbitrator or Arbitration but Arbitration Act 1999 permits to hearing power of High Court and according to the existing constitution of Nepal. Supreme Court is permitted - each and every dispute or case- the jurisdiction for the hearing [Writ-Jurisdiction: Review and Revise]; consequently the act and the constitution are not favored to Arbitration or Arbitrator in this connection Supreme Court interprets that on the one hand Courts are permitted to hear all types of disputes or cases on the contrary it is withdrawn and referred arbitrator or arbitration for the disputes settlement. Contradiction is induced by Supreme Court itself: misfortune.

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3. Arbitral Procedures Regulations of Nepal Council of Arbitration (NEPCA) 2016, Nepal Council Arbitration, Kathmandu, Nepal
4. The Constitution of Nepal [English Version], Law Books Management Board, Kathmandu
5. www.suprecourt.gov.np

Commercial Arbitration in Nepal: Issues and Challenges

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1. Introduction

Arbitration is a method of dispute resolution involving two or more parties. The term commercial arbitration is used to indicate the settlement of a dispute related to trade, industry and commerce. Accordingly, commercial arbitration is being used as an alternative means of private dispute settlement to provide an expeditious, expert and civilized forum for resolving many differences of opinion which may arise as a normal incident of commercial life. As a result, the concept of commercial arbitration has been growing in Nepal.

2. Concept

It is an alternative mechanism for resolving disputes different from the traditional and established judicial system. It is a process of resolving disputes that arise between two or more parties to an agreement or a contract in which a neutral third party called the arbitrator renders an enforceable decision. All parties of any agreement or contract, who agree to settle the dispute through arbitration, should agree to appoint the arbitrator to whom they submit their dispute for settlement. During the arbitration process, there is a possibility that the parties will compromise and the dispute will be solved, but if no such solution is found, the arbitrators can render an award of binding nature.

3. Historical Evolution

Arbitration can be traced back to the system of 'Panchayat' in Nepal long before the codified judicial system developed. Panchayat was an informal tribunal of five gentlemen chosen from among the villagers to render an impartial decision in the settlement of disputes between the members of villages. Since early times the decisions of Panchayats were acceptable and binding on the parties. Panchayat as private tribunal was a different system of arbitration and was subordinate to a regular court of law. In the Lichhavi era, the Panchali which was also known as Pancha Sava, was empowered to decide disputes at the local level. This form of dispute settlement mechanism that was practiced for a long period should be considered as the foundation of the concept of arbitration in Nepal's context, but not the same as the modern notion of arbitration. In Nepal, the concept of arbitration in its modern sense was first found in government contracts.

The history of the modern notion of commercial arbitration in Nepal is brief. Before the enactment of general legislation on commercial arbitration in 1981, statutory provisions of commercial arbitration were found in a scattered form in different legislations with different purposes. Such a provision first appeared in section 9 of the current Development Board Act 1957 which provided for the resolution of a dispute under a contract to which the Board is a party. This type of arbitration is termed compulsory arbitration. Therefore, parties are forced to follow the rules set out in the statute. The objective behind introducing such an arbitral process may be looked at in the context of inviting foreign capital and technology for economic enhancement and fostering development plans and industrialization in the country.

The Arbitration Act of 1981 was superseded by the Arbitration Act of 1999 and is the prevailing general law on commercial arbitration. Furthermore, it was made in line with the UNCITRAL Model Law. On the basis of this new act, the Supreme Court of Nepal has promulgated the Arbitration (Court Procedure) Rules, 2002 relating to court procedure in order to promote arbitration in Nepal. Despite the above legal framework promoting and facilitating arbitration in Nepal, there are still many remaining challenges.

4. Basic Aspects of Arbitration

- Arbitration Tribunal: A panel of arbitrators appointed to hear and decide a dispute according to the rules of arbitration.
- Arbitration clause: A contractual provision mandating arbitration and thereby avoiding litigation of disputes about the contracting parties' rights, duties, and liabilities.
- Arbitrator: A neutral person who resolves disputes between parties, especially by means of formal arbitration. An arbitrator can also be termed an impartial chair.

5. Submissions/Arbitration Clause/Arbitration Agreements

A written agreement is required to submit present or future disputes to the arbitrators, whether or not the legal relationship is contractual. It does not make any difference whether or not the name of an arbitrator is named therein. Furthermore an arbitration agreement must be made. This bilateral nature is necessary because a "unilateral" arbitration clause did not provide an arbitration agreement but only an option. An arbitration agreement must be in writing if it is to come within the Arbitration Act, 1999. Otherwise, no particular form is necessary. A valid arbitration agreement may be contained in a clause quite collateral to the main purpose of an agreement.

6. Appointment of Arbitrators and Third/Presiding Arbitrator

An arbitrator is appointed generally by the parties, but if one party fails to make an appointment, the court is empowered to make the appointment. The third/presiding arbitrator is generally appointed by the arbitrators. Again, if arbitrators fail to appoint the third/presiding arbitrator, the court may make an

appointment by default. Section 5(1) and (2) of the Arbitration Act, 1999 are related to the appointment of both arbitrators and the provisions of law are less clear in regard to the court's appointment of third arbitrator.

7. Evolution of the General Law of Commercial Arbitration in Nepal

7.1 Arbitration Act, 1981

The general law of domestic commercial arbitration originated in Nepal with the Arbitration Act, 1981(2038). Under this act, any dispute of a commercial nature arising out of agreements may be settled by arbitration as provided for in such agreements. If the agreement that provided for arbitration fails to provide rules to determine the number of arbitrators or to provide the rules governing substantive or procedural law, the provisions of the Arbitration Act, 1981 would apply as default legal rules. To understand the arbitration process, it is necessary to know about the "default rule."

The default rule provides an option to the contracting party to make or choose their own rules to settle the dispute that are not contrary with the law. Otherwise, the general rules of the act will be implemented. This act provided that if the parties to the agreement fail to appoint an arbitrator under the agreement or the arbitration agreement is silent in this regard, any party is empowered to file an application at the District Court asking for the appointment of an arbitrator.

7.2 Arbitration Act, 1999

There are various reasons for the replacement of the old Arbitration Act, 1981: the fundamental reason was its ineffectiveness. Other reasons include: incompleteness and inadequacy of the act, by which the defaulters benefited; unnecessary delays and interferences made by the courts in the arbitration process; appointment of inefficient arbitrators lacking knowledge of arbitration processes and procedures who often favored their nominators; a lack of institutions supporting arbitrations; a paucity of literature relating to arbitration; drafting of defective arbitration clauses in contracts; lack of law providing action against the biased arbitrators.

The 1999 act is the prevailing law of the land and is mostly influenced by UNCITRAL Model Law. An arbitration agreement is defined as "an agreement between the parties to refer present or future disputes arising in respect of a defined legal relationship whether it is contractual or not".

An award given by an arbitrator that is produced through fraud, bribery or other malpractice provides an appropriate reason to make the award universally void by the court but the new law is directly silent in this regard. Though, there are other sections of this legislation to curb this problem. Section 30 (3)(b) of this Act provides that to protect the public interest and public policy, the court has the power to quash the award. Fraud or bribery or other malpractices are such phenomena which directly hamper public morality as well as breach public policy. The term, "public policy" is defined as "broad, principles and standards regarded by the legislature or by the courts as being a fundamental concern to the state and the whole of society…More narrowly, the principle that a person should not be allowed to do anything

that would tend to injure the public at large." So, in this regard, we can conclude that the court has been given the duty by legislation to control such misconduct in the name of public policy if the arbitrator's decision appeared so, but up until this date no such interpretation has been evinced in Nepal.

8. Arbitral Institutions in Nepal

The Nepal Council of Arbitration (NEPCA) was established in 1991 to facilitate arbitration in Nepal, but is yet to be recognized by the law. Yet, the court has already impliedly recognized it because the court has heard a petition after NEPCA's panel award. This is the only institution working on a permanent basis which provides rules (NEPCA Rules of Arbitral Proceedings, 2003, NEPCA Arbitration Rules, 2016 made in line with Arbitration Act, 1999), venues and a panel of arbitrators to conduct arbitration process. NEPCA is a non-profit institution.

9. Issues and Challenges

The following issues/challenges are required to be addressed properly to ensure that the goal of successful arbitration is obtained. These issues and challenges are discussed below.

9.1 Delay

Delay on the finality of an arbitral award by entertaining writ jurisdiction must be curbed. Delay on appointment of an arbitrator is also a great issue. It contradicts the concept of arbitration.

9.2 Cost

The cost of the arbitration process is being increased day by day which may prevent the business sector from choosing arbitration as a form of ADR.

9.3 Definition

The term 'commercial arbitration' is not defined by law which is very uncertain.

9.4 Award by Fraud or Corruption

What will happen if the award is given by fraud or corruption? It is internationally recognized that an award by fraud or corruption not only provides grounds to remove arbitrators but also provides grounds to invalidate awards in a court of law.

9.5 Code of Conduct

Till this date, Nepal has no code of conduct for an arbitrator. There is a real need in Nepal for arbitral jurisprudence.

9.6 Judicial Review of Awards

What sort of judicial review of arbitral awards is necessary for Nepal's legal system? The grounds provided for judicial review in section 30 of 1999 Act may be adequate or not? The ground to make void an award on the basis of damage to the "public interest" is absolutely vague.

9.7 Recognition

Whether or not NEPCA or other institutional arbitral organizations should be recognized by the law itself is a matter that must be dealt with.

9.8 Substantive Law

Which substantive law applies to arbitrators? Section 18 of the Arbitration Act, 1999 has provided the default rules. Parties are free to make agreements on this matter. If an arbitration agreement is silent in this regard, the Nepali substantive law will prevail. But, here in this section a rule has ignored the principle of natural justice which stated that arbitrators are not free to follow the doctrine of ex aequo et bono and amiable compositor.

9.9 Arbitral Immunity

In the USA, both state and federal courts recognize that arbitrators enjoy quasi-judicial immunity from legal liability for actions taken in their arbitral capacity. This principle has also been observed in the international commercial setting. There is a sufficient rationale to do so. The rationale behind this immunity was observed by the court and "continues to influence the courts today."

But, Nepal's scenario is different from the above explanation. It is found that in an ad hoc arbitration process after the arbitrators have given an award, they are often personally defending their position in a writ petition. Arbitrators are made a party to litigation which is not a good practice. If it is continuously happening, nobody will be ready to be an arbitrator in a commercial dispute because of their fear of further litigation.

10. Suggestions

- Delay on the finality of an arbitration award made by an arbitrator should be avoided. For this, writ jurisdiction should not be entertained by the Supreme Court in the name of an alternative remedy in all cases, but instead specifically address genuine issues of law and not fact.
- Delay itself produces cost. It can be reduced by speedy proceedings and a schedule for the hearing. Arbitrators are engaged in their own profession and their business may postpone the date of arbitral hearing. So, it should be managed accordingly.
- The term 'commercial arbitration' is not defined by law which produces uncertainty. So, it needs to be defined by law itself in line with the UNCITRAL Model Law.
- An award given by fraud or corruption can be controlled under the "public policy" clause as provided in section 30 (3)(B) of the Arbitration Act, 1999 though it seems quite unclear what public policy actually is. This clause provides grounds to the court of law to invalidate an award. But it should be better to add one sub-clause in the legislation that expressly invalidates the award if the arbitrator gives an award by fraud or corruption.
- A code of conduct should be made in line with internationally accepted standards.
- The term 'public interest' needs to be defined appropriately. It is a very difficult task. Therefore, if no definition is possible, it is better to remove this term from the law and only include the 'public

policy' term contained in the UNICTRAL Model Law 1985. Doing so provides certainty and reduces the court intervention in the award.

- It is not necessary to recognize any particular arbitral organization by the Arbitration Act because there can be numerous such organizations for the facilitation of arbitration. Up to this date, the court does not seem reluctant to hear petitions upon voluntary arbitration awards.
- When making contracts, every factual situation that may arise in the future cannot be incorporated. This indicates that parties must be aware in the making of the subject of the contract and the arbitration clause. Otherwise, one party may become vulnerable.
- Both, arbitral and testimonial immunities are necessary for arbitrators. For this, certain rules or standards need to be developed which may enable the arbitrators to think that they are protected when they are acting in a fair manner.
- The almost established 'Commercial Bench' of the High Court should hear arbitration related disputes.
- The arbitration law should expressly state which arbitral panel should rehear matters returned to the arbitral level. In this case, until the law is reformed, the High Court should have the discretionary power to choose on a case by case basis the makeup of the arbitral panel.

11. Conclusion

The number of construction disputes is increasing day by day. Similarly, the volume of private business tremendously is expanding as part of accelerated development goal. Accordingly, more infrastructures, more contracts and more disputes. Settling these commercial disputes by the private means of commercial arbitration is an effective method but not the solution. Commercial mediation is also increasingly being used now as a form of ADR for commercial disputes. Once the arbitration method is adopted in an arbitration agreement or clause, there is no flexibility to undertake other methods of dispute settlement unless both or all parties give their consent.

Despite the few drawbacks of commercial arbitration, it is a widely popular tool for domestic as well as international commercial dispute resolution. It would be better to adopt harmonized arbitration standards and enforcement procedures to facilitate the growing transnational nature of business activity and construction activity.

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सुनसरी मोरङ्ग सिंचाइ आयोजना बिरुद्ध सिनो हाइड्रो कर्पोरेशन बीचको विवाद र मध्यस्थता: मुद्दा अध्ययन

अनिल कुमार श्रेष्ठ
अधिवक्ता
सह-प्राध्यापक, काठमाडौ स्कूल अफ ल

परिचयात्मक कथन:

पछिल्लो समयमा व्यापार र वाणिज्य क्षेत्रमा उत्पन्न हुने विवादहरु निरोपण गर्नको लागि अदालतको समानान्तर क्षेत्राधिकार भएको निकाय र माध्यमको रुपमा 'मध्यस्थता' विकास भइरहेको कुरा यथार्थ हो । भुमण्डलीकरण, अन्तराष्ट्रिय व्यापार र व्यवसायको बदलिंदो स्वरुपहरुले देशहरुको भौगोलिक सिमानाहरु पार गरेर विवाद समाधानका लागि सम्बन्धित देशको नियमित अदालत भन्दा पर मध्यस्थताका फरक-फरक निकायहरुको स्थापना, त्यस्तो निकायहरु समक्ष विवादका पक्षहरुले आ-आफ्ना देशका सिमानाहरु नाघेर सुम्पिएको विवाद निरोपणका क्षेत्राधिकार र त्यस्तो निकायहरुबाट मध्यस्थताको माध्यमहरुबाट प्रदान गरिने अवार्ड (निर्णय) हरुको स्वीकार्यता र सफल कार्यान्वयनले विवाद समाधानका सबै शास्त्रीय मान्यतालाई चुनौती दिंदै वृहत मध्यस्थता समुदायको विस्तार निरन्तर हुंदै गएको छ ।

पहिलो पटक मध्यस्थता ऐन, २०३८ बाट मध्यस्थता सम्बन्धी विशेष कानुन ल्याएर नेपालमा मध्यस्थतालाई संस्थागत गर्न सुरुवात गरिएकोमा उक्त कानुनलाई समयानुकुल र मध्यस्थताको विश्वव्यापी मान्यता र सिद्धान्त अनुकुल बनाउने सिलसिलामा त्यसलाई खारेज गरी पछिल्लो मौजुदा मध्यस्थता ऐन, २०५५ लाई कार्यान्वयनमा ल्याइएको छ । वि.सं. २०७२ सालमा संविधान सभा मार्फत बनाइएको नेपालको संविधानको दफा ५१ अन्तर्गतको राज्यको निर्देशक सिद्धान्त र नीति अन्तर्गत न्याय सम्बन्धी नीतिमा वैकल्पिक विवाद समाधान गर्ने माध्यमको रुपमा मध्यस्थतालाई स्वीकार गरिएको छ । मध्यस्थतालाई संस्थागत गर्दै स्थानीय सरकार संचालन ऐन, २०७४ ले वडा र पालिका स्तरमा मध्यस्थता केन्द्रहरु स्थापना गर्ने परिकल्पना गरेको कुराले हाम्रो विधायिकि मनशाय मध्यस्थतालाई राज्यको तल्लो निकायसम्म पुर्याउन उद्दत रहको कुरा सकारात्मक दृष्टिकोणबाट बुझ्न सकिन्छ ।

मौजुदा मध्यस्थता ऐन, २०५५ ले कोरेको र नियमित गर्न खोजेको मध्यस्थता संस्थागत (Institutional) भन्दा पनि तदर्थ (Adhoc) मध्यस्थता रहेको कुरा ऐनको संरचना र व्यवस्थाको अध्ययनबाट देखिन्छ तथा यसको प्रावधानहरुको सम्बन्धमा सर्बोच्च अदालतबाट गरिएका व्याख्याहरुबाट बुझ्न सकिन्छ । हालको मौजुदा मध्यस्थताको ऐन आउनु अघि नै मध्यस्थता गर्ने संस्थागत निकाय 'नेपाल मध्यस्थता परिषद्'को स्थापना र संचालनले समेत मध्यस्थता सम्बन्धी कानुन र मध्यस्थता गर्ने निकाय नेपालमा करिब करिब सँग सँगै शुरु भएको बुझ्न सकिन्छ । मध्यस्थता सम्बन्धी विशेष कानुन आउनु पुर्व नै नेपालको कानुनी प्रणालीमा यसलाई अङ्गिकार गरेको ५ दशकभन्दा लामो समयावधि व्यतित भएपनि नेपालमा गरिने अधिकांश मध्यस्थताहरु निर्माण र ठेक्का सम्बन्धी विवादहरु अन्तर्गतको रहेको कुरा साँचो हो । ठुल्ठुला निर्माण र पुर्वाधारको विकासमा गरिने ठेक्का सम्बन्धी करार सम्झौताहरुमा विवाद समाधान गर्ने अन्तिम र अनिवार्य माध्यमको रुपमा मध्यस्थतालाई हामीले स्वीकार गरेको दशकौं भइसकेको कुरा उत्तिकै महत्वपूर्ण छ । वर्तमान समयमा नेपालमा गरिने अधिकांश मध्यस्थताहरु निर्माण र ठेक्का विवादसँग सम्बन्धित रहेको कुरा नेपाल मध्यस्थता परिषद्को विगत केही वर्षदेखिको वार्षिक प्रतिवेदनहरुबाट समेत देखिन्छ ।

मध्यस्थताका प्रकृया र औचित्यमाथि यसलाई हामीले विवाद समाधानको माध्यमको रुपमा स्वीकार गरेको समयदेखि नै प्रश्न गरिने गरिएको र चुनौती पेश भएको कुरापनि अर्को उत्तिकै सान्दर्भिक र मननयोग्य कुरा हो । मध्यस्थताको माध्यमबाट विवाद समाधान ठिक कि वेठिक, मध्यस्थता गर्दा अदालती प्रकृयाभन्दा समय र लागत कम लाग्छ कि लाग्दैन, मधयस्थताबाट भएका निर्णयहरुको सहजै कार्यान्वयन हुन्छ कि हुँदैन जस्ता प्रश्नहरु र केकति कारणले मध्यस्थता सम्बन्धी अवार्डहरु माथिल्लो अदालतहरुले बदर गर्ने गरिएको छ भन्ने कुरा नेपालमा मात्रै नभई विश्वभरि नै मध्यस्थता सम्बन्धी कार्यमा संलग्न सरोकारवालाहरुको साझा चासो र विश्लेषणको विषय हो । यी यावत विषयहरुको अध्ययन र विमर्शको महत्व हुंदाहुंदै पनि नेपालमा मध्यस्थताको अवस्था के छ ? मध्यस्थताको प्रकृयामा के कति समय लाग्ने गरिएको छ ? मध्यस्थताबाट अवार्ड प्रदान भएपछि त्यसको कार्यान्वयन के कसरी हुने गरेको छ ? मध्यस्थता न्यायधिकरणले आंशिक निर्णय दिंदा के हुन्छ ? के कसरी मध्यस्थताको निर्णयलाई चुनौती दिने गरिन्छ? के मध्यस्थताले दिएको अवार्ड उपर अदालतमा मेलमिलाप हुनसक्छ ? भन्ने प्रश्नहरुको उत्तर यस लेखले खोजेको छ ।

माथिल्लो अनुच्छेदमा उठाइएका प्रश्नहरुको उत्तर खोज्न सिंगो विद्यावारिधिको सोध समेत अपर्याप्त हुन सक्छ । यद्यपि कहिले काँही मध्यस्थता क्षेत्र र समुदायका लागि ज्वलन्त र तड्कारो रहेको यी प्रश्नहरुको उत्तर यस लेखमा एउटा विवाद (मुद्दा) लाई केन्द्रित गरेर त्यसको अध्ययनबाट यँहा प्रस्तुत गर्न खोजिएको छ । यस लेखमा अध्ययन गर्न खोजिएको मुद्दा नेपालको मध्यस्थताको क्षेत्रमा मध्यस्थताको प्रभावकारिता र औचित्यलाई सँधै जसो शंकाको दृष्टिकोण र गलत अभ्यासको रुपमा उदाहरण दिंदै आइएको **'सुनसरी मोरङ्ग सिंचाइ आयोजना बिरुद्ध सिनो हाइड्रो कर्पोरेशन बीचको विवाद र मध्यस्थता'** सँग सम्बन्धित छ । प्रस्तुत विवादको विषय मध्यस्थतासँग नै सम्बन्धित रहेको छ । मध्यस्थताको विषय र निर्णय सामान्यतया पक्षहरुको सहमति बेगर प्रकाशित र सार्बजनिक रुपमा उपलब्ध नहुने र त्यसको गोप्यता कायम गरिने कुरा उत्तिकै महत्वपुर्ण रहेको भएतापनि प्रस्तुत मुद्दा मध्यस्थताको अतिरिक्त काठमाडौ जिल्ला अदालत, उच्च अदालत लगायतको न्यायिक निकायसम्म पुगेको, यस विवाद सम्बन्धमा निर्माण कार्यका लागि

ठेक्का आव्हान गर्ने नियोक्ताहरु र निर्माण व्यवसायीहरु र मध्यस्थता समुदाय बारे अन्यौल तथा विभिन्न शंका, अन्यौल तथा आशंका रहेको र प्रस्तुत मुद्दामा मध्यस्थतामा अवार्ड भई त्यस उपर बदर माग गरि उच्च अदालतमा मुद्दा परी मेलमिलापबाट विवाद समाधान भएकोले यँहा यस सम्बन्धी महत्वपुर्ण घट्नाक्रममा र मध्यस्थताको प्रकृया भएका केही कार्यहरु यस लेखबाट प्रकाशमा ल्याउने खोजिएको छ । लेखक स्वयंले उच्च अदालतको मुद्दामा एक पक्षको प्रतिनिधित्व गरेका कारण समेत यस विवाद सम्बन्धी जानकार रहेको कारण यस लेखमा भए गरेका तथ्य र घट्नाक्रमहरुले नेपालको मध्यस्थता क्षेत्र र समुदायलाई यसबारे सुचित गर्ने प्रयोजनार्थ यो लेख तयार गरी प्रस्तुत गरिएको छ ।

ठेक्का सम्झौता र विवाद तथा मध्यस्थता सम्बन्धी घट्नाक्रम र देखिएको कैफियत:

सुनसरी मोरङ्ग सिंचाइ योजना तेस्रो (पहिलो चरण) कार्यान्वयन गर्न तत्कालिन सुनसरी मोरङ् सिंचाइ विकास समिति हाल सुनसरी मोरङ् सिंचाइ आयोजना (यस पछि प्रतिवादकर्ता/नियोक्ता भनी सम्बोधन गरिएको) र तत्कालीन साबिक चाईना नेशनल वाटर रिसोर्स एण्ड हाईड्रोपावर ईन्जिनियरिङ्ग कर्पोरेशन हाल नाम परिवर्तित भई कायम हुन आएको सिनो हाइड्रो कर्पोरेशन (यस पछि दाबीकर्ता/निर्माण-व्यवसायी भनी सम्बोधन गरिएको) का बीच ८ डिसेम्बर, १९९८ मा रु. १,२६,५८,२१,६६९.०० (अक्षेरेपी एक अर्ब छब्बिस करोड अन्ठाउन्न लाख एक्काईस हजार छ सय उनान्सत्तरी रुपैंया मात्र) बराबरको रकमको सम्झौता सम्पन्न भएको थियो । ठेक्का सम्पन्न भई Letter of Appreciation मिति अप्रिल २, २००३ तथा Taking over Certificate मिति मार्च २०, २००३ मा जारी भएको थियो ।

सो सम्झौताको शुरु भए पश्चात के कसरी विवाद उत्पन्न भयो र कसरी मध्यस्थता ट्राइबुनल गठन भयो र के कसरी मध्यस्थको अन्तिम निर्णय आयो भन्नेसम्मको भएको घट्नाक्रमहरु संक्षिप्त र बुंदागत रुपमा निम्नानुसार छन् :

सि.नं.	मिति	विवरण
१.	वि.सं. २०५४, कार्तिक १२ (सन् १९९७, २८ अक्टोबर)	निर्माण-व्यवसायीले बोलपत्र बुझाएको
२.	वि.सं.२०५५, बैशाख १७ (सन् १९९८, ३० अप्रिल)	ठेक्का दिने सम्बन्धी आशय पत्र (श-शर्त) जारी गरिएको
३.	वि.सं. २०५५, बैशाख २५ (सन् १९९८, ८ मे)	ठेक्का दिनुपूर्वको वार्ता शुरु भई वि.सं. २०५५, जेष्ठ २४ (सन् १९९८, ७ जुन) सम्म जारी रहेको
४.	वि.सं. २०५५, जेष्ठ २४ (सन् १९९८, ७ जुन)	ठेक्का प्रक्रिया बारे भएको बैठकको निर्णय (Minutes of Meeting)
५.	वि.सं. २०५५, असार २८ (सन् १९९८, १२ जुलाई)	बैठकको निर्णय (Minutes of Meeting) बाट केही कुराहरु हटाएको सम्बन्धमा नियोक्ताको तर्फबाट आयोजना प्रमुखले निर्माण-व्यवसायीलाई पत्राचार गरिएको
६.	वि.सं. २०५५, श्रावण २५ (सन् १९९८, १० अगष्ट)	निर्माण-व्यवसायीले आंसिक रुपमा नियोक्ताले बैठकको निर्णय (Minutes of Meeting) मा हटाउन अनुरोध गरेको १३ वटा बुंदा मध्ये निर्माण-व्यवसायीले साइटमा ल्याएको मेशिन म्याटेरियलको पेश्की बाहेकका अन्य १२ वटा निर्णयको हकमा करार सम्झौताको व्याख्यामा सारभूतरुपले प्रभाव नपार्ने गरी उक्त १२ वटा बिषय हटाउँदा फरक नपर्ने भनी पत्राचार गरेको ।
७.	वि.सं. २०५५, श्रावण २५ (सन् १९९८, १० अगष्ट)	ठेक्का स्वीकृतिको पत्र जारी भएको ।
८.	वि.सं. २०५५, भाद्र ४ (सन् १९९८, २० अगष्ट)	ठेक्का सम्झौता भएको दिन ।
९.	वि.सं.२०५५, भाद्र २४ (सन् १९९८, ९ सेप्टेम्बर)	निर्माण-व्यवसायीलाई कार्यादेश दिइएको ।
१०.	वि.सं. २०५९, चैत्र १६ (सन् २००३, ३० मार्च)	सम्झौता अनुसार ठेक्का कार्य सम्पन्न भएको र भुक्तानी सम्बन्धी विवाद उत्पन्न भएको, सम्झौताको प्रावधान मुताविक विवाद पुनरावलोकन बोर्ड (Dispute Resolution Board) बाट विवाद समाधान गर्नुपर्नेमा UNCITRAL नियम मुताविक मध्यस्थको माध्यमवाट विवाद निरुपण गर्न पक्षहरु सहमत भएको ।
११.	वि.सं.२०६०, कार्तिक ७ (सन्२००३, अक्टोबर २४)	दाबीकर्ता/निर्माण-व्यवसायीले मध्यस्थता सम्बन्धी सूचना दिएको र तत्पश्चात् पक्षहरुबाट सम्बन्धित मध्यस्थहरु नियुक्त भई मध्यस्थता ट्राइबुनल गठन गरिएको ।
१२.	वि.सं. २०६१, माघ १७ (सन् २००५, जनवरी ३०)	दाबीकर्ता/ निर्माण-व्यवसायीले मध्यस्थ ट्राइबुनल समक्ष विभिन्न १७ फरक फरक शीर्षकमा दाबी (Statement of Claim) प्रस्तुत गरेको जुन यस पूर्व सम्झौता अनुरुपको इन्जिनियरद्वारा भुक्तानीको लागि इन्कार गरिएको थियो । निर्माण-व्यवसायी कम्पनीले १७ वटा दाबी मार्फत जम्मा रु. २,५३,८९,४८,७६२.०० (दुइ अर्ब त्रिपन्न करोड उनानब्बे लाख अठचालिस हजार सात सय बैसठ्टी रुपैयाँ) को माग दावी लिएर Tribunal समक्ष गएको ।

१३.	वि.सं. २०६२, बैशाख २० (सन् २००५, मे ३)	नियोक्ता/प्रतिवादकर्ताले आफ्नो प्रतिवाद पत्र (Statement of Defense/Response) मध्यस्थ समक्ष पेश गरेको र मुख्यतया बैठकको निर्णय (Minutes of Meeting) हटाइएको विषयवस्तु कारणले निर्माण-व्यवसायीको दाबी भुक्तानी गर्न नमिल्ने भन्ने विषयलाई आधार मानेर प्रतिवाद गरिएको।
१४.	वि.सं. २०६२, असार ५ (सन् २००५, जुन १९)	दाबीकर्ता/ निर्माण-व्यवसायीले नियोक्ता/प्रतिवादकर्ताको प्रतिवाद पत्र विरुद्ध प्रतियुक्ति पत्र (Statement of Rejoinder) पेश गरेको र बैठकको निर्णय (Minutes of Meeting) मा सहमत गरेको कुराहरुमा सम्झौताको प्रावधानहरुको व्याख्या गर्ने हदसम्म मात्र हटाउन स्वीकार गरिऐको र एउटा आइटम हटाउन इन्कार गरिएको कारण दाबी अनुसार गरेको भुक्तानी पाउनुपर्ने जिकिर लिईएको।
१५.	वि.सं. २०६४, जेष्ठ १७ (सन् २००७, मे ३१)	बैठकको निर्णय (Minutes of Meeting) सम्म पुगु अघि वार्ता टोलीमा सहभागीहरु मध्ये नियोक्ताको तर्फबाट वार्तामा सहभागी ए.के पोख्रेल र राकेश कुमार झाको मध्यस्थ ट्राइबुनल समक्ष साक्षी परिक्षण भएको। **कैफियत:** साक्षी परिक्षण गरिएको- नेपालमा मध्यस्थताको अभ्यास अन्तर्गत हामीले साक्षीको परिक्षण भएको न्यून विवादमा पाउन सक्छौं, यसमा Verbatim को सहायताले साक्षीहरुको बकपत्रलाई रेकर्ड गरिएको थियो।
१६.	वि.सं. २०६४, असार ११ देखि १३ (सन् २००७, जुन २५ देखि २७ सम्म)	मध्यस्थ ट्राइबुनलले विवाद सम्बन्धि सुनुवाइ गर्दै बैठकको निर्णय (Minutes of Meeting) सम्बन्धमा आंसिक निर्णय (अवार्ड) दिनुपर्ने निर्णय गरिएको र सो बारेमा सुनुवाइको पहिलो दिनमा संकेत गरिएको थियो। सोही क्रममा मध्यस्थ ट्राइबुनलले दाबीकर्ताले प्रस्तुत गरेको दाबीको सम्बन्धमा मध्यस्थको प्रकृयालाई विभाजन गर्नुपर्ने र सर्वप्रथम दायित्व रहेको नरहेको सम्बन्धमा सुनुवाई गरी सो कुराको यकिन गरेपछि मात्र दायित्वको भुक्तानी के-कति दिने भन्ने विषयमा प्रवेश गर्ने निष्कर्षमा पुगेको थियो। **कैफियत:** सैद्धान्तिक तथा आंशिक निर्णय दिने अभ्यास अनुशरण गरिएको- मध्यस्थताको प्रकृया सकिएपछि मात्रै मध्यस्थ न्यायधिकरणले निर्णय दिने स्थापित मान्यता र अभ्यास रंहदै आएकोमा यस विवादमा सुनुवाइकै क्रममा मध्यस्थले सैद्धान्तिक निर्णय र आंशिक निर्णय दिने संकेत विवादका पक्षहरुलाई गरेको देखियो।
१७.	वि.सं. २०६४, असार १२ (सन् २००७, जुन २६)	मध्यस्थ ट्राइबुनलले वि.सं. २०६४, असार ११ देखि १३ सम्मको सुनुवाईको क्रममा असार १२ गतेको दिनमा एक जना मध्यस्थले दुबै पक्षका बहसमा सहभागीहरुलाई २५ वटा प्रश्न सोधेकोमा सो मध्ये २ वटा प्रश्नको लिखित जवाफ माग गरिएको थियो, जुन निम्नानुसार रहेको छ: १. बैठकको निर्णय (Minutes of Meeting) कसरी बाध्यकारी करारको अंग हुन्छ जब उक्त निर्णयमा स्वयं यदि र जब उक्त ठेक्का दाबीकर्तालाई दिइएको अवस्थामा मात्र उक्त निर्णय करारको भाग हुन्छ भन्ने कुरा उल्लेख छ? २. कुनै करार हुनको लागि पक्षहरुको सहमति हुनुपर्छ। उक्त बैठकको निर्णय (Minutes of Meeting) को १३ वटा आइटमहरु र सोको हकमा दाबीकर्ताले घुसाएको विषयमा पक्षहरुको पुर्ण सहमति थियो ? करार सही गर्नु अघि पक्षहरुलाई वार्ताको क्रममा भएका सहमतिहरु फिर्ता लिनको लागि पक्षहरु स्वतन्त्र थिएनन् ? करारका दुबै पक्षहरुले आ-आफ्नो ढंगमा यी प्रश्नहरुको लिखित जवाफ दिएको।
१८.	वि.सं. २०६५, फाल्गुन ७ (सन् २००९, फेब्रुवरी १८)	पहिलो मध्यस्थको बहुमतको आंसिक सैद्धान्तिक निर्णय आएको तथा पहिलो ट्राइबुनलको मध्यस्थहरु मध्ये स्व. विश्वनाथ उपाध्याय (पुर्व प्रधानन्यायधिश) ज्यूले फरक निर्णय प्रस्तुत गर्ने कुरा पहिलो बहुमतको आंसिक निर्णयमा उल्लेख सम्म भएको तर के कति कारणले फरक मत नआएको भन्ने कुरा पत्ता नलागेको। **कैफियत:** सैद्धान्तिक र आंसिक निर्णय दिने परिपार्टी अवलम्बन भएको- यस अघिको सुनुवाइको क्रममा सैद्धान्तिक र आंसिक निर्णय दिने संकेत सम्म गरेको मध्यस्थ न्यायधिकरणले औपचारिक रुपमा सैद्धान्तिक र आंसिक निर्णय दिएको तर उक्त निर्णय सर्वसम्मत रुपमा मध्यस्थ न्यायधिकरणबाट आउनुपर्नेमा दुई जना मध्यस्थहरुको बहुमतले मात्र प्रदान गरिएको, एक जना मध्यस्थको फरक मत आउने भनेता पनि त्यो नआएको। मध्यस्थको रुपमा फरक मत दिन पाउने कुरालाई अन्यथा भन्न नमिलेतापनि फरक मत बहुमत मध्यस्थको निर्णयसँगै आएको हुंदो हो त त्यसले पक्षहरुलाई आ-आफनो दाबीको अवस्था र क्षति भराइ पाउने अवस्थाको जानकारी हुनेमा त्यसो नभएको, के कस्तो फरक मत आउनेवाला थियो भनेर अनुमान सम्म गर्न नसकिएको, यसलाई मध्यस्थको आचरण र दायित्व पुरा नगरेको तथा असल अभ्यास नभएको भनी बुझ्नु पर्ने।

कैफियत: पहिलो मध्यस्थको बहुमतको आंसिक सैद्धान्तिक निर्णय आएपछि लामो समय करिब ३ वर्ष सम्म मध्यस्थताको काम कारवाही अगाडी बढ्न नसकेको कुरा यस विवादको घट्नाक्रमले देखाउँछ। मध्यस्थताको सिद्धान्तको रुपमा रहेको छिटो छरिटो विवाद निरुपण गर्ने भन्ने मानक यस विवादमा पहिलो बहुमतको सैद्धान्तिक निर्णय आएपछि एकजना मध्यस्थको स्थान रिक्त भएको कारण ३-३ वर्षसम्म मध्यस्थको प्रकृया यथास्थितिमा रोकिने कुराले मध्यस्थमा (ले) जे गरे पनि हुन्छ भन्ने कुरा स्थापित हुने जोखिम देखिन्छ। एक जना मध्यस्थको पद खाली भएपछि सो पदको पुनर्नियुक्ती जे जसरी पहिले भएको छ सोही अनुरु गर्न पर्छ भन्ने कानुनी व्यवस्था रहेको भएतापनि निज नियुक्ती हुनु भएको मूख्य मध्यस्थको हकमा के हुन्छ, निज नियुक्त हुनु अघि भएको काम- कारवाही, पक्षहरुले बुझाएको दाबीपत्र, प्रतिवाद पत्र र प्रत्युक्ती र सुनुवाई भई भएको बहुमतको सैद्धान्तिक निर्णय के हुन्छ भन्ने बारेमा स्पष्ट भई सो कुराको सम्बोधन गरेर मात्र मध्यस्थ न्यायधिकरण र विवादका पक्षहरु अगाडी बढ्नु पर्ने हुन्छ। यसले कार्यविधिगत रुपमा मध्यस्थको काम कारवाहीलाई विश्वस्निय, पारदर्शी र निष्पक्ष बनाउन मद्दत गर्दछ।

१९.	वि.सं. २०६८ चैत्र १४ (सन् २०१२, मार्च २७)	पहिले गठन भएको मध्यस्थ ट्राइबुनलका सदस्य मध्ये विश्वनाथ उपाध्याय (पुर्व प्रधानन्यायधिश) को स्थान खाली हुन आइ निम्नानुसारको मध्यस्थहरु ट्राइबुनल गठन भएको मुख्य मध्यस्थः जोर्डन एल्. ज्यन्स् (पहिलेकै निरन्तरता) मध्यस्थः तोसीहिको ओमोटो (पहिलेकै निरन्तरता र दाबीकर्ताको तर्फबाट नियुक्त) मध्यस्थः सूर्यनाथ उपाध्याय (विश्वनाथ उपाध्यायको स्थानमा नियुक्त हुनुभएको, प्रतिवादकर्ताको तर्फबाट रिक्त स्थानमा नियुक्त) र उक्त ट्राइबुनलले दाबीकर्ता निर्माण-व्यवसायीको दाबीहरु मध्ये दाबी नं. १४ र १६ को दाबी अनुसार भुक्तानी पाउने भनी सैद्धान्तिक रुपमा दोस्रो आंसिक निर्णय आएको।
२०.	वि.सं. २०६९, फाल्गुन ४ (सन् २०१३, फेब्रुवरी १५)	वि.सं. २०६८, चैत्र १४ (सन् २०१२, मार्च २७) भएको दोस्रो आंशिक सैद्धान्तिक निर्णयानुसार परिमाणात्मक रुपमा गणना गरी पूरक निर्णय दिइएको। दोस्रो आंसिक निर्णयानुसार विवादका पक्षहरुलाई वार्ता मार्फत् विवाद समाधान गर्नको लागि वार्ताको अवसर पनि प्रदान गर्दै पछिल्लो पटक दाबी नं. १४ र १६ मा partial award प्रदान गरी सांवा रकम र निर्णय गर्दाको दिनसम्मको हुन आउने व्याज तथा tribunal को पारिश्रमिकसमेत (नेपाली मुद्राको हकमा १० प्रतिशतका दरले र अमेरिकी डलरको हकमा सरदर (London Inter- Bank On-Lending Rate (LIBOR) २% को दरले व्याज लगाई) हिसाब गरी US $ तर्फ ३१,३७,३२९.०० (एकतीस लाख सैतीस हजार तीन सय उनान्तीस डलर) र नेपाली मुद्रा तर्फ रु. १५,२४,७५,७६५.०० (पन्ध्र करोड चौवीस लाख पचहत्तर हजार सात सय पैंसट्ठी रुपैयाँ) निर्माण-व्यवसायी कम्पनीलाई नियोक्ताले तिर्नुपर्ने भनी रकम निर्धारण गरिदिएको।

कैफियत: पटक पटक गरी दाबी गरिएका १७ वटा दाबी मध्ये दाबी नं. १४ र दाबी नं. १६ को हकमा सैद्धान्तिक र आंशिक निर्णय प्रदान भएको, मध्यस्थता ऐनको दफा २१ को उप-दफा १) को छ) मा मध्यस्थको अधिकार भित्र मध्यस्थले प्रारम्भिक आदेश दिन सक्ने र कुनै पक्षको अनुरोधमा अन्तरिम र अन्तरकालिन आदेश दिन सकिने व्यवस्था भएको भएतापनि स्पष्ट रुपमा आंशिक निर्णय (अवार्ड) सम्बन्धमा केही नबोलेको र यस अवस्था सो निर्णयका सम्बन्धमा चित्त नभुझने पक्ष सोही दफा को उप-दफा २) को आधारमा उच्च अदालतमा जान सक्ने कि दफा ३० को उपदफा २ अनुसार उच्च अदालतमा जाने भन्ने कुरामा आज परयन्त अन्यौल रहि रहेको छ। सोही आंशिक निर्णय अवार्डमा बांकी दाबीहरुका सम्बन्धमा पक्षहरुले मेलमिलाप गर्न सक्ने भनी मध्यस्थता न्यायधिकरणले अनावश्यक रुपमा आफुले निर्णय दिनुपर्ने विषयमा मेलमिलापको प्रयास गर्ने भनी उल्लेख हुनुले मध्यस्थहरु जिम्मेवार भएको नदेखिएको।

२१.	वि.सं. २०७० जेष्ठ १२	मध्यस्थता ट्राईब्यूनलको वि.सं. २०६८ चैत्र १४ को भुक्तानी पाउने भनी सैद्धान्तिक रुपमा आएको दोस्रो आंसिक निर्णय र सोही आधारमा वि.सं. २०७० जेष्ठ १२ गतेको परिमाणात्मक रुपमा गणना गरी दिइएको पूरक निर्णय कार्यान्वयन गरी पाउँ भनी निर्माण-व्यवसायी कम्पनिको श्री काठमाडौं जिल्ला अदालतमा निवेदन दर्ता भएको।
२२.	वि.सं. २०७० जेठ १२	सुनसरी मोरङ्ग सिचोई विकास समितिको नाउँमा रकम दाखिल गर्न ल्याउनु भनी श्री काठमाडौं जिल्ला अदालतबाट ३५ दिने म्याद जारी भएको।
२३.	वि.सं. २०७० असार १२	का.जि.अ. बाट विगो दाखिल गर्ने सम्बन्धमा नेपाल सरकार सिंचाई मन्त्रालय र सिंचाई विभागका नाउँमा पत्र लेखिएको।
२४.	वि.सं. २०७० श्रावण १५	सुनसरी मोरङ्ग सिचोई विकास समितिको नाउँमा रकम दाखिल गर्न ल्याउनु भनी का.जि.अ. बाट जारी गरिएको ३५ दिने म्याद म्याद तामेल भएको।
२५.	वि.सं. २०७० असार १८	नेपाल सरकार सिंचाई मन्त्रालयको का.जि.अ. लाई लेखेको पत्र। *"का.जि.अ. बाट विगो दाखिल गर्ने पत्र सम्बन्धमा सुनसरी मोरंग सिंचाइ आयोजना III (Phase-I) कार्यान्वयन गर्ने क्रममा भएको ठेक्का सम्झौताबाट उत्पन्न विवाद UNCITRAL Rules बमोजिम गठन भएको अन्तर्राष्ट्रिय मध्यस्थ समक्ष विचाराधिन अवस्थामा नै रहेको छ।* *सो विवादका विभिन्न १७ वटा दाविहरु मध्ये पछिल्लो अवस्थामा अन्तर्राष्टिय मध्यस्थबाट दावि नं. १४ र १६ का सम्बन्धमा आंशिक निर्णय (Award) निर्णय आएको कुरा विवादको पक्ष Sinohydro Corporation, China का तर्फबाट फैसला कार्यान्वयनका लागि तहां पेश गर्न भएको निवेदनका साथ संलग्न Award को छांयाप्रतिबाट अवगत भएकै होला।* *सो (Award) ले वार्ता मार्फत समस्या समाधान गर्न अवसर समेत प्रदान गरेको छ। सो अवसरलाई सदुपयोग गर्न यस मन्त्रालयले विवादको पक्षलाई संलग्न पत्रको छांयाप्रति बमोजिमको जानकारी गराइ सकिएको छ भने अर्को तर्फ वार्ता मार्फत विवाद समाधान गर्ने प्रयोजनार्थ अर्थ मन्त्रालयको सहमती प्राप्त गर्नु अत्यावश्यक भई सहमतीको लागि अर्थ मन्त्रालयमा अनुरोध भई गएको ब्यहोरा जानकारीको लागि आदेशानुसार अनुरोध छ।"*

२६.	वि.सं. २०७०, कार्तिक २५	निर्माण-व्यवसायी कम्पनिले नियोक्ताको बैंक खाता रोक्का राखि पाउ भनी निवेदन दर्ता
२७.	वि.सं. २०७०माघ २२	निर्माण-व्यवसायी कम्पनिले नियोक्ताको बैंक खाता रोक्का राखि पाउ भनी पुनः निवेदन दर्ता।
२८.	वि.सं. २०७० चैत्र ७	मध्यस्थको निर्णय कार्यान्वयन सम्बन्धमा फैसला कार्यान्वयन अधिकारीको आदेश।
२९.	वि.सं. २०७० चैत्र ९	का.जि.अ. ले रकम पठाई दिने भनी सुनसरी मोरङ्ग सिंचोई विकास समितिलाई लेखेको पत्र।
३०.	वि.सं. २०७१, बैशाख २९	का.जि.अ. ले रकम पठाई दिने भनी सुनसरी मोरङ्ग सिंचोई विकास समितिलाई पत्र लेखि सोको वोधार्थ नेपाल सरकार सिंचाई मन्त्रालय र सिंचाई विभाग लाई दिएको।
३१.	वि.सं. २०७१, जेठ ९	निवेदनमा उल्लेखित खाताहरु विपक्षी सुनसरी मोरङ्ग सिंचोई विकास समितिको नेपाल राष्ट्र बैंकमा रहेका छन् छैनन? सोको जवाफ प्राप्त भएपछि विपक्षीलाई पेशीको जानकारी दिई पेश गर्नु भन्ने का.जि.अ. को आदेश।
३२.	वि.सं. २०७१, जेठ १२	का.जि.अ. ले नेपाल राष्ट्र बैंक थापाथलीलाई खुलाई पठाई दिने भनी पत्र लेखेको।
३३.	वि.सं. २०७१ जेठ १३	नेपाल राष्ट्र बैंक थापाथलीलाई खुलाई पठाइ दिने भनी पत्र लेखेको।
३४.	वि.सं. २०७१, असार १२	का.जि.अ. ले नेपाल राष्ट्र बैंक थापाथलीलाई खुलाई पठाई दिने भनी लेखेको पत्र।
३५.	वि.सं. २०७१ असार २६	का.जि.अ. ले नेपाल राष्ट्र बैंक बिराटनगरलाई खुलाई पठाई दिने भनी पत्र लेखी मोरङ्ग सिंचोई विकास समितिलाई वोधार्थ पत्र दिएको।
३६.	वि.सं. २०७१ असार ३०	नेपाल राष्ट्र बैंक बिराटनगरले का.जि.अ. लाई पत्र लेखेको।
३७.	वि.सं. २०७१, श्रावण ७	का.जि.अ. ले खुलाई पठाई दिने भनी सुनसरी मोरङ्ग सिंचोई विकास समितिलाई पत्र लेखेको।
३८.	वि.सं. २०७१, श्रावण २०	नेपाल राष्ट्र बैंक बिराटनगरले का.जि.अ. लाई पत्र लेखेको।
३९.	वि.सं. २०७१, श्रावण २१	का.जि.अ. ले खुलाई पठाई दिने भनी सुनसरी मोरङ्ग सिंचाई विकास समितिलाई पत्र लेखेको।
४०.	वि.सं. २०७१, श्रावण ३०	का.जि.अ. ले सुनसरी मोरङ्ग सिंचोई विकास समितिलाई पेशीको सूचना दिएको।
४१.	वि.सं. २०७१, भाद्र ६	निवेदन मागदाबी बमोजिम बैंक खाता रोक्का राख्न मिलेन भन्ने का.जि.अ. को आदेश।
४२.	वि.सं. २०७१, असोज २२	का.जि.अ. मा नेपाल सरकार अर्थ मन्त्रालयबाट रकम मगाई बिगो असुल उपर गरी पाउ भनी निर्माण-व्यवसायी कम्पनिले निवेदन दिएको।
४३.	वि.सं. २०७१, असोज २२	का.जि.अ. को आदेश।
४४.	वि.सं. २०७१, असोज २६	का.जि.अ. ले कोष तथा लेखा नियन्त्रण कार्यालय बिराटनगरलाई खुलाई पठाई दिने भनी पत्र लेखेको।
४५.	वि.सं. २०७१, असोज २९	कोष तथा लेखा नियन्त्रण कार्यालय बिराटनगरले खुलाई पठाएको भनी का.जि.अ. लाई पत्र लेखेको।

४६.	वि.सं. २०७१, पौष २१	निर्माण-व्यवसायी कम्पनिले का.जि.अ. मा निवेदन दिएको ।
४७.	वि.सं. २०७१, माघ २	का.जि.अ. को आदेश ।
४८.	वि.सं. २०७१।१०।८ वि.सं. २०७१।१०।२१ वि.सं. २०७१।११।२८ वि.सं. २०७२।०१।	का.जि.अ. ले सचिव, सिचाई मन्त्रालय समेतलाई विपक्षी बनाई पत्र लेखेको ।
कैफियत: मध्यस्थता न्यायधिकरणले दिएको आंशिक निर्णय कार्यान्वयन गर्न दाबी जितेको पक्षले ऐनले दिएको मार्ग प्रशस्त गरेको भएतापनि नियोक्ताको पक्षपोषण गरेको देखिन्छ । मध्यस्थता को एउटा गुण छिटो छरितो निर्णय दिने भएतापनि निर्णय कार्यान्वयनको लागि दिएको निवेदन अनुसारको कार्य तत्काल नहुंदा ढिला न्याय दिनु भनेको न्याय नदिनु सरहको भन्ने युक्तिको चरितार्थ प्रस्तुत मुद्दामा भएको सहजै अनुमान लगाउन सकिन्छ ।		
४९.	वि.सं. २०७२, बैशाख ३	निर्माण-व्यवसायी कम्पनिले श्री काठमाडौं जिल्ला अदालतमा सिंचाइ मन्त्रालय, सिंचाइ विभाग समेतलाई विपक्षी बनाइ अदालतको अवहेलना मुद्दामा निवेदन दर्ता भएको ।
कैफियत: मध्यस्थताबाट दिएको निर्णय कार्यान्वयन गरी दिने बाध्य रहेको एउटा पक्ष उदासिन रहने र अर्को पक्षले अदालतको अवहेलना सम्म पुग्नु पर्ने बाध्यात्मक परिस्थितिले हामीले अङ्गिकार गरेको मध्यस्थताको अभ्यासको असली चरित्रलाई उजागर गर्ने काम गरेको छ । मध्यस्थलाई विश्वस्नीय बनाउन कम्तिमा मध्यस्थ न्यायधिकरणबाट भएको निर्णय कार्यान्वयनको सुनिश्चितता हुनुपर्छ । विवादलाई मान्ने, त्यो विवाद समाधान गर्न मध्यस्थताको प्रकृया अवलम्बन गर्ने, आ-आफ्नो तर्फबाट मध्यस्थ नियुक्त गर्ने दाबी-प्रतिदाबी र प्रतिवाद गर्ने तर मध्यस्थको निर्णय कार्यान्वयनमा उदासिन रहने विरोधाभाषपुर्ण रहेको छ ।		
५०.	वि.सं. २०७२, बैशाख २९ वि.सं. २०७२, जेठ १८	क्रमश: सिंचाइ विभाग र सिंचाइ मन्त्रालयको तर्फबाट आफ्नोसमेत हकमा महानिर्देशक र सचिवबाट निर्माण-व्यवसायी कम्पनिले का.जि. मा हालेको अदालतको अवहेलना मुद्दामा लिखित जवाफ फर्काएको । "निवेदक सिनो हाइड्रो र सुनसरी मोरङ् सिंचाइ विकास समिति बीच सुनसरी मोरङ्ग सिंचाई योजना (तेस्रो चरण) का निर्माण कार्य ठे नं. SMIP III- ICB 1/98 को कार्यान्वयनको विषयलाई लिएर उत्पन्न जम्मा १७ वटा विषयका विवाद निरुपणका लागि UNCITRAL ARBITRATION RULES अन्तर्गत मध्यस्थतामा कारवाही भैरहेकोमा १७ वटा विषय मध्ये २ वटा विषयका मात्र मध्यस्थताबाट निर्णय भएको अवस्था र बाँकी १५ वटा विषयको हकमा TRIBUNAL बाट समेत Negotiation गरी मिलाउने भन्ने आशय तथा नेपाल सरकार र सुनसरी मोरङ सिंचाइ विकास समिति समेतले १७ वटै दावीलाई एकमुष्ट वार्ताबाट समाधान गर्दा उपयुक्त हुने देखि समग्रतामा निकास निकाल्ने उद्देश्यले यस विषयलाई गम्भिरतापूर्वक लिई Negotiation बाट समस्यालाई एकमुष्ट रुपमा समाधान गर्ने गरी कारबाहीको प्रकृया सुरु गरेको व्यहोरा सम्मानित अदालत समक्ष सादर अनुरोध छ । यसै विषयलाई कार्यान्वयन तहमा लैजाने प्रयोजनको लागि तत्कालिन सिचाइ मन्त्री उमाकान्त झाको कार्यकालमा मिति २०७०।०५।०२ मा मन्त्रीस्तरीय निर्णय गरी वार्ता टोलि गठन गर्न प्रस्ताव सहितको उपयुक्त निकास दिनको लागि नेपाल सरकार (मन्त्रिपरिषद्) मा मिति २०७०/०५/०४ मा प्रस्ताव पठाईएकोमा सो प्रस्ताव उपर हालसम्म पनि निणय भएका जानकारी प्राप्त नभएको ।
माथि उल्लेखित प्रस्तुत मध्यस्थमा सुम्पिएको विवादको घट्नाक्रमहरुको विकासक्रम हुँदै गर्दा मध्यस्थको अन्तिम निर्णय नआई एक मध्यस्थ ट्राइबुनलको आंसिक निर्णय कार्यान्वयन गर्ने, गर्दा के कसरी गर्ने र दुई मध्यस्थ ट्राइबुनलको आंसिक निर्णय कार्यान्वयन नगरेको अवस्थामा अदालतको अवहेलना हुने नहुने भन्ने दुई वटा बिषय काठमाडौं जिल्ला अदालतमा विचाराधिन रहिरहेको अवस्थामा सम्झौताका दुबै पक्षहरु बीच कायम रहेको विवादबारे दुबै पक्षबीच निरन्तर छलफल, वार्ता तथा पत्राचार समेत भईरहेको थियो ।		
५१.	वि.सं. २०७७, साउन १६ (सन् २०२०, जुलाई ३१)	तीन सदस्यीय मध्यस्थता ट्राइबुनल मध्ये मुख्य मध्यस्थ जोर्डन एल्. ज्यन्स् र मध्यस्थ तोसीहिको ओमोटो बाट अन्तिम निर्णय (Final Award) प्रदान गरिएको । **मध्यस्थको ट्राइबुनलको बहुमतको अन्तिम निर्णय (Final Award)** *दोस्रो आंशिक अवार्ड को अनुच्छेद ४९ मा उल्लेख गरिए अनुसार, यस मध्यस्थताका पक्षहरुलाई उनीहरुको बाँकी सबै दाबीहरुलाई आपसी रुपमा समाधान गर्न प्रोत्साहित गर्ने प्रयासमा अनिश्चित कालको लागि खुला रहेको थियो । यस अन्तिम अवार्ड हुनु पूर्व, दाबीकर्ता तथा प्रतिवादकर्ता मध्ये कुनैपनि पक्षले एक अर्का बिरुद्ध थप दाबिहरु पेश गरेकामा अब यस ट्राइबुनलबाट कुनैपनि थप दाबीहरु स्वीकार गरिने छैन ।* *दोस्रो आंशिक अवार्डको अनुच्छेद ४८ बमोजिम, दोस्रो आंशिक अवार्डको पूरकले दावीकर्तालाई उसको दावी १४ र १६ को सम्बन्धमा प्रतिवादकर्ताले दाबीकर्तालाई बुझाउनु पर्ने कूल रकमको योग भुक्तानी सम्बन्धमा निर्णय प्रदान गरेको थियो । उक्त आंशिक अवार्ड अन्तिम रहेको र जारी भएको मिति देखि बाध्यकारी थियो, त्यस्तै रहने, र शंका निवारण गर्न यस अन्तिम अवार्डको हकमा पुन: निश्चित गरिएको छ ।* *यसका साथै, दोस्रो आंशिक अवार्डको पूरकको अनुच्छेद ९ मा दोस्रो आंशिक अवार्डको पूरक जारी गर्नु पूर्व मध्यस्थताको खर्चमा थप पेश्कीको अपेक्षा गरेको र उक्त पेश्की प्राप्त गरेको, उक्त मध्यस्थताको पूर्ण खर्च दावीकर्ताले*

		मात्र व्यहोरेको तथा प्रतिवादकर्ताको तर्फबाट ट्राइबुनलले माग गरेको पेश्कीको कुनैपनि रकम बुझाउन असमर्थ रहेको छ । दोस्रो आंशिक अवार्डको पूरक पक्षहरुलाई विधिपुर्वक हस्तान्तरण गरिएको र तत्कालैबाट अन्तिम र बन्धनकारी भएको थियो । *मध्यस्थताको सुरुवातैदेखि, मध्यस्थताको खर्चको सम्बन्धमा १००% पेश्की रकम नै ट्राइबुलनलाई दाबीकर्ताको तर्फबाट चुक्ता गरिएको छ । आंशिक अवार्डहरूको हकमा कुनै पनि रकम प्रतिवादकर्ताद्वारा दावीकर्तालाई दाखिला गरिएको छैन ।* *यस अन्तिम अवार्डबाट, ट्रिब्यूनलले दाबीकर्तालाई यसै सँग समावेश गरिऐको शारंश र परिशिष्ट १ देखि ६ मा व्यवस्था गरे बमोजिम थप लागत र विस्तृत ब्याज प्रदान गर्ने निर्णय गर्दछ ।* *यो अन्तिम अवार्ड ३१ जुलाई २०२० देखि लागु हुने गरी नेपालको काठमाडौंमा दिइएको हो ।* मध्यस्थको अन्तिम निर्णयबाट दाबीकर्ता पक्षले देहाय बमोजिमको रकम भराई पाउने ठहर भएको थियो । - नेपाली रुपैयाँ रु.३१,०६,८९,८००।५० (अक्षेरेपी एकतिस करोड छ लाख उनानब्बे हजार आठ सय रुपैयाँ पचास पैसा) - अमेरिकी डलर (३९,९०,९०१।०८ (अमेरिकी डलर अक्षेरेपी उनान्चालिस लाख नब्बे हजार नौ सय एक र आठ सेन्ट्स)

कैफियत: यसरी वि.सं.२०६०, कार्तिक ७ (सन् २००३, अक्टोबर २४) गते निर्माण-व्यवसायीले मध्यस्थता सम्बन्धी सूचना दिएसँगै शुरु भएको मध्यस्थताको काम कारवाही तत्पश्चात् पक्षहरुबाट सम्बन्धित मध्यस्थहरु नियुक्त भई मध्यस्थता ट्राइबुनल गठन गरिएसँगै अगाडी बढी वि.सं. २०७७, साउन १६ (सन् २०२०, जुलाई ३१) मा मात्र अन्तिम निर्णय (अवार्ड) आएको कुराले मध्यस्थताको माध्यमबाट विवाद समाधान गर्ने कार्य परम्परागत अदालती प्रकृया भन्दा छिटो छरितो हुन्छ भन्ने मान्यता प्रतिकुल रहेको छ । वि.सं. २०६८ चैत्र १४ (सन् २०१२, मार्च २७) गते दोस्रो आंसिक सैद्धान्तिक निर्णय र वि.सं. २०६९, फाल्गुन ४ (सन् २०१३, फेब्रुवरी १५) गते दोस्रो आंसिक सैद्धान्तिक निर्णयानुसार परिमाणात्मक रुपमा गणना गरी पूरक निर्णय दिइएको भएतापनि यँहासम्म तीनै जना मध्यस्थहरुको सहभागितामा र सर्बसम्मत रुपमा निर्णय प्रदान भएको भएतापनि के कति कारणले अन्तिम निर्णयमा २ जना विदेशी मध्यस्थहरुको सहभागितामा बहुमतीय निर्णय आयो भन्ने कुरा विवादको सम्पुर्ण मिसिलको अध्ययनबाट कँही कतै पनि खुल्दैन ।

दाबीकर्ताले दावी नं. १४ र १६ को दाबी मात्र भराउने यस अघिको आंसिक निर्णयमा केवल अन्तिम निर्णय दिने दिन सम्मको व्याजको हिसाब किताब गरी र मध्यस्थता न्यायधिकरणको पारिश्रमिक दाबीकर्ताले नियोक्ताबाट भराई पाउने निर्णय भएको छ । यस निर्णयमा बहुमत मध्यस्थले यसअघि आंसिक निर्णय दिंदा के कति कारणले यस मध्यस्थताका पक्षहरुलाई निर्णय दिन बाँकी सबै दाबीहरुलाई पक्षहरुले आपसी रुपमा समाधान गर्न प्रोत्साहित गर्ने समय दिइएको थियो र त्यो के कति कारणले करिब ८ वर्षसम्म लम्बिएको थियो भन्ने कुरा समेत कँही कतैबाट खुल्दैन । स्वयं अन्तिम निर्णय दिने बहुमत मध्यस्थले बाँकी दाबीहरुका सम्बन्धमा पक्षहरुलाई आपसी रुपमा विवाद समाधान गर्न समयावधि अनिश्चित कालको लागि खुला रहेको थियो भनी स्वीकार गरेको भएतापनि यस पछाडीको कुनै आधार, कारण र कानुनी तथा करारीय प्रावधानमा अन्तरनिहित भई पक्षहरुलाई त्यस्तो दिन मिल्ने भन्ने कुराको भरपर्दो जवाफ तथा विश्लेषण उक्त अन्तिम निर्णयमा परेको देखिंदैन । के आंसिक निर्णय दिएको करिब आठ वर्ष सम्म पनि कुनै मध्यस्थ कायम रहन सक्छ त भन्ने प्रश्नमा यस मध्यस्थता एउटा गलत दृष्टान्तको रुपमा सदा सर्बदा नेपालको मध्यस्थताको क्षेत्रमा बरकरार रहने स्थिति देखियो । अन्तिम निर्णय दिनु अघि पक्षहरुलाई सुनुवाई र बहस पैरबी गर्न नदिई अविश्वस्नीय ढंगबाट केवल २ जना मध्यस्थले आफ्नो मनलाग्दी व्यवहार गर्न पाँउन कुराले यस अवार्डको माध्यमबाट बैधानिकता पाएको देख्न सकिन्छ । यस सम्बन्धमा थप कैफियत जति पनि निकाल्न र विश्लेषण गर्न सकिने भएतापनि एउटा लामो र अन्त्यहिन जस्तो देखिएको मध्यस्थताले निष्कर्ष पाएको कुरालाई सफालता मान्न पर्ने देखिन्छ ।

५२.	वि.सं. २०७७, असोज ०४	वि.सं. २०७७ साउन १६ को अन्तिम निर्णय (Final Award) मन्त्रालयमा दर्ता भई साबिकको सुनसरी मोरङ्ग सिंचाइ विकास समिति मिति २०७५।३।२० को मन्त्रीपरिषद्को वैठकबाट विगठित भई हाल सो को दायित्व सरि गएको सुनसरी मोरङ्ग सिंचाइ आयोजना समक्ष जानकारीमा आइ मध्यस्थको त्रृटिपुर्ण निर्णय जानकारीमा आएको ।
५३.	वि.सं. २०७७, कार्तिक ०४	नियोक्ताको कार्यालय उपरोक्त मध्यस्थता ट्राईबुनलको बहुमतबाट भएको निर्णय, मध्यस्थता ऐन, २०५५ को दफा ३०(१), (२), (३) को पुर्वावस्था भई सो निर्णयमा चित्त नबुझेकाले सोही ऐनको दफा ३०(१) बमोजिम उच्च अदालत पाटनमा बहुमत मध्यस्थको उक्त निर्णय बदर गरि पाँउ भन्ने मिति २०७७।०७।१६ गतेको निवेदन माग दाबी दर्ता ।
५४.	वि.सं. २०७७, मङ्सिर १२	विपक्षी र सक्कल मिसिल झिकाउने गरी उच्च अदालत पाटनको आदेश ।
५५.	वि.सं. २०७७, मङ्सिर १५	निर्माण व्यवसायीले श्री काठमाडौं जिल्ला अदालतमा मध्यस्थको निर्णय कार्यान्वयनको लागी निवेदन दिएकोमा उच्च अदालतमा नियोक्ताले मध्यस्थको निर्णय बदर गर्न माग गरी निवेदन दर्ता भइसकेकाले श्री काठमाडौं जिल्ला अदालतले मिति २०७७।११।२६ गते मध्यस्थताको निर्णय कार्यान्वयनको निवेदन तामेलीमा पठाएको ।
५६.	वि.सं. २०७७, पौष २१	निर्माण-व्यवसायीले नियोक्ताको अवार्ड बदर गर्ने निवेदन उपर निवेदन खारेज गरी न्याय इन्साफ पाउं भन्ने लिखित प्रतिवाद दर्ता ।
५७.	वि.सं. २०७७, चैत्र १८ (ता.३१ मार्च, २०२१)	मध्यस्थको अन्तिम निर्णय बमोजिम निर्माण व्यवसायीले नियोक्ताबाट दैनिक रुपमा पाउने ब्याज बाहेक न्यूनतम पनि नेपाली रुपैयां अठत्तर (७८) करोड पाउनु पर्ने भएता पनि दुवै पक्षको जीत हुने गरी सिंचाई विभागलाई सम्बोधन गरी उर्जा, जलस्रोत तथा सिंचाई मन्त्रालयका तत्कालिन सहसचिव श्री रामानन्द प्रसाद यादवको कार्यदलले मिति २०७२

		भाद्र २७ (ता. १३ सेप्टेम्बर २०१५) गतेका दिन दिएको सुझाव प्रतिवेदन अनुसारको जम्मा नेपाली रुपैयाँ ५२,१८,०२,२०३।९७ (अक्षेरेपी बाउन्न करोड अठार लाख दुई हजार दुईसय तीन रुपैयाँ सन्तानब्बे पैसा) मात्र भुक्तानी पाए मध्यस्थको मिति २०७७ श्रावण १६ (ता. ३१ जुलाई २०२०) गतेको अन्तिम निर्णय वमोजिम निर्माण व्यवसायीले पाउनु पर्ने थप रकमको दावी तथा अन्य अड्डा अदालतमा दिएको निवेदन बमोजिमको सम्पूर्ण दावि छोडी तथा मध्यस्थहरुको खर्च जमानत रकम दावि समेत कम्पनीले व्योहोर्ने सम्म भनी मिलापत्र गर्न तयार रहेको व्यहोरा उल्लेख गरी निवेदन दिएको,
५८.	वि.सं. २०७८, बैशाख १६	निर्माण-व्यवसायीको मेलमिलापको प्रस्ताव उपर नियोक्ता पक्षले प्रस्तावित दावी बमोजिम श्री रामानन्द प्रसाद यादवको कार्यदलले मिति २०७२ भाद्र २७ गते दिएको सुझाव प्रतिवेदन अनुसारको जम्मा नेपाली रुपैयाँ ५२,१८,०२,२०३।९७ (अक्षेरेपी बाउन्न करोड अठार लाख दुई हजार दुईसय तीन रुपैयाँ सन्तानब्बे पैसा) दिँदा मुलुकको आर्थिक दायित्व समेत कम हुने हुँदा उक्त निर्माण-व्यवसायीको प्रस्ताव बमोजिम मेलमिलाप गर्न उपयुक्त छ भनी मिति २०७८।०१।१६ को मन्त्रिस्तरीय निर्णय।
५९.	वि.सं. २०७८, जेठ ११	मिति २०७८।०१।१६ गते च.नं. २११७ को पत्रमा अदालति तथा प्रशासनिक प्रकृया पुरा गरी ठहर भई आए भुक्तानी दिने भनी अर्थ मन्त्रालयले रकम सुनिश्चितता भएको हुँदा आवश्यक कारबाहि बढाउन भनि मिति २०७८।०२।११ को सचिव स्तरीय निर्णय बमोजिम मेलमिलापका लागी भएको निर्णय नै मुद्दाका पक्षहरुको मेलमिलाप हुन सक्ने विन्दुको रुपमा रहेको।
६१.	वि.सं. २०७८, असार २७	प्रस्तुत मुद्दाका दुबै पक्षले कोभिड महामारीका कारण तथा निशेधाज्ञाको अवस्थामा अदालतले गरेको सेवा संकुचनको अवस्थामा पेशी तोक्न निवेदन दिई मिति २०७८।०३।२७ गते पेशीमा चढी मेलमिलापमा पठाउने आदेश भएको।
६२.	वि.सं. २०७८, साउन २५	मेलमिलाप मार्फत मिलि आएको व्यहोरा- मिलि आएको व्यहोरा यो छ कि विपक्षी सिनो हाईड्रो कर्पोरेशन लिमिटेड (Sinohydro Corporation Limited) (साविक नाम चाईना नेशनल वाटर रिसोर्सेज् एण्ड हाइड्रोपावर ईन्जिनियरिङ्ग कर्पोरेशन) ले मध्यस्थ ट्राइबुनलको अन्तिम निर्णय बमोजिमको ठहर रकम र सो को व्याज र मध्यस्थहरुको शुल्क वापत बुझाएको रकम समेत जोडेर हुन आउने सम्पूर्ण रकम मा आफ्नो दाबी छोडी उर्जा, जलस्रोत तथा सिंचाई मन्त्रालयका तत्कालिन सहसचिव श्री रामानन्द प्रसाद यादवको कार्यदलले मिति २०७२ भाद्र २७ (ता. १३ सेप्टेम्बर २०१५) गतेका दिन दिएको सुझाव प्रतिवेदन अनुसारको जम्मा नेपाली रुपैयाँ ५२,१८,०२,२०३।९७ (अक्षेरेपी बाउन्न करोड अठार लाख दुई हजार दुईसय तीन रुपैयाँ सन्तानब्बे पैसा) मात्र निवेदक साबिकमा सुनसरी मोरङ्ग सिचाई बिकास समिति नाम रहेकोमा हाल सो को दायित्व सरि आएको सुनसरी मोरङ्ग सिचाई आयोजनाबाट प्रत्यर्थीलाई सिनो हाईड्रो कर्पोरेशन लिमिटेडलाई रकम भुक्तानी दिन तथा प्रत्यथीले उक्त प्रतिवेदन बमोजिमको दावि रकम निवेदक पक्षबाट बुझ्न मञ्जुर गर्दछ .....१ मेलमिलापबाट ठहर भए बमोजिमको उल्लिखित नेपाली रुपैयाँ ५२,१८,०२,२०३।९७ (अक्षेरेपी बाउन्न करोड अठार लाख दुई हजार दुईसय तीन रुपैयाँ सन्तानब्बे पैसा) रकम भुक्तान गर्न आवश्यक सम्पूर्ण आन्तरिक तथा प्रशासनिक प्रकृया टुङ्गयाई निवेदक आयोजनालाई अर्थ मन्त्रालयबाट भुक्तानी हुनासाथ प्रत्यर्थी सिनो हाईड्रो कर्पोरेशन लिमिटेडलाई निजको नबिल बैक लि. मा रहेको खाता नं. २३०१०१७५००५७५ मा रकम दाखिला गर्ने कुरामा निवेदक पक्ष मञ्जुर छ ....१, मेलमिलापबाट ठहर भए बमोजिमको दावी रकम निवेदक पक्षबाट प्राप्त भएपश्चात निवेदक प्रत्यर्थीबाट यसै मध्यस्थको निर्णय कार्यान्वयन तथा अदालतका मानहानी लगायतका विषयमा निवेदक पक्षलाई विपक्षी बनाई सम्पूर्ण तहका अड्डा अदालतमा दायर भएका मुद्दा तथा निवेदन समेत फिर्ता लिने कुरामा तथा निवेदक प्रत्यर्थीले यसै विषय अन्तर्गत लिएका अन्य सबै दावी छाड्न मञ्जुर गर्दछ....१, त्यसैगरी मध्यस्थको प्रकृया पुरा गर्दा मध्यस्थताको कुनै खर्च दावि भए सो पनि व्योहोर्न निवेदक प्रत्यर्थी सिनो हाईड्रो कर्पोरेशन लिमिटेड मञ्जुर छ....१ भनी निवेदक र प्रत्यर्थी दुबैले आ–आफ्नो निवेदन दाबी र लिखित प्रतिवाद जिकिर छाडी मिलापत्र गर्न एक आपसमा परस्पर मञ्जुरी र सहमति भएकोले हामीहरु को आपसी मनोमान राजीखुशीसँग मुलुकी देवानी कार्यविधि संहिता, २०७४ को दफा १९४ बमोजिम मेलमिलापकर्ता श्री रामचन्द्र सिंखडाको उपस्थितिमा मेलमिलाप गरी मिलापत्र गरी पाउन सम्मानित अदालत समक्ष यो संयुक्त निवेदन पेश गर्दछौ। अतः मुलुकी देवानी कार्यविधि संहिता, २०७४ को दफा १९४ बमोजिम मेलमिलाप गरी मुद्दा मिलापत्र गर्न यो संयुक्त दर्खास्त गरेका छौं । लेखिएबमोजिम मिलापत्र गरी निवेदक प्रत्यर्थीको मेलमिलाप बमोजिको व्योहोरा प्रधानमन्त्री तथा मन्त्रीपरिषद्को कार्यालय, अर्थ मन्त्रालय, उर्जा तथा सिंचाई मन्त्रालय तथा जलश्रोत तथा सिंचाइ विभागमा समेत अदालत मार्फत मेलमिलाप भएको व्योहोरा लेखि जानकारी लेखी पठाई पाँउ।

विश्लेषण:

१) **लामो मध्यस्थताको प्रकृया:** मध्यस्थता ट्राईबुनल समक्ष मिति २०६१।१०।१७ गते विपक्षी ठेकेदार कम्पनीले १७ वटा दावीहरु पेश गरेको सम्बन्धमा मिति २०६५।११।०७ गते बहुमत मध्यस्थबाट १७ वटै दावीहरुका सम्बन्धमा पहिलो (Partial Award) आशिंक सैद्धान्तिक निर्णय आएकोमा मिति २०६८।१२।१४ गते पुनः मध्यस्थ ट्राईबुनलबाट दावी नं १४ र १६ को सम्बन्धमा दोश्रो (Partial Award) सैद्धान्तीक निर्णय/अवार्ड आई सो को पुरक अवार्ड (Supplementary Award) मिति २०६९।११।४ गते दिएकोमा, मिति २०७७।४।१६ गते सम्पुर्ण १७ वटै दावीहरुको सम्बन्धमा **अन्तिम अवार्ड** (Final Award) भएको कुरा यथार्थ हो । मध्यस्थता ऐन, २०५५ को २४ को प्रावधान बमोजिम साधारण तथा सम्पुर्ण कागजात प्राप्त भएको १२० दिन भित्र काम कारवाही सम्पन्न गरी निर्णय दिनुपर्ने बाध्यात्मक व्यवस्था रहेको छ । सुनुवाइ सपन्न भइसकेको दशक भन्दा लामो समय व्यतित भएपछि आएको बहुमत मध्यस्थको अन्तिम निर्णयले मध्यस्थताको प्रकृया लामो र अनिश्ययात्मक हुन सक्ने कुरालाई मनन गर्दै सम्बन्धित विवादका मध्यस्थहरुले प्रारम्भिक बैठक देखि नै समयसिमा तोकेर मध्यस्थताको काम कारवाही र अवार्ड आउने समयसम्मका लागि छुट्टै प्रारम्भिक रुपमा कार्यविधिगत आदेश (Procedural Order) जारी गरेर यस प्रकृयालाई छिटो र विश्वस्नीय बनाउन पर्ने देखिन्छ ।

२) **मध्यस्थको परिवर्तन तथा एकजना मध्यस्थको सहभागिता विना गरिएको काम कारवाही:** प्रस्तुत विवादमा नियोक्ताको तर्फबाट नियुक्त मध्यस्थ श्री विश्वनाथ उपाध्याय (पूर्व प्रधान न्यायधिश) ज्युले पहिलो आंसिक सैद्धान्तिक निर्णय हुंदासम्म मध्यस्थको भूमिकामा रहनु भएको भएतापनि बहुमत मध्यस्थले दिनुभएको उक्त सैद्धान्तिक निर्णयमा फरक मत दिने भनिएको देखिएतापनि निजको तर्फबाट त्यस्तो फरक मत दिइएको नभेटिनुले मध्यस्थको भुमिका बस्ने तर पदीय दायित्व निर्वाह नगरी राजिनामा दिने कुराले मध्यस्थताको गरिमा र मर्यादालाई बरकरार राख्न सहयोग नगर्न सक्छ । यसबीच मध्यस्थ श्री विश्वनाथ उपाध्यायको देहबासन भएको भन्ने कुराहरुपनि आएको भएतापनि मध्यस्थ न्यायधिकरणको निर्णय तथा बैठकको निर्णयहरुमा यस सम्बन्धमा केही पनि खुल्दैन । यद्यपि त्यसपछि नियोक्ताको तर्फबाट नियुक्त मध्यस्थको परिवर्तन भई श्री सूर्यनाथ उपाध्याय नियुक्त भएको देख्न सकिन्छ । यसरी एकजना मध्यस्थको परिवर्तन भएकोमा त्यस अघिको काम कारवाहीको बैधानिकता के हुने भन्ने सम्बन्धमा विवादका पक्षहरु र मध्यस्थ न्यायधिकरणले सहमति गरेर अगाडी बढ्न पर्ने देखिन्छ । यस मध्यस्थतामा पहिले दिइएको आंसिक सैद्धान्तिक निर्णयलाई नै पछि तीनै जना मध्यस्थहरुले दिनु भएको दोस्रो आंसिक निर्णयमा आत्मसात गरिनुले एकै विषयमा दोहर्याएर निर्णय भएको देखिन्छ र सैद्धान्तिक मात्र भनिएको कारण त्यसले प्रकृयागत र कानुनी जटिलता ननिम्टाएको हुने अनुमान गर्न सकिन्छ । मध्यस्थको परिवर्तन भएको कारणले नै मध्यस्थताको प्रकृया लम्बिएको निष्कर्ष निकाल्न सकिन्छ । यद्यपि प्रस्तुत विवादमा नियोक्ता पक्षले एकजना मध्यस्थ श्री सूर्यनाथ उपाध्यायको अनुपस्थितिमा अन्तिम अवार्ड प्रदान गरिएको भनी जिकिर लिएको र निर्माण व्यवसायी पक्षले मध्यस्थता जस्तो विषय नटुड्याई लामो समय राख्नु कुनैपनि दृष्टिबाट उचित नहुने भएकोले बन्द गर्नु पर्ने हुंदा सो विषयमा मध्यस्थ श्री गर्डन एल. जेन्सले पहल गर्दा मध्यस्थ श्री तोसिहिको ओमोटोले सहमती जनाई मध्यस्थताको कारबाहीमा भाग लिनु भएको तर अर्का मध्यस्थ श्री सूर्यनाथ उपाध्यायले जवाफ समेत नदिई वेवस्ता गरी बस्नु भएकोले दुईजना मध्यस्थहरुले मध्यस्थताको कारबाही अगाडी बढाई अन्तिम निर्णय दिइएको जिकिर लिनु भएको छ । यस प्रकार मध्यस्थहरुको कामकारवाहीले मध्यस्थताको विश्वश्नीयतामाथि नै प्रश्न खचडा हुने र यो नै तदर्थ (Ad-hoc) मध्यस्थको प्रमुख अवगुण भएकाले यस खाले कमजोरीहरुलाई संस्थागत मध्यस्थता (Institutional Arbitration) को माध्यमबाट सम्बोधन गर्न सकिने देखिन्छ ।

३) अपार्दर्शी मध्यस्थताको प्रकृया र निर्णय: मध्यस्थताको दोस्रो आंसिक निर्णय (Second Partial Award), दोस्रो आंशिक निर्णयको पूरक (Supplement to Partial Award) हुंदा सम्म एकैसाथ भएका तीनै जना मध्यस्थहरु त्यसपछि के कति कारणले अन्तिम निर्णय/अवार्ड(Final Award) आंउदा सम्म एकसाथ आउन सकेनन् भन्ने कुरा प्रस्तुत विवाद रहस्यमय छ । अर्को चाख लाग्दो कुरा प्रस्तुत विवादकै मुद्दाको सक्कल मिसिल, सम्झौताको दफा ५.१ (ख) (Condition of Particular Application and Appendix to Bid sub-clause 5.1 (b)) अनुसार नेपाल कानुन लागु हुने र त्यसैगरी सम्झौताको दफा ६७.३ (CoC sub-clause 67.3) अनुसार मध्यस्थता ट्राइबुनल काठमाडौमा बस्ने हुंदा संयुक्त राष्ट्रको अन्तराष्ट्रिय व्यापार कानुन सम्बन्धी आयोग (UNCITRAL) मध्यस्थता नियम, १९७६ को धारा ३२(७) र मध्यस्थता ऐन, २०५५ को दफा १२ र ४२ अनुसार काठमाडौ जिल्ला अदालतमा बुझाएको हुनुपर्नेमा उक्त सक्कल मिसिल वि.सं. २०७७, मङ्सिर १२ को उच्च अदालतको आदेश मुताविक काठमाडौ जिल्ला अदालतमा भएको देखिएन या भनौं बुझाएको पाएनौं । यसले समग्र मध्यस्थताको सिंगो दस्ताबेजको अध्ययन गर्ने कठिनाइ मात्र उत्पन्न नभई मध्यस्थताको काम कारवाहीको पार्दर्शीतामाथि शंका गर्ने ठाँउ बनाइ दिएको छ । अन्तिम निर्णयको मिति वि.सं. २०७७, साउन १६(सन् २०२०, जुलाई ३१) रहेकोमा सो समयमा अन्तिम निर्णय दिने २ जना मध्यस्थहरु (दुबै विदेशी नागरिक हुनुभएको) मा र मध्यस्थता नेपालको काठमाडौंमा हुन्छ भनी लेखिएको र अन्तिम अवार्डमा पनि सोही कुरा लेखिएको भएपनि कोभिड माहामारीको समयमा बन्दाबन्दीको अवस्थामा के कसरी निजहरु काठमाडौंमा आए र ट्राइबुनलको वैठक कहाँ कसरी बस्यो भन्ने कुरा खुल्दैन । मध्यस्थता ट्राइबुनलले अन्तिम निर्णय/अवार्ड दिएको विषयमा एकजना मध्यस्थलाई जानकारी नभएको के कसरी वहाँको अनुपस्थितिमा त्यस्तो अन्तिम निर्णय/अवार्ड दिए भन्ने कुरामा निजको अनभिज्ञताले पुनः यस सम्बन्धमा शंका गर्ने ठाँउ बनाएको छ । साथै, मध्यस्थता सम्बन्धी राष्ट्रिय र अन्तर्राष्ट्रिय अभ्यास र प्रचलन, तथा प्रस्तुत विवादका पक्षहरुले गरेको करार सम्झौता अनुसार लागु हुने मध्यस्थता ऐन, २०५५ को दफा २८ मा मध्यस्थले निर्णय गर्दा औपचारीक पत्र दिई जानकारी गराई मध्यस्थहर तथा पक्षहरुको रोहवरमा अवार्ड पक्षहरुको समक्ष पढी सुनाउनु पर्नेछ र त्यसको एक एक प्रति पक्षहरुलाई दिनुपर्ने भन्ने व्यवस्था गरेको छ तथा उक्त सुनुवाइमा कुनै पक्ष अनुपस्थित भए सो निर्णयको एकप्रति पठाउनु पर्ने प्रावधान रहेको छ । यस प्रावधानलाई मध्यस्थता न्यायधिकरणले पालना गरेको नदेखिएबाट मध्यस्थको प्रकृया सम्बन्धी गोपनियतालाई सम्बोधन गर्दै मध्यस्थताको पार्दर्शीता र निष्पक्षतालाई आगामी दिनमा आत्मसात गरेर जानुपर्ने हुन्छ ।

४) निर्णय कार्यान्वयनमा अर्घेलाईं र वाधा व्यवधानः मध्यस्थता ट्राइबुनल समक्ष लामो समय विचाराधीन रही विभिन्न समयमा सुनुवाई गरी प्रथम आंशिक निर्णय (First Partial Award), दोस्रो आंशिक निर्णय (Second Partial Award), दोस्रो आंशिक निर्णयको पूरक (Supplement to Partial Award) आउंदा र सो पश्चात मध्यस्थको आंसिक निर्णय कार्यान्वयन गर्न काठमाडौ जिल्ला अदालतमा जांदा भोग्न परेको कठिनाई र बाधा व्यवधान माथि तालिकामा प्रस्तुत गरिएको छ । निर्णय कार्यान्वयन गर्न अदालतले गरेको आदेशहरु, निर्माण व्यवसायी पक्ष बाध्य भई अदालतको अवहेलनामा निवेदन दर्ता गर्न पुग्नु सम्मको अवस्थाले हाम्रो मध्यस्थताको सिद्धान्त, कानुन र व्यवहारिक कठिनाईको पाटोलाई उजागर गरेको सजिलै बुझ्न सकिन्छ । मध्यस्थताको कारबाहीमा मध्यस्थ नै अन्तिम निर्णयकर्ता हो । मध्यस्थ ट्राइबुनलले सम्झौता र विबादका तथ्यको अधिनमा रहेर गरेको निर्णय पक्षहरुको लागि अन्तिम र बाध्यकारी हुन्छ । बिना शर्त मध्यस्थताको प्रकृयामा भाग लिएपछि परिणाम आफुले सोचे जस्तो नभएकै कारण उपरोक्त प्रकृतिबाट मध्यस्थको निर्णय कार्यान्वयनलाई अर्घेलाईं र वाधा व्यवधान गर्ने कुराले फेरिपनि मध्यस्थताको विश्वस्नीयता र सर्वस्वीकार्यताको मान्यतालाई नै पराजित गर्दछ । यस हिसाबमा मध्यस्थताको निर्णय कार्यान्वयनलाई कसरी सबल र प्रभाबकारी बनाउने भन्ने कुरामा संवेदनशील भएर लाग्ने वेला घर्की सकेको छ ।

५) मध्यस्थता मेलमिलापबाट टुङ्गिएकोः प्रस्तुत विवाद जे जसरी अगाडी बढेर अन्तिम निर्णय सम्म पुगेको र एउटा पक्षले त्यसको बदर हुन माग गरी उच्च अदालतसम्म पुगेको भएतापनि यसमा विवादका पक्षहरुले वुद्धिमता प्रस्तुत गरेको र मध्यस्थता- मेलमिलाप (Arb-Med) मेलमिलाप - मध्यस्थता (Med- Arb) सम्बन्धमा पछिल्लो समयमा विश्वपरिदृश्यमा देखिएको र अनुशरण गर्न थालिएको मान्यतालाई आत्मसात गरेको देख्न सक्छौं । यदि यस विवादमा मेलमिलाप नभएको भए उक्त निर्णयहरुको सम्बन्धमा अदालतले हस्तक्षेप गर्न मिल्थ्यो वा मिल्दैनथ्यो भन्ने अर्का विमर्ष र चिन्तन मन्थनको पाटो रँहदा रंहदै मिति २०७७।१२।१८ गते निर्माण व्यवसायीले मध्यस्थको अन्तिम निर्णय बमोजिम निर्माण व्यवसायीले नियोक्ताबाट दैनिक रुपमा पाउने ब्याज बाहेक न्यूनतम पनि नेपाली रुपैयां अठत्तर (७८) करोड पाउनु पर्ने भएता पनि दुवै पक्षको जीत हुने गरी सिंचाई विभागलाई सम्वोधन गरी उर्जा, जलस्रोत तथा सिंचाई मन्त्रालयका तत्कालिन सहसचिव श्री रामानन्द प्रसाद यादवको कार्यदलले मिति २०७२ भाद्र २७ (ता. १३ सेप्टेम्बर २०१५) गतेका दिन दिएको सुझाव प्रतिवेदन अनुसारको जम्मा नेपाली रुपैयाँ ५२,१८,०२,२०३।९७ (अक्षेरेपी बाउन्न करोड अठार लाख दुई हजार दुईसय तीन रुपैयाँ सन्तानब्बे पैसा) मात्र भुक्तानी पाए मध्यस्थको मिति २०७७ श्रावण १६ (ता. ३१ जुलाई २०२०) गतेको अन्तिम निर्णय वमोजिम निर्माण व्यवसायीले पाउनु पर्ने थप रकमको दावी नगर्ने तथा अन्य अड्डा अदालतमा दिएको निवेदन बमोजिमको सम्पूर्ण दावि छोडी तथा मध्यस्थहरुको खर्च जमानत रकम दावि समेत कम्पनीले व्योहोर्ने सम्म भनी मिलापत्र गर्न तयार रहेको व्यहोरा उल्लेख गरी निवेदन दिएकोमा मिति २०७८।०१।१६ गते नियोक्ता पक्षले जनाएको समर्थनले यस विवाद झन्डै दुई दशक देखि मध्यस्थताको नाममा अल्झिएको विवादले निकास पाउने अवस्था सिर्जना भयो । अन्ततः मेलमिलापबाट मिति २०७८।०४।२५ मा प्रस्तुत विवादले निकास पायो । नेपालको समग्र मध्यस्थता क्षेत्रको नै बदनाम यस विवादले यस ढंगले निकास पाउने कुराले अन्ततः मध्यस्थताको नै जित भएको छ र मध्यस्थताको यस्तो जटिल विवाद समेत हामीले पार लगाएको कुराले अन्य विवादहरुलाई समेत मार्ग प्रशस्त गरेको कुरालाई हामीले पाठको रुपमा लिनुपर्छ ।

नोट: यो लेख दाबीकर्ता/निर्माण-व्यवसायी 'सिनो हाइड्रो कर्पोरेशन" र प्रतिवादकर्ता/नियोक्ता 'सुनसरी मोरङ्ग सिंचाइ आयोजना बाट सविकृत प्राप्त बमोजिम रहेको छ |

Interim Measures in Arbitration and the Requirement for Revision in the Arbitration Act, 2055

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As arbitration is the most popular alternative dispute resolution mechanism in corporate affairs, many nations have formally recognized it with appropriate laws and regulations. Also, the legislation amendment has provided for adequate solutions to difficulties that have emerged from time to time. In recent decades, different countries have made some changes in their existing provisions of arbitration relating to Interim Measures/Reliefs to make arbitration more effective, fruitful, and enforceable. In this regard, there have been amendments to the UNCITRAL Model Law as well. Thus, it is beneficial to examine the Interim Measures/Relief/Order given in the Nepal Arbitration Act, 2055, on a current and international perspective in order to enhance efficiency and make arbitration more achievable.

1. Interim Measures/Reliefs

Interim reliefs are provisional or temporary orders issued by the Arbitration Tribunal. It is an order that is put into effect pending a hearing, trial, final judgment, or an act by one of the parties. The fundamental function of interim measures is to protect a party's rights while pending the outcome of a dispute in arbitration. The major objectives are to maintain or restore the parties pending the determination of the dispute in arbitration; preserve the assets out of which a subsequent award may be satisfied; preserve evidence; and. provide security for the costs of the dispute referred to arbitration. The provision of these interim measures is essential in making the arbitration process as well as the outcome of the arbitration more effective, as they provide parties with the security and/or relief that allow them to continue with the process. Generally, interim relief is granted when:

a. Prima facie there is a case;

b. the balance of convenience lies with the aggrieved party who is seeking the relied; and

c. Irreparable damage or injury may be caused if the interim relief is not granted.

Amended Article 17 of the UNCITRAL Model Law have provided above basis for the Interim Measure:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination

More effectively the National Civil Procedure (Code) Act, 2017, Section 518, has provided the general ground for the interim relief in Nepal.

(1) If the concerned petitioner considers that the petition claim would be meaningless if the status quo of any subject matter of any claim is not maintained pending the final settlement of the petition, such a petitioner may, setting out that matter, pray for the issuance of an interim order.

2. Mode of the Interim Relief/ Measures in Arbitration

There are several modes of the Arbitration relief has been practice.

a. Injunctions are orders that may prevent a party from doing something. Alternatively, injunctions may prevent someone from leaving the country or getting rid of their assets. These are applied when a party predicts that the other will go to great lengths not to pay the final amount in the arbitration award.

b. Security for costs is an interim measure usually requested by the claimant if there is reasonable cause to believe that the claimant is insolvent and will not pay if he or she loses that arbitration. This includes the cost of the arbitration fees.

c. Applications for the preservation or detention of property are less common, however they may be equally as important. Arbitrators should exercise great care in these instances as preservation or detention of property may have serious and adverse consequences for a party that needs to use or sell their property. What may be less detrimental is an application for the inspection of a property. Arbitrators must be careful to always evaluate the advantages and disadvantages of implementing an interim measure such as this one.

d. Active interim measures (or 'preserving the status quo', as they are often referred to) require a party to take, or refrain from taking, specified actions. For example, arbitrators may order a party to continue the performance of contractual obligations (such as carrying out construction works), to continue shipping products, or providing intellectual property, or the adverse. ..etc

3. Provision of Interim Relief under the Arbitration Act 2055 and General Scenario.:

i. The Arbitration Act, 2055 has confined the several Powers to the Arbitrator Whereas :

Section 21, (1) (g):- To issue preliminary orders, or interim or inter locating orders in respect to any matter connected with the dispute on the request of any party, or take a conditional decision.

(2) Any party which is not satisfied with the order issued by the arbitrator pursuant to Clause (g) of Sub-section (1) may submit an application to the appellate court within 15 days, and the decision made by the Appellate Court shall be final.

ii. The provisions of the Arbitration Act, 2055, Section 21 of reliefs are very limited. There are no procedural rules or guidance on how interim measures should be dealt with or guidelines outlining under what circumstances interim measures should be granted. It is unclear whether the Tribunal has the authority to issue interim orders against non-parties to the dispute. There is no clear position to handle the situation of the interim order, if required, before and after the Award is delivered to the parties. There is no legal enforcement mechanism for the implementation of interim relief in cases of violation. It is unclear whether the arbitration statute authorizes or prohibits the parties from obtaining double-standard remedies from the regular court and arbitration tribunal.

iii. Also, in general practice, it is seen that one of the parties deliberately prolongs the time for the arbitration proceedings to prejudice the rights of the other party, for some other reason beneficial

to them, or to delay the pronouncement of the arbitral award against them and thereby delay the enforcement of the award. Thus, the arbitral tribunal and/or the court must safeguard the rights of the aggrieved party before, during, and after the arbitral proceedings until the award is enforced. For which the interim measure must be enforced.

iv. As per the literal interpretation of arbitration, the tribunal can only grant interim reliefs against parties to the arbitration agreement; however, it is unclear that the arbitration tribunal itself has the authority to make directives and orders for nonparties whose roles are in that matter. Thus, lacks in provision it has been seen in practice that the powers of both the court and arbitral tribunal were effectively equal, and confusion on the parties regarding the jurisdiction of the general court and arbitration regarding the interim order.

v. There is a chance that the arbitrator will use interim relief arbitrarily, hence there must be direction for the arbitrators. It has also become crucial because the majority of arbitrators nowadays come from technical backgrounds.

vi. The Arbitration Act, 2055, provides for an enforcement award by the district court after the completion of the award. But there is no provision for an enforcement mechanism for the implementation of the interim measures/ order. It looks like an order with no execution.

Thus, the Arbitration Act, 2055, deals with interim measures with a very limited scope. It cannot cover the complete context of the present period. Some statutory gaps have been observed in the arbitration domicile. There is a need for conditions and rules that make the powers of both courts and arbitral tribunals effective and address our contradictions.

In this regard, it is easy if we study the current international law and the recent changes made in India's arbitration law.

A) International standards of Interim Measure on UNCITRAL Model Law

In order to encourage harmonization regarding the definition and scope of interim protection of rights in international arbitration, the United Nations Commission on International Trade Law (UNCITRAL) amended Article 17 of the UNCITRAL Model Law (Model Law) provision on interim measures in 2006 to define tribunal powers to grant interim measures and to describe the enforcement role of national courts.

Article 17. Power of arbitral tribunal to order interim measures

Article 17 A. Conditions for granting interim measures

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

Article 17 C. Specific regime for preliminary orders

Article 17 D. Modification, suspension, termination

Article 17 E. Provision of security

Article 17 F. Disclosure

Article 17 G. Costs and damages

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Thus, the Model Law of the UNCITRAL Amendment (adopted by the Commission at its thirty-ninth session in 2006) has provided some rational norms, leading to the conclusion of the dichotomy on the use of the Interim Order by the Regular Court, and Arbitration also provides the framework and enforcement of the Interim Order.

B) Recent Indians Prospective on Interim Measure and Amendment.

The Arbitration and Conciliation Act, 1996, with objective improves the usefulness of arbitration, provided there's clarity, ensuring predictability and strengthening arbitration have amended the Provision relating to Interim Measures (with amendment on 2015 and 2019). More delightedly due the problems and forcibility and relief from the standards of the between the Court and Tribunal to power of the Judiciary to pass interim orders in aid of arbitration proceedings, encompassed under Section 9 of the Act under Arbitration and Conciliation act, 1996.

Section 9 : Interim measures by Court

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Section 17: Interim measures ordered by arbitral tribunal.

According to Section 17, during arbitrary procedures, apply to the arbitral tribunal for relief, as mentioned in a similar provision in Section 9 of the Act; however, this provision adds the authority to execute Tribunal's orders: As above

Section 17(1) e..... interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

The Sections 9 and 17 of the Arbitration and Conciliation act, 1996 Act grant judicial authority to issue crucial interim orders, enhancing alternative dispute resolution efficiency. Also, Section 9 and Section 17 of the Act, though similar, differ in scope, with the court having more extensive authority, particularly in cases involving non-parties. A party to the arbitration proceeding chooses to avail remedy under Section 9 of the Act for interim measures either before or during arbitral proceedings or after the making of the arbitral award but before its enforcement in accordance with Section 36 of the Act. Thus, Indian law has more comfortably addressed due process and the implementation of the Interim Order, as well as the unification of the Tribunal and Court's rights.

Conclusion

Our existing provisions for interim measures, as specified in the Arbitration Act, 2055, are exceedingly limited, and lack the legal basis for implementing measures. Thus, it should be revised in order to meet changes in arbitral practice over the last decades. Since the arbitration law is a special law in itself, a major requirement is to unify the existing system, both national and international prospectives.

The required amendment will make the interface between regular courts and arbitration more legally effective. It will also definitely be helpful for the technical personnel involved in arbitration to easily understand interim measures and implement them effectively. It helps to reduce the mandatory situation where the parties have to go to the regular courts for an interim order using the regular law and sovereign rights. Being that arbitration also covers multi-national disputes, there is an urgent need to strengthen the legal framework for interim measures for the implementation of arbitration awards. Thus, it appears that stakeholders must conduct their investigation under this provision of interim measures/ relief in order to maintain standard principles of arbitration.

Nepal Council of Arbitration (NEPCA) Committees

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

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

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

a. Membership Scrutiny Committee

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

b. Arbitrator/Adjudicator/DB Appointment Committee

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

c. Statute, Discipline and Panelist Scrutiny Committee

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

d. Training Committee

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

e. Institutional Development and International Relations Committee

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

f. Research and Publication Committee

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

Activities of NEPCA/Seminars & Trainings

1. On 9th to 13th August, 2023

Nepal Council of Arbitration (NEPCA) in collaboration with Progressive and Professional Lawyer Association (PPLA) conducted a 5-day training on Contract Management and Dispute Settlement at Union House, Anamnagar, Kathmandu. All together 42 participants of Law practitioners and Individual

Professionals were physically participated on the training program. NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and PPLA's Chairperson Advocate Bhoj Raj Acharya distributed the certificate to the participants. Finally, the training was closed with a group photo.

2. ५ श्रावन २०८०

नेपाल मध्यस्थता परिषद् (नेप्का) र चाइनास्थित ग्वान्झाओ आर्बिट्रेसन कमिशन (Guangzhou Arbitration Commission) बीच अन्तर्राष्ट्रिय मध्यस्थताको विषयमा सहकार्य गर्नका लागि चाइनाको ग्वान्झाओमा एक कार्यक्रमबीच आपसी समझदारीपत्रमा हस्ताक्षर सम्पन्न भयो। ग्वान्झाओ आर्बिट्रेसन कमिशन (GZAC) द्वारा आयोजना गरिएको कार्यक्रममा नेप्काका अध्यक्ष डा. राजेन्द्रप्रसाद अधिकारी र ग्वान्झाओ आर्बिट्रेसन कमिशनका महानिर्देशक छेन सिमिङले समझदारीपत्रमा हस्ताक्षर गर्नु भएको हो ।

उक्त कार्यक्रममा ग्वान्झाओका लागि नेपालका महावाणिज्य दूत (Consular General of Nepal) हरिशरण पुडासैनीको पनि सहभागिता रहेको थियो । उक्त कार्यक्रममा बोल्दै महावाणिज्य दूत पुडासैनीले नेपाल मध्यस्थता परिषद् र ग्वान्झाओ आर्विट्रेसन कमिशनबीच भएको यो समझदारीपत्रले दुई देशबीचको आपसी सम्बन्धलाई थप मजबुत बनाउन महत्वपूर्ण भूमिका खेल्ने बताउनुहुँदै व्यवसायिक प्रकृतिका विवाद समाधानका लागि नेपालले गरेको प्रयास र यसका उपलब्धीहरुलाई विश्वकै आर्थिक केन्द्रको रुपमा विकास भइरहेको ग्वान्झाओ सहरमा रहेको ग्वान्झाओ आर्विट्रेसन कमिशन मार्फत उजागर गर्नु प्रशंसनीय रहेको बताउनु भयो । नेप्काको यस कार्यले विदेशका लगानीकर्ताहरुलाई नेपालप्रति आकर्षित गर्न र नेपालमा विदेशी लगाउन भित्र्याउनका निमित्त महत्वपूर्ण भूमिका खेल्नेमा आफू विश्वस्त रहेको पनि बताउनु भयो ।

ग्वान्झाओ आर्विट्रेसन कमिशनका निर्देशक छेन सिमिङले नेपाल मध्यस्थता परिषद्सँग भएको यो समझदारीले अन्तर्राष्ट्रिय मध्यस्थताको विस्तार र सुदृढीकरणका लागि थप बल पुग्ने बताउँदै दुई देशबीचको आपसी सम्बन्धलाई मजबुत बनाउन समेत यस कार्यले मद्दत पुऱ्याउछ भन्नु भयो । सोही कार्यक्रममा बोल्दै नेपाल मध्यस्थता परिषद्का अध्यक्ष डा. राजेन्द्रप्रसाद अधिकारीले अन्तर्राष्ट्रिय मध्यस्थताको निमित्त नेपाल र नेपाल मध्यस्थता परिषद् एक उपयुक्त स्थान हुने र आपसी सहकार्यबाट अन्तर्राष्ट्रिय मध्यस्थताको लागि दुबै संस्थाले मिलेर काम गर्न सक्छ भन्ने धारणा व्यक्त गर्नु भयो ।

उक्त समझदारीपत्रमा हस्ताक्षर गर्ने कार्यक्रममा नेपाल मध्यस्थता परिषद्का महासचिव अधिवक्ता बाबुराम दाहाल, र सचिव अधिवक्ता थानेश्वर काफ्ले, महावाणिज्य दूताबासका वाणिज्य दूत कुञ्जन शाह र ग्वान्झाओ आर्विट्रेसन कमिशनका दो योङ्याङ लगायतको उपस्थिति रहेको थियो ।

3. On 7th to 11th August, 2023

Nepal Council of Arbitration (NEPCA) conducted a 5-day training on Contract Management and Dispute Settlement at NEPCA training hall, Kupondole, Lalitpur. Altogether, 68 participants were

participated physically and Virtual in the training program. Law practitioners, Government Officials, Private Companies and Individual Professionals took part in training. Dr. Rajendra Prasad Adhikari, Chairperson distributed the certificate to the participants. Finally, the training was closed with a group photo.

4. On 6th to 10th October, 2023

Nepal Council of Arbitration (NEPCA) in collaboration with High Court Bar Association, Patan (HCBA-Patan) conducted a 5-day training on Contract Management and Dispute Settlement at Union House, Anamnagar, Kathmandu. Honorable Mr. Kumar Regmi, Justice, Supreme Court of Nepal was the

Chief Guest in the Program. Altogether, 50 participants of Law practitioners and Individual Professionals were participated in the training program. Chief GuestHonorable Justice Mr. Kumar Regmi, NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and HCBA-Patan's Chairperson Advocate Santi Ram Khatiwada distributed the certificate to the participants. Finally, the training was closed with a group photo.

5. On 18th to 22nd December, 2023,

Nepal Council of Arbitration (NEPCA) conducted 5 days training on Construction Management and Dispute Settlement at NEPCA training hall, Kupondole, Lalitpur. Altogether, 35 participants were

participated physically and Virtual in the training program. Law practitioners, Government Officials, Private Companies and Individual Professionals took part in the training. Dr. Rajendra Prasad Adhikari, Chairperson distributed the certificate to the participants. Finally, the training was closed with a group photo.

6. २०८० पौष ६

नेपाल मध्यस्थता परिषद् (नेप्का) का सुचिकृत मध्यस्थहरुलाई प्रमाण-पत्र वितरण तथा संस्थाको प्रतिक चिन्ह शुसोभन कार्यक्रम होटेल हिमालयनमा सम्पन्न भयो । सो कार्यक्रमको सभापतित्व नेप्का का सभापति डा. राजेन्द्रप्रसाद अधिकारीज्यूले गर्नुभयो र विशेष अतिथिको रुपमा नेप्काका पूर्व अध्यक्ष श्री नारायण दत्त शर्मा, श्री सुर्यनाथ उपाध्याय तथा निवर्तमान अध्यक्ष श्री ध्रुवराज भट्टराइको गरिमामय उपस्थितिमा सम्पन्न भयो ।

कार्यक्रम संचालन नेप्काका महासचिव श्री बाबुराम दहालज्यूले गर्नु भयो र उपसभापति श्री लालकृष्ण के.सी.ज्यूले कार्यक्रम उपस्थित सूचिकृत मध्यस्थहरुज्यूलाई स्वागत गर्दै आफ्नो स्वागत मन्तव्य राख्नु भयो तथा सचिव श्री थानेश्वर काफ्लेज्यूले कार्यक्रम माथि प्रकाश गर्दै आफ्नो मन्तव्य राख्नु भयो ।

सो कार्यक्रममा यस संस्थाका पूर्व सभापतिज्यूहरुबाट यस संस्थाका सूचिकृत मध्यस्थज्यूहरुलाई प्रमाणपत्र वितरण तथा यस संस्थाका प्रतिक चिन्ह (यिनय) शुसोभन गर्नु भयो । पूर्वसभापति श्री नारायण दत्त शर्माज्यूले यस संस्थाको स्थापना कालको अवस्थालाई स्मरण गर्दै मध्यस्थताको चुनौतीहरु औंल्याउँदै सुधारको अपेक्षासहित अन्तराष्ट्रिय जगतमा संलग्नता रहदै आएकोमा थप सुध्रिड बनाउदै लैजानु पर्ने धारणा व्यक्त गर्नुभयो । निवर्तमान सभापति श्री ध्रुवराज भट्टराईज्यूले नेप्काको भूमिका बारे प्रकाश पार्दै यस संस्थाले मध्यस्थताको काम, कर्तव्य र अधिकार बारे व्याख्य गर्दै अन्तराष्ट्रिय जगतमै प्रतिस्पर्धा गर्न योग्य तथा विज्ञ मध्यस्थहरु उत्पादन गर्न सक्षम भएको र उहाँहरुलाई सम्बर्धन गर्दै लैजाने यस संस्थाको उद्देश्य रहेको धारणा व्यक्त गर्नु भयो त्यस्तै पूर्वसभापति तथा अख्तियार अनुसन्धान दुरुपयोग आयोगक पूर्व आयुक्त श्री सुर्यनाथ उपाध्यायज्यूले मध्यस्थता विकासको मूल अवधारणा, मध्यस्थकर्ताको इमान्दारिता र सो विषयको अनुसन्धान र अध्ययनबाट प्राप्त हुने र सोही कुराले यस संस्थाको गरिमा उच्च हुने तथा अदालतले पनि यस संस्था प्रतिको विश्वसनीयता वृध्दि हुँदै जाने धारणा व्यक्त गर्नु भयो। अन्त्यमा उहाँले यस संस्थामा सूचिकृत मध्यस्थहरु मध्येको आफू पनि एक रहेकोमा गर्व महशुस गरेको उल्लेख गर्नु भयो ।

कार्यक्रममा उपस्थित महानुभावहरुबाट मध्यस्थता क्षेत्रको चुनौतीहरु र आफ्नो अनुभवहरु राख्नुभयो साथै यस क्षेत्रलाई थप प्रवर्धन गर्दै लैजान अनुसधान, सहकार्य र समन्वय आवश्यक भएको सुझावहरु राख्नु भयो । यस संस्थाक कोषाध्यक्ष श्री हरीप्रसाद सिलवालज्यूले धन्यबाद ज्ञापन सहित आफ्नो मन्तव्य राख्नु भयो ।

अन्तमा यस संस्थाक सभापति डा. राजेन्द्रप्रसाद अधिकारीज्यूले यो क्रार्यक्रमलाई यस संस्थाको उत्सवको संज्ञा दिदै नेप्काको पुरानो र नयाँ पुस्त वीचको अन्तरंग भेटघाट आफैमा बहुमुल्य भएको जानकारी गराउदै यस संस्थाको गरिमामा उपस्थित सूचिकृत मध्यस्थज्यूहरुको क्षमता, योग्यता र इमान्दारिता सदैव रहने अपेक्षा सहित नेपालमा निर्माण विकासको क्षेत्रमा खर्च सम्बन्धि निर्णय गर्ने महत्वपूर्ण स्थानमा रहनु भएको हुँदा उहाँहरुको कार्यकुशलताले यस संस्था विश्व जगतमा विश्वाशनीय रहने विश्वास व्यक्त गर्नु भयो र सबैको सहकार्य, साझेदारी, समन्वय र सक्रियताको अपेक्षासहित धन्यबाद ज्ञापन गर्दै सभा विसर्जन गर्नु भयो ।

7. On 11th to 15th January, 2024

Nepal Council of Arbitration (NEPCA) in collaboration with Special Court Bar Association (SCBA) conducted a 5-day training on Contract Management and Dispute Settlement at Union House, Anamnagar, Kathmandu. Chief Judge of Special Court, Nepal Mr. Tek Narayan Kuwar was the chief guest in the opening ceremony and Honorable Mr. Prakash Man Singh Raut, Justice, Supreme Court of Nepal was the chief guest in the closing ceremony. Alltogether,55 participants of Law practitioners and Individual Professionals

were participated in the training program. Chief Judge of Special Court, Nepal Mr. Tek Narayan Kuwar, Honorable Justice Mr. Prakash Man Singh Raut,NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and SCBA's Chairperson Advocate Chudamani Paudel distributed the certificate to the participants. Finally, the training was closed with a group photo.

8. On 16th to 20th February, 2024

Nepal Council of Arbitration (NEPCA) in collaboration with Democratic Lawyer's Association, Nepal (DLA - Nepal) conducted a 5-day training on Contract Management and Dispute Settlement at Union House, Anamnagar, Kathmandu. Nepal Bar Association's Chairperson Advocate Gopal Krishna Ghimire was the chief guest in the opening ceremony and Former JusticeSr. Advocate Anil Kumar Sinha was the

Chief Guest in the closing ceremony. Altogether,55 participants of Law practitioners and Individual Professionals were physically participated on the training program. Former Justice Sr. Advocate Anil Kumar Sinha, NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and DLA - Nepal's Chairperson Sr. Advocate Sita Ram K.C. distributed the certificate to the participants. Finally, the training was closed with a group photo.

NEPCA Panelist

S.N	Name	Profession	Address
1	Mr. Ajaya Kumar Pokharel	Engineer	New Baneshwor, Kathmandu
2	Mr. Ashish Adhikari	Advocate	Naxal, Kathmandu
3	Mr. Babu Ram Dahal	Advocate	Anamnagar, Kathmandu
4	Mr. Bhoj Raj Regmi	Engineer	Baluwatar, Kathmandu
5	Mr. Bhola Chhatkuli	Engineer	Kritipur, Kathmandu
6	Mr. Bhoop Dhoj Adhikari	Former Judge	Old Baneshwor, Kathmandu
7	Mr. Bindeshwar Yadav	Engineer	Baneshwor, Kathmandu
8	Mr. Bipulendra Chakraworty	Senior Advocate	Jahada, Biratnagar, Morang
9	Mr. Birendra Bahadur Deoja	Engineer	Baneshwor, Kathmandu
10	Mr. Birendra Mahaseth	Engineer	Chakupat, Lalitpur
11	Mr. Dev Narayan Yadav	Engineer	Baneshwor, Kathmandu
12	Mr. Dhruva Raj Bhattarai	Engineer	Gyaneswor, Kathmandu
13	Mr. Dinker Sharma	Engineer	Mandikatar, Kathmandu
14	Mr. Dipak Nath Chalise	Engineer	Maligaun, Kathmandu
15	Mr. Durga Prasad Osti	Engineer	Baneshwor, Kathmandu
16	Mr. Dwarika Nath Dhungel	Social Sciences Researcher	Baneshwor, Kathmandu
17	Dr. Gokul Prasad Burlakoti	Advacate	Babarmahal, Kathmandu
18	Mr. Gyanendra P. Kayastha	Engineer	Sanepa, Lalitpur
19	Mr. Hari Prasad Sharma	Engineer	Anamnagar, Kathmandu
20	Mr. Hari Ram Koirala	Engineer	Kalanki, Kathmandu
21	Mr. Indu Sharma Dhakal	Engineer	Mahankal, Kathmandu
22	Mr. Keshav B. Thapa	Engineer	Babarmahal, Kathmandu
23	Prof. Khem Nath Dallakoti	Engineer	Battisputali, Kathmandu
24	Dr. Kul Ratna Bhurtel	Advocate	Dhobighat, Lalitpur
25	Mr. Lekh Man Singh Bhandhari	Engineer	Sainbhu, Lalitpur
26	Mr. Madhab Prasad Paudel	Rt. Civil Servent/ Lawyer	Jagritinagar, Kathmandu
27	Mr. Mahanedra Bahadur Gurung	Engineer	Hadigaun, Kathmandu
28	Mr. Mahendra Nath Sharma	Engineer	Battisputali, Kathmandu
29	Mr. Manoj Kumar Sharma	Engineer	Nagarjun, Kathmandu
30	Mr. Matrika Prasad Niraula	Senior Advocate	Anamnagar, Kathmandu
31	Mr. Mohan Man Gurung	Engineer/ Advocate	Bagbazar, Kathmandu
32	Mr. Murali Prasad Sharma	Advocate	Baneswor, Kathmandu
33	Mr. Narayan Datt Sharma	Advocate/ Engineer	Gyaneshwor, Kathmandu
34	Mr. Narayan Prasad Koirala	Advocate	Naya Baneshwor, Kathmandu
35	Mr. Narendra Kumar Shrestha	Fromer Deputy Attorney General, Advocate	Naya Baneshwor, Kathmandu
36	Mr. Naveen Mangal Joshi	Engineer	Kobahal Tole, Lalitpur
37	Mr. Niranjan Prasad Poudel	Engineer	Baluwatar, Kathmandu
38	Mr. Poorna Das Shrestha	Engineer	Balkot, Bhaktapur
39	Mr. Raghab Lal Vaidya	Senior Advocate	Nagarjun, Kathmandu

S.N	Name	Profession	Address
40	Mr. Rajendra Kishore Kshatri	Advocate	Lainchour, Kathmandu
41	Mr. Rajendra Niraula	Engineer	Balkhu kathmandu
42	Mr. Rajendra P. Kayastha	Engineer	Maharajgunj, Kathmandu
43	Dr. Rajendra Prasad Adhikari	Project Mgmt, Advocate	Bishalnagar, Kathmandu
44	Mr. Ram Kumar Lamsal	Engineer	Bhimsengola, Kathmandu
45	Mr. Rameshwar Prasad Kalwar	Engineer	Balkhu, Kathmandu
46	Dr. Rishi Kesh Wagle	Advocate	Tokha, Kathmandu
47	Mr. Sanjeev Koirala	Engineer	Balkumari, Lalitpur
48	Mr. Satya Narayan Shah	Engineer	Lalitpur, Nepal
49	Mr. Shambhu Thapa	Senior Advocate	Tinkune, Kathmandu
50	Mr. Sharada Prasad Sharma	Engineer	Baneshwor, Kathmandu
51	Mr. Shree Prasad Pandit	Senior Advocate	Dillibazar, Kathmandu
52	Mr. Shreedhar Sapkota	Advocate	Baneshwor, Kathmandu
53	Mr. Som Bahadur Thapa	Engineer	Madhyapur, Thimi, Bhaktapur
54	Mr. Som Nath Paudel	Engineer	Teku, Kathmandu
55	Mr. Subash Chandra Verma	Engineer	Gothatar, Bhaktapur
56	Ms. Sujan Lopchan	Senior Advocate	Kapan, Kathmandu
57	Mr. Suman Kumar Rai	Advocate	Ithari, Sunsari
58	Mr. Sunil Kumar Dhungel	Engineer	Baneshwor, Kathmandu
59	Mr. Suresh Kumar Regmi	Engineer	Maligaun, Kathmandu
60	Mr. Surya Nath Upadhyay	Advocate, Former CIAA Chief	Ghattekulo, Kathmandu
61	Mr. Surya Raj Kadel	Engineer/ Advocate	Palungtar, Gorkha
62	Mr. Thaneshwar Kafle(Rajesh)	Advocate	Samakhushi, Kathmandu
63	Mr. Tul Bahadur Shrestha	Advocate	Anamnagar, Kathmandu
64	Mr. Tulasi Bhatta	Senior Advocate	Anamnagar, Kathmandu
65	Mr. Udaya Nepali Shrestha	Former VC, Law Reform Commission	Satdobato, Lalitpur
66	Mr. Varun P. Shrestha	Engineer	Baneshwor, Kathmandu

NEPCA Life Member

S.N	Name	Profession
1	Mr. Ajaya Kumar Pokharel	Engineer
2	Ms. Alpana Bhandari	Advocate
3	Mr. Amar Jibi Ghimire	Advocate
4	Mr. Amber Prasad Pant	Senior Advocate
5	Mr. Amod Kumar Adhikari	Engineer
6	Mr. Amog Ratna Tuladhar	Advocate
7	Mr. Anil Kumar Sinha	Senior Advocate
8	Mr. Anup Kumar Upadhyay	Engineer
9	Mr. Ashish Adhikari	Advocate
10	Dr. Awatar Neupane	Advocate
11	Mr. Babu Ram Dahal	Advocate
12	Mr. Babu Ram Pandey	Advocate
13	Mr. Badan Lal Nyachhyon	Engineer
14	Dr. Bal Bahadur Parajuli	Engineer
15	Mr. Bala Krishna Niraula	Engineer
16	Mr. Bala Ram K.C.	Former Justice, Supreme Court
17	Mr. Balaram Shrestha	Engineer
18	Mr. Bedh Kantha Yogal	Engineer
19	Mr. Bhagawan Shrestha	Engineer
20	Ms. Bhagwati Sharma Bhandari	Advocate
21	Mr. Bharat Bahadur Karki	Senior Advocate
22	Mr. Bharat Kumar Lakai	Advocate
23	Mr. Bharat Lal Shrestha	Engineer
24	Mr. Bharat Mandal	Engineer
25	Mr. Bharat Prasad Adhikari	Advocate
26	Mr. Bhava Nath Dahal	Auditor
27	Mr. Bhesh Raj Neupane	Advocate

S.N	Name	Profession
28	Mr. Bhim Pd. Upadhyaya	Engineer
29	Mr. Bhoj Raj Regmi	Engineer
30	Mr. Bhola Chatkuli	Engineer
31	Mr. Bhoop Dhoj Adhikari	Former Chief Judge, High Court
32	Mr. Bhupendra Chandra Bhatta	Engineer
33	Mr. Bhupendra Gauchan	Engineer
34	Mr. Bikash Man Singh Dangol	Engineer
35	Mr. Bimal Prasad Dhungel	Advocate
36	Mr. Bimal Subedi	Advocate
37	Mr. Bindeshwar Yadav	Engineer
38	Mr. Binod Shrestha	Engineer/Advocate
39	Mr. Bipulendra Chakravartty	Senior Advocate
40	Mr. Birendra Bahadur Deoja	Engineer
41	Mr. Birendra Mahaset	Engineer
42	Mr. Bishnu Om Baade	Engineer
43	Dr. Bishwadeep Adhikari	Senior Advocate
44	Mr. Bodhari Raj Pandey	Former Justice, Supreme Court
45	Mr. Bolaram Pandey	Advocate
46	Mr. Buddha Kaji Shrestha	Insurance Professional
47	Mr. Chabbi Lal Ghimire	Advocate
48	Mr. Chandeshwor Shrestha	Senior Advocate
49	Mr. Chandra Bahadur KC	Engineer
50	Mr. Daya Kant Jha	Engineer
51	Mr. Deo Narayan Yadav	Engineer
52	Mr. Deukaji Gurung	Engineer
53	Mr. Devendra Karki	Engineer
54	Mr. Dhanaraj Gnyawali	Formal Secretary

S.N	Name	Profession
55	Mr. Dhruba Prasad Paudyal	Engineer
56	Mr. Dhruva Raj Bhattarai	Engineer
57	Mr. Dhundi Raj Dahal	Engineer
58	Mr. Digamber Jha	Engineer
59	Mr. Dilip Bahadur Karki	Engineer
60	Mr. Dilli Raman Dahal	Advocate
61	Mr. Dilli Raman Niraula	Engineer
62	Mr. Dinesh Kumar Karky	Advocate
63	Mr. Dinesh Raj Manandhar	Engineer
64	Mr. Dinker Sharma	Engineer
65	Mr. Dipak Nath Chalise	Engineer
66	Mr. Dipendra Shrestha	Engineer
67	Mr. Durga Prasad Osti	Engineer
68	Mr. Dwarika Nath Dhungel	Social Sciences Researcher
69	Mr. Fanendra Raj Joshi	Engineer
70	Mr. Gajendra Kumar Thakur	Engineer
71	Dr. Prof. Gandhi Pandit	Senior Advocate
72	Ms. Gauri Dhakal	Former Justice, Supreme Court
73	Mr. Gaya Prasad Ulak	Engineer /Consultant
74	Mr. Ghan Shyam Gautam	Engineer
75	Mr. Girish Chand	Engineer
76	Mr. Gokarna Khanal	Engineer
77	Dr. Gokul Prasad Burlakoti	Advocate
78	Dr. Gopal Siwakoti	Law Practice
79	Mr. Govinda Kumar Shrestha	Former Judge, High Court
80	Mr. Govinda Prasad Parajuli	Former Chief Judge, High Court
81	Mr. Govinda Raj Kharel	Advocate
82	Mr. Gunanidhi Nyaupane	Senior Advocate

S.N	Name	Profession
83	Mr. Gyanendra Prasad Kayastha	Engineer
84	Mr. Hari Bahadur Basnet	Former Judge, High Court
85	Mr. Hari Bhakta Shrestha	Engineer
86	Mr. Hari Kumar Silwal	CA / Lawyer
87	Mr. Hari Narayan Yadav	Enginer
88	Mr. Hari Prasad Dhakal	Engineer
89	Mr. Hari Prasad Sharma	Engineer
90	Mr. Hari Ram Koirala	Engineer
91	Mr. Hari Ram Koirala (2)	Former Chief Judge
92	Mr. Hari Ram Shrestha	Engineer
93	Mr. Harihar Dahal	Senior Advocate
94	Mr. Hariom Prasad Shrivastav	Engineer
95	Mr. Hum Nath Koirala	Construction Entrepreneur
96	Mr. I.P. Pradhan	Engineer
97	Mr. Indra Lal Pradhan	Engineer
98	Mr. Indu Sharma Dhakal	Engineer
99	Mr. Ishwar Bhatta	Engineer
100	Mr. Ishwar Prasad Tiwari	Engineer
101	Mr. Ishwori Prasad Paudyal	Engineer
102	Mr. Jagadish Dahal	Advocate
103	Mr. Janak Lal Kalakheti	CA
104	Mr. Jaya Mangal Prasad	Advocate
105	Mr. Jayandra Shrestha	Adviser/Finance
106	Mr. Jayaram Shrestha	Advocate
107	Mr. Jivendra Jha	Engineer
108	Mr. Kamal Kumar Shrestha	Joint Secretary, PMO
109	Mr. Kamal Raj Pande	Engineer
110	Mr. Kameshwar Yadav	Engineer

S.N	Name	Profession
111	Mr. Kedar Man Shrestha	Engineer
112	Mr. Kedar Nath Acharya	Former Justice, Supreme Court
113	Mr. Kedar Prasad Koirala	Advocate
114	Mr. Keshari Raj Pandit	Former judge, High Court
115	Mr. Keshav Bahadur Thapa	Engineer
116	Mr. Keshav Prasad Mainali	Advocate
117	Mr. Keshav Prasad Ghimire	Engineer
118	Mr. Keshav Prasad Pokharel	Engineer
119	Mr. Keshav Prasad Pulami	Engineer
120	Prof. Khem Dallakoti	Engineer
121	Mr. Khem Prasad Dahal	Accountant
122	Mr. Kishor Babu Aryal	Engineer
123	Mr. Komal Natha Atreya	Engineer
124	Mr. Krishna Prasad Nepal	Engineer
125	Mr. Krishna Sharan Chakhun	Engineer,
126	Mr. Kul Ratna Bhurtyal	Former Chief Justice
127	Dr. Kumar Sharma Acharya	Senior Advocate
128	Mr. Lal Krishna K.C.	Engineer
129	Mr. Lava Raj Bhattarai	Engineer
130	Mr. Laxman Krishna Malla	Engineer,
131	Mr. Laxman Prasad Mainali	Advocate
132	Mr. Lekh Man Singh Bhandhari	Engineer
133	Mr. Lok Bahadur Karki	Advocate
134	Mr. Madan Gopal Maleku	Engineer
135	Mr. Madan Shankar Shrestha	Engineer
136	Mr. Madan Timsina	Engineer
137	Mr. Madhab Prasad Paudel	Rt. Civil Servent/Lawyer
138	Mr. Madhav Belbase	Engineer
139	Mr. Madhav Das Shrestha	Advocate
140	Mr. Madhav Prasad Khakurel	Engineer
141	Mr. Madhusudan Pratap Malla	Engineer
142	Mr. Mahendra Bahadur Gurung	Engineer
143	Mr. Mahendra Kumar Yadav	Engineer
144	Mr. Mahendra Narayan Yadav	Engineer
145	Mr. Mahendra Nath Sharma	Engineer
146	Mr. Mahesh Bahadur Pradhan	Engineer
147	Mr. Mahesh Kumar Agrawal	Entreoreneur
148	Mr. Mahesh Kumar Thapa	Senior Advocate
149	Mr. Manoj Kumar Sharma	Engineer
150	Mr. Manoj Kumar Yadav	Engineer/Advocate
151	Mr. Matrika Prasad Niraula	Senior Advocate
152	Mr. Meen Raj Gyawali	Engineer
153	Mr. Min Bahadur Rayamajhee	Former Chief Justice, Supreme Court
154	Mr. Mitra Baral	Civil Service
155	Mr. Mohan Man Gurung	Engineer/Advocate
156	Mr. Mohan Raj Panta	Engineer
157	Mr. Mukesh Raj Kafle	Engineer
158	Mr. Mukunda Sharma Paudel	Senior Advocate
159	Mr. Murali Prasad Sharma	Advocate
160	Mr. Nagendra Nath Gnawali	Engineer
161	Mr. Nagendra Raj Sitoula	Consultant
162	Mr. Narayan Datt Sharma	Advocate/Engineer
163	Mr. Narayan Prasad Koirala	Engineer/Advocate
164	Mr. Narendra Bahadur Chand	Engineer
165	Mr. Narendra Kumar Baral	Engineer
166	Mr. Narendra Kumar K.C	Advocate

S.N	Name	Profession
167	Mr. Narendra Kumar Shrestha	Former DAG, Advocate
168	Mr. Naveen Mangal Joshi	Engineer
169	Mr. Niranjan Prasad Chalise	Engineer
170	Mr. Niranjan Prasad Poudel	Engineer
171	Mr. Om Naraya Sharma	Engineer
172	Mr. Panch Dev Prasad Gupta	Advocate
173	Mr. Pawan Karki	Engineer
174	Mr. Poorna Das Shrestha	Engineer
175	Mr. Prabhu Krishna Koirala	Advocate
176	Mr. Prajesh Bikram Thapa	Engineer
177	Mr. Prakash Jung Shah	Engineer
178	Mr. Prakash Poudel	Engineer
179	Mr. Pramod Krishna Adhikari	Engineer
180	Ms. Prativa Neupane	Advocate
181	Mr. Prithivi Raj Poudel	Engineer
182	Prof. Purna Man Shakya	Senior Advocate
183	Mr. Purnendu Narayan Singh	Engineer
184	Mr. Purusottam Kumar Shahi	Engineer
185	Mr. Puspa Raj Pandey	Advocate
186	Mr. Radheshyam Adhikari	Senior Advocate
187	Mr. Raghab Lal Vaidya	Senior Advocate
188	Mr. Rajan Adhikari	Advocate
189	Mr. Rajan Raj Pandey	Engineer
190	Mr. Rajendra Kishore Kshatri	Advocate
191	Mr. Rajendra Kumar Bhandhari	Former Justice, Supreme Court
192	Mr. Rajendra Niraula	Engineer
193	Mr. Rajendra Paudel	Engineer
194	Dr. Rajendra Prasad Adhikari	Project Mgmt, Advocate

S.N	Name	Profession
195	Mr. Rajendra Prasad Kayastha	Engineer
196	Mr. Rajendra Prasad Yadav	Engineer
197	Mr. Raju Man Singh Malla	Advocate
198	Mr. Ram Krishna Sapkota	Engineer
199	Mr. Ram Krishna Sapkota	Engineer
200	Mr. Ram Kumar Lamsal	Engineer
201	Mr. Ram Prasad Acharya	Advocate
202	Mr. Ram Prasad Gautam	Advocate
203	Mr. Ram Prasad Shrestha	Senior Advocate
204	Mr. Ram Prasad Silwal	Engineer
205	Mr. Ram Shanker Khadka	Advocate
206	Mr. Ramesh Kumar Ghimrie	Advocate
207	Mr. Ramesh Prasad Rijal	Engineer
208	Mr. Ramesh Raj Satyal	Auditor
209	Mr. Rameshwar Lamichhane	Engineer
210	Mr. Rameshwar Prasad Kalwar	Engineer/Advocate
211	Mr. Ravi Sharma Aryal	Former Justice, Supreme Court
212	Mr. Resham Raj Regmi	Advocate
213	Mr. Rishi Kesh Sharma	Engineer
214	Dr. Rishi Kesh Wagle	Dean KU, Law
215	Mr. Rishi Ram Sharma Neupane	Engineer (Water Mgmt)
216	Mr. Rishiram Koirala	Engineer
217	Mr. Roshan Soti	Engineer
218	Dr. Rudra Prasad Sitaula	Advocate
219	Mr. Rupak Rajbhandari	Engineer
220	Mr. Sahadev Prasad Bastola	Former Judge, District Court
221	Mr. Sajan Ram Bhandary	Advocate
222	Mr. Sanjeev Koirala	Engineer

S.N	Name	Profession
223	Mr. Santosh Kumar Pokharel	Engineer
224	Ms. Sarala Moktan	Advocate
225	Mr. Sarb Dev Prasad	Engineer
226	Mr. Saroj Chandra Pandit	Engineer
227	Mr. Satya Narayan Shah	Engineer
228	Mr. Shailendra Kumar Dahal	Senior Advocate
229	Mr. Shaligram Parajuli	Engineer/Advocate
230	Mr. Shambhu Thapa	Senior Advocate
231	Mr. Shankar Prasad Pandey	Formal Secreatary
232	Mr. Shant Raj Sharma	Financial Analyst
233	Mr. Sharada Prasad Sharma	Engineer
234	Ms. Sharda Shrestha	Former Justice, Supreme Court
235	Mr. Sher Bahadur Karki	Advocate
236	Mr. Shishir Koirala	Engineer
237	Mr. Shital Babu Regmee	Engineer
238	Mr. Shiva Hari Sapkota	Engineer
239	Mr. Shiva Kumar Basnet	Engineer
240	Mr. Shiva Prasad Sharma Paudel	Engineer
241	Mr. Shiva Prasad Uprety	Engineer
242	Mr. Shiva Raj Adhikari	Formal Judge, High Court
243	Mr. Shiva Ram K.C	Engineer
244	Mr. Shree Prasad Agrahari	Engineer
245	Mr. Shree Prasad Pandit	Senior Advocate
246	Mr. Shreedhar Sapkota	Advocate
247	Mr. Shyam Bahadur Karki	Engineer
248	Mr. Shyam Bahadur Pradhan	Former Justice, Supreme Court
249	Mr. Shyam Prasad Kharel	Engineer
250	Mr. Shyam Shrestha	Advocate

S.N	Name	Profession
251	Mr. Siddha Prasad Lamichanne	Advocate
252	Mr. Som Bahadur Thapa	Engineer
253	Mr. Som Nath Poudel	Engineer
254	Mr. Subash Kumar Mishra	Engineer
255	Mr. Subhash Chandra Verrma	Engineer
256	Ms. Sujan Lopchan	Senior Advocate
257	Mr. Suman Kumar Rai	Advocate
258	Mr. Suman Prasad Sharma	Engineer
259	Mr. Suman Rayamajhi	Chartered Accountant
260	Mr. Sunil Bahadur Malla	Engineer
261	Mr. Sunil Ghaju	Engineer
262	Mr. Sunil Kumar Dhungel	Electrical Engineer
263	Mr. Sunil Man Shakya	Advocate
264	Mr. Suresh Chitrakar	Engineer
265	Mr. Suresh Kumar Regmi	Engineer
266	Mr. Suresh Kumar Sharma	Engineer
267	Mr. Suresh Man Shrestha	Advocate
268	Mr. Surya Dev Thapa	Engineer
269	Mr. Surya Nath Upadhyay	Former CIAA Chief/Advocate
270	Mr. Surya Prasad Koirala	Senior Advocate
271	Mr. Surya Raj Kadel	Engineer/Advocate
272	Mr. Sushil Bhatta	Engineer
273	Mr. Suvod Kumar Karna	Chartered Accountant
274	Mr. Tanuk Lal Yadav	Engineer
275	Mr. Tara Bahadur Sitaula	Senior Advocate
276	Mr. Tara Dev Joshi	Advocate
277	Mr. Tara Man Gurung	Engineer
278	Mr. Tara Nath Sapkota	Engineer

S.N	Name	Profession
279	Mr. Tej Raj Bhatta	Advocate
280	Mr. Tek Nath Achraya	Chartered Accountant
281	Mr. Thaneshwar Kafle (Rajesh)	Advocate
282	Mr. Tilak Prasad Rijal	Advocate
283	Mr. Trilochan Gauchan	Senior Advocate
284	Mr. Tul Bahadur Shrestha	Advocate
285	Mr. Tulasi Bhatta	Senior Advocate
286	Mr. Udaya Nepali Shrestha	Former VC, Law Reform Commission
287	Mr. Uddhav Prasad Kadariya	Tax Counselor
288	Mr. Uma Kanta Jha	Engineer
289	Mr. Umesh Jha	Engineer
290	Mr. Upendra Dev Bhatta	Engineer

S.N	Name	Profession
291	Mr. Upendra Rja Upreti	Advocate/Engineer
292	Mr. Varun Prasad Shrestha	Engineer
293	Mr. Vinod Prasad Dhungel	Former Judge
294	Mr. Vishnu Bahadur Singh	Engineer
295	Mr. Vishwa Nath Khanal	Engineer
296	Mr. Yadav Adhikari	Nepal Police
297	Mr. Yagya Deo Bhatt	Engineer
298	Mr. Yajna Man Tamrakar	Engineer
299	Mr. Yaksha Dhoj Karki	Construction Entrepreneur
300	Mr. Yoganand Yadav	Engineer
301	Mr. Yubaraj Snagroula	Senior Advocate

NEPCA Ordinary Member

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

S.N.	Name	Profession
26	Mr. Prabhu Krishna Koirala	Advocate
27	Mr. Prajwal Shrestha	Engineer
28	Mr. Pramesh Tripathi	Engineer
29	Mr. Puskar Pokhrel	Advocate
30	Dr. Rabindra Nath Shrestha	Engineer
31	Mr. Rabindra Shah	Engineer
32	Mr. Raj Narayan Yadav	Engineer
33	Mr. Rajeev Pradhan	Engineer
34	Dr. Ram Chandra Bhattarai	Lecturer, T.U
35	Mr. Sadhu Ram Sapkota	Advocate
36	Mr. Santosh K.Pokharel	Engineer
37	Ms. Saraswati Shah	Advocate
38	Mr. Satyendra Sakya	Engineer
39	Mr. Semanta Dahal	Advocate
40	Mr. Shailendra Upareti	Advocate
41	Mr. Shankar Prasad Agrawal	Advocate
42	Mr. Shankar Prasad Yadav	Engineer
43	Mr. Sita Prasad Pokharel	Advocate
44	Mr. Sital Kumar Karki	Advocate
45	Mr. Suraj Regmi	Engineer
46	Mr. Tarun Ranjan Datta	Engineer/Lawyer
47	Mr. Temba Lama Sherpa	Engineer
48	Mr. Tilak Prasad Rijal	Advocate
49	Mr. Tribhuvan Dev Bhatta	Advocate

Table 1. Indicative Status of Adjudication Cases in the Year 2079/80

SN	R.Date	Case Name	Contract Amount	Project	Admin.Cost	Award Date	Claim Amount	Award Amount	Award Decision	Rules Follwed
1	10/2/2077	Aashish/Adventure/Budiganga JV and DUDBC	53078886.82	Construction of PHC Building	195102.00	2/7/2080	13619106.80	13619106.80	Claim Accepted	NEPCA rules
2	3/24/2078	Lohani - Devchuli JV vs IDO syangja	67140187.38	Construction and Upgrading of Rogdi Rampur Road	212500.00	1/31/2080	19001966.60	5828863.27	Claim Accepted	NEPCA rules
3	10/25/2077	Bishal & Birat construction vs DRO	10888720.08	Periodic Maintenance Work on Mulpani Gorkha Road	400000.00	7/18/2079	624722.06	408945.98	Claim Accepted	NEPCA rules
4	3/30/2079	SEW- Tundi JV vs Sanjen Jalavidhyut Company Ltd.	1529478115.85	SHEP-Lot-2 Civil Works	302500.00	9/21/2079	54194642.00	0.00	Claim Rejected	NEPCA rules
5	9/10/2077	CM - Bishal & Birat J.V VS DRO	57655154.62	Improvement of Gorkha Pakhathok Road	194500.00	5/5/2079	13032827.53	9371837.40	Claim Accepted	NEPCA rules
6	4/8/2078	MK- Pradip - Dragon Jv vs DRO	67755071.46	Construction of Toll Collection Plaza	275750.00	3/24/2080	23260018.70	0.00	Claim Rejected	NEPCA rules
	4/25/2077	United/Nepal Adarsha/Mrit Sanjivani JV vs KVRIP	160322556.97	Improvement of Lainchaur-Maharajgunj-Budanilkantha road	306162.67	5/9/2079	59794415.50	18083106.87	Claim Accepted	NEPCA rules
		Administrative Cost Received from 3 DB Cases			420000.00					
			1946318693.18		**2306514.67**		**183527699.19**	**47311860.32**		
							9.43%	**25.78%**		

Table 2. Indicative Status of Arbitration Cases in the Year 2079/80

S.N.	R. Date	Case Name	Project	Arbitrators Status	Date of Decision	Administrion Cost	File to District Court	Appeal	Contract Amount	Claim	Award Amount	Award Decision	Appeal Decision	Rules Followed
1	2077/12/6	Lama Nagarjun Trishuli JV Vs Department of Roads	Construction/Improvement of Halesi Diktal Road	E,E,L	2079/10/6	283788.50	2079/11/29	Appealed	154805978	30287084	22373024	Claim Accepted	No info	NEPCA
2	2077/12/25	The Waves Group Trading Pvt. Ltd Vs. National Reconstruction Authority	Supply and Delivery of Tablets with Power Bank	E,L,L	2079/5/13	333352.00	2079/7/12	No Record	22995500	38337774	29894150	Claim Accepted	No info	AAct
3	2078/4/32	Shah Consult Vs. Patel Engineering Limited, India	Budhi Gandaki KA and KHA HE Project	E	2079/10/17	420000.00	2079/12/10	Appealed	110559589	83019394	29821421	Claim Accepted	No info	NEPCA
4	2078/10/3	Chakreshwori Samanantar JV Vs. Singh Durbar Secretariat Reconstruction Committee	Construction of Building for National Vigilance Centre at Singhadurbar	E,L,L	2079/10/25	280800.00	2079/12/17	Appealed	130696755	25613211	19171186	Claim Accepted	No info	NEPCA
5	2079/1/4	Guangzhou – Lama – Raman J/V Vs Bagmati Improvement Project	Design and Build of Dhap Dam	E,L,L	2079/9/20	460000.00	2079/11/29	Appealed	510752348	87839434	77734013	Claim Accepted	No info	UNCITRAL
6	2077/12/31	TUNDI -SHEC J/V Vs. DUBDC	Construction of Federal Parliament Building	E,E,L	2079/6/13	633625.00	2079/8/12	No Record	5672761585	508296452	49962	Claim Rejected	No info	UNCITRAL
7	2077/8/3	Lama Construction Vs Department of Roads (01)	Upgrading of Dhading Gorka Road	E,L,L	2079/6/4	323200.00	2079/8/12	Appealed	330182352	42785310	23062292	Claim Accepted	No info	NEPCA
8	2079/1/16	Lama Constrcution Vs Nepal Red Cross	Construction of NRCS Central Blood Transfusion Service Building	E,E,E	2079/12/6	410000.00	2080/2/5	Appealed	192454756	86907590	33853185	Claim Accepted	No info	UNCITRAL
9	2078/9/25	Sharma BKOI JV vs DOLI	Construction of Seti (Jhanana) River Bridge at Chainpur-Dipayal Road	E,L,L	2079/5/26	392177.00	2079/7/12	Appealed	102509009	56088716	29018156	Claim Accepted	No info	NEPCA
10	2079/5/26	APAR Industries limited vs NEA	Supply of ACSR Moose Conductor	E,L,L	2080/3/8	580000.00	2080/5/10	No Record	1558367665	153368383	0	Claim Rejected	No info	UNCITRAL
11	2079/2/30	Pappu Mahabir JV Vs DoLI	Construction of Bagmati River Bridge	E	2080/3/12	222500.00	2080/5/10	No Record	95191247	14181374	407370	Claim Accepted	No info	NEPCA
12	2079/8/11	ZCGIEC Ashish VS BICC, Butwal	Construction of International Convention Center	E,E,I	2080/2/29	408462.00	2080/5/10	No Record	933498199	63622973	63622973	Claim Accepted	No info	UNCITRAL
13	2075/1/7	District Coordination Committe Kanchanpur Vs. KS Mitra Nirman Sewa	Construction of Sotial Khola Bridge	L	2079/12/29	237500.00	2080/2/5	No Record	11532655	16439840	5806347	Claim Accepted	No info	NEPCA
14	2079/2/24	Industrial District Management Ltd Vs Biruwa/Simran JV	Upgrading of Road and Drain	E	2079/7/23	85000.00	2079/10/5	No Record	21496602	2441269	1012578	Claim Accepted	No info	NEPCA
15	2077/10/7	Tulasi Bhakta PR Sammridhi JV Vs. EPS Korea	Construction of Vocational and Skill Development Training Center	E,E,L	2079/9/26	134740.50	2079/12/17	No Record	60490361	24196144	0	Amicable Settlement	No info	NEPCA
16	2077/5/7	Ashish Prithivi JV Vs IDO Mugu	Construction of Karnali River Motorable Bridge	L,L,L	2079/10/20	440000.00	2079/12/17	No Record	95404160	61961766	17250810	Claim Accepted	No info	NEPCA
17	2079/1/19	Prakritik- Shiv J/V Vs. WRIDD	Construction of Headworks, Canal and Canal Structures	E,E,E	2079/10/5	155000.00	2079/12/17	No Record	79761715	6879070	1523590	Claim Accepted	No info	NEPCA
18	2078/6/14	NITDB Vs ZIEC-Pappu	Extension of Storage Shed	E,E,L	2080/2/14	400000.00	2080/5/5	Appealed	1505117355	49585228	23281910	Claim Accepted	No info	NEPCA
19	2078/4/3	PEN Education Network Vs. Ideal Model School	Lease Agreement	L	2080/2/16	300000.00	2080/5/5	No Record	72000000	16700000	16165000	Claim Accepted	No info	AAct
20	2076/10/5	Sikta Irrigation Project Vs. Coastal Pappu Jv	Construction of Main and Link Canals and rehabilitation of Head Works	E,E,E	2080/2/18	796250.00	2080/5/5	Appealed	988118238	333958223	165046058	Claim Accepted	No info	NEPCA
21	12/9/2079	Structro Nepal P Ltd. Vs. Khanikhola Hydropower Co. Ltd	Tungun-Thosne Hydropower Project	L,L,L	2079/10/13	185000.00	2079/12/29	No Record	1331140122	8651396	0	Amicable Settlement	No info	AAct
22	2077/12/6	Century Commercial Bank Vs. M & M Remit	Remittance Agreement	E,L,L	2079/10/12	436300.00	2079/12/29	Appealed	N/A(RA)	78150840	63863118	Claim Accepted	No info	AAct
23	2079/4/9	CM / Shivalaya JV Vs Tansen Municipality,	Flag Stone Pavement Work	L,L,E	2080/2/10	165000.00	2080/5/16	No Record	18319455	7171841	5756034	Claim Accepted	No info	NEPCA

24	2077/7/21	Microtech M & E-Cosmic Electrical JV Vs. Construction San Jose S.A.	Air Transport Capacity Enhancement	L	2080/1/19	605000.00	2080/4/26	Appealed	284642998	296248101	182132183	Claim Accepted	No info	AAct
25	2079/4/17	Santoshi Nirman Sewa Vs IDO Tanahu	Construction of Krishna Marga (Sabung Deurali Keladighaat Road)	E,L,L	2079/12/9	428800.00	2080/2/16	No Record	107601955	74404282	37634882	Claim Accepted	No info	NEPCA
26	2079/5/16	ZCGIEC-Ashish - Prera JV Vs DOLI (RCIP)	Upgrading and Performance Based Maintaince of Roads	E	2080/1/4	417040.00	2080/3/23	No Record	768125885	49719108	44665886	Claim Accepted	No info	NEPCA
27	2077/9/2	ZCGIEC-Ashish JV Vs Department of Roads	Construction of Steel Truss Bridge	E,L,L	2079/8/23	454284.00	2079/10/24	Appealed	209086371	35025840	6833417	Claim Accepted	No info	NEPCA
28	2079/4/4	Biruwa - Simran JV Vs DUDBC, Pokhara	Foothpath Renovation and Drain, Street Lamp ect. Construction Works	L	2079/12/22	280000.00	2080/3/23	No Record	72003303	21465425	0	Claim Rejected	No info	NEPCA
29	2078/5/17	Mount Kailash Energy Company Ltd. Vs. NEA	Power Purchase Agreement	E,L,L	2079/11/18	663688.00	2080/2/5	Appealed	N/A (PPA)	359714077	63548715	Claim Accepted	No info	NEPCA
30	2078/12/23	Lama Pragati-Kunwar JV Vs DOR	Roadway Excavation, Retaining Structures and Cross Drainage works	L	2079/11/12	225000.00	2080/2/5	No Record	7546318	4734975	72118	Claim Rejected	No info	NEPCA
31	2078/12/9	Kalika-Kumar JV Vs Rani Jamara Kulariya Irrigation Project, Tikapur	Construction of new branch canal and canal structures of Lamki Extension	E,L,L	2079/12/12	570000.00	2080/2/23	Appealed	1717915454	188945479	49441436	Claim Accepted	No info	UNCITRAL
32	2079/5/21	Paramount Construction vs Clean City	Complete Fabrication, Supply, Erection and Construction of Physical structure.	E,L,L	2080/2/12	260647.00	2080/4/24	No Record	17150920	13320822	489440	Claim Accepted	No info	NEPCA
33	2078/10/20	Swachchhanda - Khani JV vs CAAN	Construction of Two Bay in Southside of International Airport	E,E,L	2079/6/13	326510.00	2079/8/6	Appealed	253271163	160616192	0	Claim Rejected	No info	AAct
34	2078/11/2	Tundi - Lama - Samanantar Vs CAAN	Construction of Remote Airport Parking at TIA	E,E,L	2079/5/28	318240.00	2080/8/6	Appealed	343469973	150403483	0	Claim Rejected	No info	AAct
						12631904.00			**17778969986**	**3151081099**	**1013531253**			
										17.72%	**32.16%**			

श्री
उच्च अदालत, पाटन
संयुक्त इजलास
इजलास नं. :-३
माननीय न्यायाधीश श्री महेश शर्मा पौडेल
माननीय न्यायाधीश श्री धीर बहादुर चन्द
फैसला
द.नं. ०७-०७७-०६३६९
मुद्दा नं. ०७७-FJ-०१५९
मुद्दाः- मध्यस्थको निर्णय बदर।
निर्णय नं. :- ५३९

कम्पनी रजिष्ट्रार कार्यालय काठमाडौंमा प्रा.लि.द.नं. १४०४२२।०७२/०७३ को दर्ताले ललितपुर जिल्ला ललितपुर उपमहानगरपालिका वडा नं. १७ को हाल ललितपुर महानगरपालिका वडा नं. १० चाकुपाट रजिष्टर्ड कार्यालय रहेको कामख्या डिजिटल केबल नेटवर्क प्रा.लि. को तर्फबाट अख्तियार प्राप्त ऐ. कम्पनीका संचालक सरोज कार्की ----------१ **निवेदक**

विरुद्ध

कम्पनी रजिष्ट्रार कार्यालय काठमाडौंमा प्रा.लि.द.नं. १०८५०४।०६९/०७० को दर्ताले ललितपुर जिल्ला ललितपुर महानगरपालिका वडा नं. २२ चाकुपाट रजिष्टर्ड कार्यालय भै ललितपुर जिल्ला ललितपुर महानगरपालिक वडा नं. २ सानेपाल स्थित वडा कार्यालय नजिकै रहेको सिम्पल मिडिया नेटवर्क प्रा.लि. ----------१ **प्रत्यर्थी**

द.नं. ०७-०७७-०६२७८
मुद्दा नं. ०७७-FJ-०१५६
निर्णय नं. :- ५४०

कम्पनी रजिष्ट्रार कार्यालय काठमाडौंको प्रा.लि.द.नं. १०८५०४।०६९/०७० को दर्ताले ललितपुर जिल्ला ललितपुर महानगरपालिका वडा नं. २ सानेपास्थित रजिष्टर्ड कार्यालय रहेको (साविक ललितपुर उपमहानगरपालिका वडा नं. २२ चाकुपाट) सिम्पल मिडिया नेटवर्क प्रा.लि. को तर्फबाट अख्तियारप्राप्त व्यक्ति ऐ. का कर्मचारी बाग्लुङ जिल्ला गल्कोट नगरपालिका वडा नं. ९ (साविक गोठाटार गा.वि.स. वडा नं. ८) बस्ने तेजबहादुर के.सी. को नाति टिका बहादुर के.सी. को छोरा महेन्द्र बहादुर के.सी. ----१ **निवेदक**

विरूद्ध

कम्पनी रजिष्ट्रार कार्यालय काठमाडौंको प्रा.लि.द.नं. १४०४२२।०७२/०७३ को दर्ताले ललितपुर जिल्ला ललितपुर उपमहानगरपालिका वडा नं. १० हाल ललितपुर महानगरपालिका वडा नं. १० चाकुपाट रजिष्टार्ड कार्यालय रहेको कामख्या डिजिटल केबल नेटवर्क प्रा.लि. ----------१

प्रत्यर्थी

निर्णय गर्ने मध्यस्थहरू:-

मुख्य मध्यस्थ	:	श्री पूर्णमान शाक्य
मध्यस्थ	:	श्री बाबुराम दाहाल
मध्यस्थ	:	श्री समिर शर्मा
निर्णय मिति	:	२०७७।१२।०२

न्याय प्रशासन ऐन, २०७३ को दफा ८(३) तथा मध्यस्थता ऐन, २०५५ को दफा ३० बमोजिम यसै अदालतको क्षेत्राधिकारभित्र पर्ने भै दायर हुन आएको प्रस्तुत मुद्दाको सङ्क्षिप्त तथ्य एवम् ठहर यसप्रकार छ :

तथ्य खण्ड

१. विपक्षी कम्पनीको रिचार्ज कार्ड सम्झौता बमोजिम खरिद गर्न नसकेमा ३ महिनाको अग्रिम सूचना दिई सम्झौता भंग गर्न सक्ने प्रावधान रहेपनि विपक्षीले मिति २०७३।०५।१५ मा बिना सूचना सम्झौता भंगको पत्र प्रेषित गरेको र सो विषयको जानकारी मागदा विपक्षी कम्पनीका अध्यक्षले क्षमा याचना सहित दुवै कम्पनी बीचको सम्झौता यथावत रहेको भनी मिति २०७३।०५।२९ मा पत्र प्राप्त भएको थियो। सिम टिभीको सम्पूर्ण रिचार्ज कार्डहरू दावीकर्ताले बिक्री वितरण गर्न पाउने अवस्थामा विपक्षीले रिचार्ज उपलब्ध नगराई समाधान भै सकेको विषयलाई पुनः उठान गरी सम्झौता भंग गरेको छ। यस कम्पनीलाई भौतिक रिचार्ज कार्डमा ११.७५% र अनलाईन रिचार्जमा ११.५% कमिसन दिनुपर्ने भएकोले उक्त कमिशन रकम वापत रिचार्ज माग गर्दा सम्झौता भंग भै सकेको भनी विपक्षीले रिचार्ज पठाउन इन्कार गरेको थियो। विपक्षी सिम टिभीले करार बमोजिमको कार्य गर्नबाट रोकेको हुँदा विपक्षीको उक्त कार्य सम्झौता तथा करार ऐन, २०५६ को विपरीत छ। विपक्षी कम्पनीले सम्झौता भंग गरेको कारण फाल्गुन मसान्तसम्मको कर्मचारी, कामदार तलव सुविधा, घर भाडा लगायतको खर्च वापत रू.२९,७९,७५४।- र सो को व्याज, कूल बिक्रीको भौतिक रिचार्ज कार्डमा ११.७५% र अनलाईन रिचार्जमा ११.५% कमिसन दिनु पर्ने र अघिल्लो वर्षको अनुपातलाई आधार मानी १९ वर्षसम्म सम्झौता बमोजिम कार्य गर्दै कम्पनीलाई हुने मुनाफा ५२,१२,०८,०७४।०५ हुनेमा सोमा खर्च कट्टा गरी बाँकी हुने अनुमानित मुनाफा ४०,००,००,०००।- यस कम्पनीलाई हानी नोक्सानी वापत भराई सम्झौता बमोजिम तत्काल रिचार्ज कार्डहरू उपलब्ध गराई बिक्री वितरण गर्न पाउँ भन्ने समेत बेहोराको कामख्या डिजिटल केबल नेटवर्क प्रा.लि. को मध्यस्थ समक्ष निवेदन मागदावी।

२. सम्झौता बमोजिम रिचार्ज कार्डको प्रभावकारी बिक्री वितरण गर्न करारीय दायित्व भएको दावीकर्ताले शर्तको दफा १० नं. गम्भीर रूपमा उल्लंघन गरेको छ। रिचार्ज कार्ड नगद वा बैंक ग्यारेन्टी

मार्फत खरिद गर्न नसकेको र स्थानीय तवरमा रिचार्ज विक्री गर्न नसकेको कारण सम्झौता रद्द गरिएको हो। शालिनी पौडेलको नामबाट भएको पत्राचार अनाधिकृत, अख्तियारी नभएको, स्वास्थ र सरोकार बाझिएको व्यक्ति भएको कारण निजको पत्राचार गैरकानूनी भएको भनी विपक्षीको दावी आधारहिन छ। प्रशासनिक कुरामा विपक्षीको दायित्व नरहने हुँदा दावीकर्ताको नोक्सानी व्यहोर्नु पर्ने होइन। दावीकर्ता आफैंले सम्झौता उल्लंघन गरेको हुँदा विपक्षीले दावी गर्न मिल्दैन। विपक्षीको दावी सम्मानित सर्वोच्च अदालतको प्रतिपादित सिद्धान्त विपरीत रहेको छ। करारमा र लेखिएको शर्त बाहेक अन्य शर्तहरू थप गरी करारको व्याख्या गर्न मिल्ने होइन। करार तथा सम्झौताको परिपालना नगर्ने पक्षले क्षतिपूर्तिको दावी लिन नसक्ने र क्षतिपूर्ति भराउन मिल्दैन। विपक्षीले दावी गरेको क्षतिपूर्ति प्रमाणबाट पुष्टि हुँदैन, त्यसकारण वास्तविक पनि छैन। विपक्षी स्वयंले नै करारको उल्लंघन गरेको कारण विपक्षीलाई क्षतिपूर्ति दावी गर्ने अनुमती छैन भन्ने समेत बेहोराको सिम्पल मिडिया नेटवर्क प्रा.लि. को मध्यस्थ समक्ष प्रतिवाद जिकिर।

३. मध्यस्थबाट देहाय बमोजिम निर्णय (Award) भएको ।

क) विपक्षी सिम्पल मिडिया नेटवर्क प्रा.लि. को तर्फबाट मिति २०७३।०५।१२ गतेको निर्णय बमोजिम २०७३।०८।१५ गतेको पत्र जानकारीबाट भएको सम्झौता रद्द गर्ने कार्य सम्झौता प्रतिकूल भई वेरितपूर्ण भएको,

ख) सम्झौताको प्रकृति हेर्दा दावीकर्ताको माग अनुसार करारको यथावत परिपालनाको उपचार प्राप्त नहुने,

ग) कर्मचारी, कामदार तलव सुविधा खर्च नोक्सानी वापतको रू.२९,७९,७५४।१९ नपाउने,

घ) विगतको बिक्रीको अनुपातलाई मान्दै १९ वर्षसम्म सम्झौता बमोजिम कार्य गर्दै जाँदा दावीकर्तालाई प्राप्त हुने कमिशन वापतको कूल रकम रू.५२,१२,०८,०७४।०५ हुनेमा सोमा खर्च कट्टी गरी बाँकी हुने खुद मुनाफा रू.४०,००,००,०००।- हानी नोक्सानीको दावीका सम्बन्धमा विचार गर्दा दावीका सैद्धान्तिक आधारमा मध्यस्थ ट्राईबुनल सहमत भएपनि सोमा दावी गरिएको रकम मनासिव नभएको,

ङ) सिम्पल मिडिया नेटवर्क लिमिटेडको बिना ठोस आधार पूर्वाग्रही भई सुधारको मौका समेत नदिई करारको शर्त उल्लंघन हुने गरी करारको अन्त्य गरी कामख्या डिजिटल लिमिटेडलाई बाँकी १७ वर्ष ८ महिनाको एकाधिकार प्राप्त अधिकृत मूल बिक्रेताको अधिकारबाट बञ्चित गरेकोमा मनासिव क्षतिपूर्ति वापत प्रति वर्ष रू.३०,००,०००।- का हिसावले १७ वर्ष ८ महिनाको जम्मा रू.५,३०,००,०००।- क्षतिपूर्ति भराई पाउने,

च) यो निर्णय दिएको मितिदेखि ऐनले तोकेको कार्यान्वयन गर्नु पर्ने समयावधिसम्मको हकमा कुनै व्याज नलाग्ने तर सो अवधि पछि अवार्ड रकमको भुक्तानी नहुन्जेलसम्मका लागि १०% का दरले व्याज भराई लिन पाउने।

४. यस कम्पनी र विपक्षी सिम्पल मिडिया नेटवर्क प्रा.लि. बीचमा डिजिटल केबल टेलिभिजन प्रिपेड रिचार्ज कार्ड, इन्टरनेट अनलाइन भुक्तानीको लागि Exclusive Distributionship, Master Distributorship दिनका लागि आपसमा सम्झौता पत्र भएको थियो। सम्झौता बमोजिमका शर्तहरूको उल्लंघन भै भंग हुने अवस्था कहिल्यै सृजना भएको थिएन। सम्झौता बमोजिम यस कम्पनीले आफ्नो तर्फबाट गर्नुपर्ने लगानी गरी कार्यालयलाई घरभाडा, जनशक्ति र सो को प्रयोजनका लागि

सिम्पल मिडिया प्रा.लि. विरूद्ध कामख्या डिजिटल केवल नेटवर्क प्रा.लि., मुद्दा : मध्यस्थको निर्णय बदर, ०७७-FJ-०१५९, ०७७-FJ-०१५६, नि.नं. ५३९ र ५४० को फैसला, पाना **१५** मध्येको पृष्ठ **३**

आवश्यक सम्पूर्ण व्यवस्था गरी आएकोमा विपक्षी कम्पनीमा तत्कालीन अध्यक्ष र कम्पनी संचालकका बीचमा भएको आपसी द्वन्द्वको कारण निवेदक प्रा.लि.लाई एक गैर संचालक प्रतिनिधिबाट गलत तथा बनावटी झुठ्ठा आरोप लगाई सो आधारमा करार सम्झौता भंग गर्ने पत्र पठाइएको छ। यस कम्पनीले विपक्षी कम्पनीसँग सम्पन्न सम्झौता विपरीतका कुनै पनि कार्य गरेको छैन। यस कम्पनीको कार्यले सम्झौता पत्रको शर्त भंग भएको भन्ने व्यहोरालाई विपक्षीले स्थापित गर्न सक्नु भएको छैन। १९ वर्षसम्म सम्झौताको शर्तहरूको अधिनमा रही कार्य गर्नको लागि सम्झौता भएको हुँदा कम्पनीका संचालकहरूबाट विपक्षी कम्पनीको प्रयोजनका लागि रू.४,५०,००,०००।- (चार करोड पचास लाख रूपैयाँ) बुझाई कार्यारम्भ गरेको तथ्यलाई विपक्षीले अन्यथा भन्न सकेको छैन। निवेदक पक्षबाट सम्झौता पत्रको अधिनमा रही भएको लगानीलाई बेइमानीका नियतबाट भंग गरी चरम आर्थिक क्षति पुऱ्याएको अवस्था छ। क्षतिपूर्तिको निर्धारण क्रममा अनिवार्य रूपमा हेरिनु पर्ने लगानी, खुद नाफा नोक्सान, अन्य खर्चहरू र विश्वासघात जस्ता विषयहरूलाई आधारमानी तत् विषयहरूको सम्बन्धमा कुनै पनि तवरबाट विवेचना गर्न नसकी सुरू मध्यस्थ ट्राईबुनलबाट मिति २०७७।१२।०२ मा निर्णय त्रुटिपूर्ण हुँदा बदर गरी सुरू दावी तथा प्रस्तुत निवेदन माग बमोजिम गरी पाउँ भन्ने समेत बेहोराको कामाख्या डिजिटल केबल नेटवर्क प्रा.लि. को यस अदालतमा पर्न आएको निवेदन मागदावी।

५. निवेदक सिम्पल मिडिया नेटवर्क प्रा.लि. र विपक्षी कामख्या डिजिटल केबल नेटवर्क प्रा.लि. का बीच मिति २०७२।०६।०५ मा रिचार्ज कार्ड खरिद बिक्री गर्ने प्रयोजनका लागि समझदारी पत्रमा हस्ताक्षर भएको थियो। हामी निवेदक र विपक्षीका बीच मिति २०७२।०६।०५ मा रिचार्ज कार्ड खरिद विक्री गर्ने प्रयोजनका लागि भएको सम्झौताको दफा १० मा सम्झौता अन्त्य गर्ने बारेमा स्पष्ट व्यवस्था गरिएको छ। विपक्षीले बजारको माग बमोजिम प्रभावकारी रूपमा रिचार्ज कार्डको बिक्री वितरण, बजार व्यवस्थापन गर्न तथा स्थानीय केबल अपरेटरलाई रिचार्ज कार्ड उपलब्ध गराउन नसकेको र बजारमा निज विपक्षीकै कारणबाट हामी कम्पनीको रिचार्ज कार्डको अभाव समेत सिर्जना भएको हुँदा हामी कम्पनीले सम्झौता अन्त्य गरेका हौं। स्थानीय केबल अपरेटरहरूबाट विभिन्न मितिमा रिचार्ज कार्ड उपलब्ध नभएको भनी हामी कम्पनीलाई गुनासोहरू प्राप्त भएका छन्। हामीले सम्झौता अन्त्य गर्दा सम्झौताको शर्तहरू बमोजिम नै गरिएको हो। सम्झौता रद्द भएपछि पनि निज विपक्षीबाट विभिन्न पत्र प्राप्त भएकाले हामी कम्पनीले पुनः मिति २०७३।०९।१५ तथा मिति २०७४।०५।२९ मा सम्झौता रद्द भैसकेको जानकारी गराएका थियौं। विपक्षीलाई भविष्यमा हुनसक्ने मुनाफाको अनुमान गरी काल्पनिक क्षतिपूर्ति भराउने मध्यस्थ ट्राईबुनलको निर्णय आफैंमा गलत छ। मध्यस्थ ट्राईबुनलको निर्णयमा के कुन कानून बमोजिम हामी कम्पनीले विपक्षीलाई उक्त क्षतिपूर्ति भराउनु पर्ने निर्धारण गरिएको हो, सो बारे कुनै उल्लेख गरिएको छैन। कुनै कानूनी आधार उल्लेख नै नगरी हामी कम्पनीले विपक्षीलाई उक्त क्षतिपूर्ति भराउनु पर्ने भनी गरिएको उक्त निर्णय मध्यस्थता ऐन, २०५५ को दफा २७(ग), दफा ३०(२)(ग) र (घ) तथा दफा ३०(३) बमोजिम त्रुटिपूर्ण हुँदा मध्यस्थताबाट भएको निर्णय बदर गरी पाउँ भन्ने समेत बेहोराको सिम्पल मिडिया नेटवर्क प्रा.लि. को यस अदालतमा परेको निवेदन मागदावी।

६. सम्झौता बमोजिम यस कम्पनीले आफ्नो तर्फबाट गर्नु पर्ने लगानी गरी कार्यालयलाई घरभाडा, जनशक्ति र सो को प्रयोजनका लागि आवश्यक सम्पूर्ण व्यवस्था गरी आएकोमा विपक्षी कम्पनीमा

तत्कालीन अध्यक्ष र कम्पनी संचालकका बीचमा भएको आपसी द्वन्द्वको कारण निवेदक प्रा.लि. लाई एक गैर संचालक प्रतिनिधिबाट गलत तथा बनावटी झुठ्ठा आरोप लगाई सो आधारमा करार सम्झौता भंग गर्ने पत्र पठाइएको छ। विपक्षी कम्पनीको प्रयोजनका लागि रू.४,५०,००,०००।- (चार करोड पचास लाख रूपैयाँ) बुझाई कार्यारम्भ गरेको तथ्यलाई विपक्षीले अन्यथा भन्न सकेको छैन। यस कम्पनीले विपक्षी कम्पनीसँग सम्पन्न सम्झौता विपरीतका कुनै पनि कार्य गरेको छैन। तत्कालीन करार ऐन, २०५६ तथा मुलुकी देवानी संहितामा समेत करार पत्र तथा सम्झौता पत्र बदर भएमा सोही ऐनहरूद्वारा क्षतिपूर्ति तिराउन सकिने प्रावधान रहेको छ। यस कम्पनीले पेश गरेका कागजातहरू, रिचार्ज कार्डको विवरणहरू, विपक्षी निवेदकहरू पेश गरेर कागजातहरू, दुबै पक्षका बहस पैरवी र प्रमाण समेतका आधारमा क्षतिपूर्ति रकम एकिन गरी मध्यस्थबाट निर्णय भएको हुँदा हामी विरूद्ध दायर भएको प्रस्तुत निवेदन पत्र खारेज गरी पाउँ भन्ने समेत बेहोराको कामाख्या डिजिटल केबल नेटवर्क प्रा.लि. को यस अदालत समक्ष लिखित जिकिर।

आदेश खण्ड

७. नियमबमोजिम पेशी सूचीमा चढी निर्णयार्थ यस इजलाससमक्ष पेश हुन आएको प्रस्तुत मुद्दाको निवेदन सहितको मिसिल एवम् शुरु मिसिलसंलग्न कागजातहरुसमेत अध्ययन गरियो।

८. निवेदक सिम्पल मिडिया नेटवर्क प्रा.लि. को तर्फबाट उपस्थित विद्वान् अधिवक्ताद्वय श्री तिलकविक्रम पाण्डे एवं सचिन कुमार लोहनीले कामख्यले सम्झौताबमोजिम रिचार्ज कार्ड उपलब्ध नगराई सम्झौताबमोजिमको दायित्व निर्वाह नगरेका कारण सम्झौता रद्द गर्ने निर्णय गरिएको हो । मध्यस्थताबाट निर्णय गर्दा सम्झौता जुन अर्थमा भएको छ त्यही अर्थमा लिनुपर्छ । सम्झौतामा रद्द गर्नु अघि सच्याउन समय दिनुपर्ने व्यवस्था छैन । सम्झौताको ब्यवस्थाको पालना गरी ९० दिनको सूचना दिएर सम्झौता रद्द गरिएको हो । करारमा लेखिएको शर्त बाहेक अन्य शर्तहरू थप गरी करारको व्याख्या गर्न मिल्ने होइन। करार तथा सम्झौताको परिपालना नगर्ने पक्षले क्षतिपूर्तिको दावी लिन नसक्ने र क्षतिपूर्ति भराउन मिल्दैन । मध्यस्थले क्षतिपूर्ति के कुन कानूनका आधारमा भराएको हो, खुलाएको छैन। यसैले मध्यस्थताको निर्णय बदर गरी पाउँ भनी गर्नु भएको बहस समेत सुनियो ।

९. निवेदक कामख्या डिजिटल केबल नेटवर्क प्रा.लि. को तर्फबाट उपस्थित विद्वान् अधिवक्ताहरू श्री शरद कोइराला, श्री आशिष अधिकारी, श्री राजाराम घिमिरे, श्री अमर थापा र श्री किरण पौडेलले प्रस्तुत विवादमा करार ऐन लागू हुन्छ भन्ने कुरामा अर्को पक्ष पनि सहमत रहेको छ । तत्काल प्रचलित करार ऐन,२०५६ को दफा ८३ मा करार उल्लंघन गर्ने पक्षले क्षतिपूर्ति भराउनुपर्ने व्यवस्था रहेको छ । मुलुकी देवानी संहिताको दफा ५४३ मा करार उल्लंघन नभएको भए निर्दोष पक्षले कति रकम लाभ प्राप्त गर्ने थियो भन्ने कुरा अदालतले बिचार गर्नुपर्ने कानूनी व्यवस्था छ । दावीभन्दा कम क्षतिपूर्ति भराएकोमा हाम्रो पक्षको पनि असहमति रहेको छ । सुरुले भराएको क्षतिपूर्तिलाई कायम राखी दावी बमोजिम नै क्षतिपूर्ति नभराएको हदमा मध्यस्थताको निर्णय बदर गरी दावी बमोजिम नै गरी पाउँ भनी गर्नुभएको बहस सुनियो ।

१०. यसमा मिति २०७२।०६।०५ मा भएको सम्झौता बमोजिम विपक्षी कम्पनीको रिचार्ज कार्ड खरिद गर्न नसकेमा ३ महिनाको अग्रिम सूचना दिई सम्झौता भंग गर्न सक्ने प्रावधान भएकोमा विपक्षीले बिना सूचना सम्झौता भंग गरेको, जस्ले गर्दा निवेदक कम्पनीलाई भएको हानी नोक्सानी वापत

रकम भराई सम्झौता बमोजिम तत्काल रिचार्ज कार्डहरू उपलब्ध गराई बिक्री वितरण गर्न पाउँ भन्ने निवेदन मागदावी र सम्झौता भंग गर्ने कार्य सम्झौता अनुसार नै गरिएको हुँदा दावी पुरनुपर्ने होइन भन्ने प्रतिउत्तर जिकिर भएको प्रस्तुत मुद्दामा मध्यस्थबाट मिति २०७७।१२।०२ मा भएको निर्णय मध्यस्थता ऐन, २०५५ को दफा दफा ३० विपरीत भएको हुँदा उक्त निर्णय बदर गरी पाउँ भन्ने समेत व्यहोराको दुवै पक्षको निवेदन जिकिर भएको प्रस्तुत मुद्दामा देहायका प्रश्नहरुमाथि केन्द्रित रही निर्णय दिनुपर्ने देखिन आयो :

क) मध्यस्थताको अवधारणा के हो ? मध्यस्थबाट भएको निर्णय यस अदालतबाट के कुन अवस्थामा बदर हुने हो र यससम्बन्धमा के कस्तो कानूनी व्यवस्था रहेका एवम् सर्वोच्च अदालतबाट सिद्धान्त प्रतिपादन भएका छन् ?

ख) मध्यस्थताबाट भएको निर्णय मध्यस्थलाई सुम्पिएको शर्त विपरित वा क्षेत्राधिकारभन्दा बाहिर गई भएको छ वा छैन ?

ग) मध्यस्थताबाट भएको काम कारबाही पक्षहरुबीच सम्पन्न सम्झौता अनुरुप भएको छ वा छैन?

घ) मध्यस्थबाट भएको निर्णय सार्वजनिक हित वा नीति प्रतिकुल भएको छ वा छैन ?

ग) निवेदकहरुको निवेदन जिकिरबमोजिम मध्यस्थबाट भएको निर्णय बदर हुनुपर्ने हो वा होइन ?

११. पहिलो प्रश्न अर्थात **मध्यस्थताको अवधारणा के हो ? मध्यस्थताबाट भएको निर्णय यस अदालतबाट के कुन अवस्थामा बदर हुने हो र यससम्बन्धमा के कस्तो कानूनी व्यवस्था रहेका एवम् सर्वोच्च अदालतबाट सिद्धान्त प्रतिपादन भएका छन् ?** भन्ने तर्फ हेर्दा, मध्यस्थतासम्बन्धी व्यवस्था विवादको बैकल्पिक समाधानको माध्यमको रुपमा विकास भएको हो । खासगरी व्यापार वाणिज्य तथा अन्य आर्थिक कारोवार सम्बन्धी राष्ट्रिय वा अन्तर्राष्ट्रियस्तरमा भएका द्विपक्षीय वा बहुपक्षीय सम्झौता अन्तर्गतको कुनै विवादमा सम्पन्न सम्झौतामा उल्लेखित शर्तका अधिनमा रही शिघ्र, सरल,सहज तथा अन्तिम रुपमा विवादको समाधान गरिने वैकल्पिक उपाय (Alternative Disputes Resolution) को रुपमा मध्यस्थ सम्बन्धी अवधारणा आएको देखिन्छ । यस्ता विवादको सम्बन्धमा वाणिज्य व्यापार तथा आर्थिक कारोवारसंग सम्वन्धित व्यक्तिहरु अदालतको औपचारिक कार्यविधि सम्पन्न गर्न समय धेरै लाग्ने हुंदा आर्थिक कारोवारमा प्रतिकूल असर पर्ने अदालतको कार्यविधि पूरा गर्न झंझटिलो महसुस गर्ने तथा व्यापार तथा व्यापारीको शाखमा असर पर्ने समेतका समस्याहरुलाई संवोधन गरी शीघ्र निरुपण गर्नेसमेत अभिप्रायले विवाद निरुपणको वैकल्पिक पद्धतिको रुपमा मध्यस्थताको अवधारणाले मान्यता पाएको हो ।

१२. पक्षहरुले सम्झौता गर्दा नै त्यस्तो सम्झौताका सम्बन्धमा उपस्थित विवादका सम्बन्धमा मध्यस्थबाट निर्णय हुने भनी उल्लेख गरी नियमित अदालतको क्षेत्राधिकारबाट बाहेक राखिएको हुन्छ । सामान्यतया मध्यस्थले गरेको निर्णय उपर अदालतले हस्तक्षेप नगर्ने मान्यता राखिन्छ । तर कतिपय कानूनी प्रश्नमा मध्यस्थबाट त्रुटी भएमा भने पुनरावलोकन हुनुपर्छ भन्ने मान्यताका आधारमा मध्यस्थबाट भएका केही त्रुटीहरुका सम्बन्धमासम्म अदालतले मध्यस्थको निर्णय हेर्न र बदर गर्न सक्ने कानूनी व्यवस्था विधायिकाले गरेको हुन्छ। हाम्रो सन्दर्भमा मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (१) मा मध्यस्थको निर्णय उपर उच्च अदालतमा पैंतिस दिनभित्र निवेदन गर्नसक्ने

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र उपदफा (२) मा त्यसरी निवेदन गर्ने पक्षले देहायको अवस्था प्रमाणित गरेमा मध्यस्थको निर्णय बदर गर्न वा पुनः निर्णय गराउन आदेश दिन सक्ने गरी यस अदालतलाई क्षेत्राधिकार प्रदान गरेको देखिन्छः

(क) सम्झौताका कुनै पक्ष सम्झौता गर्दाका बखत कुनै कारणले सम्झौता गर्न असक्षम रहेको वा पक्षहरु जुन मुलुकको कानूनको अधीनमा रहेका छन् सो कानून अनुसार वा त्यस्तो कानून स्पष्ट हुन नसकेकोमा नेपाल कानूनबमोजिम सो सम्झौता वैध नरहेको,

(ख) निवेदन गर्ने पक्षलाई मध्यस्थ नियुक्त गर्नका लागि वा मध्यस्थताको कारवाहीका सम्बन्धमा समयमा नै रीतपूर्वक सूचना नदिएको,

(ग) मध्यस्थलाई नसुम्पिएको विवादसँग सम्बन्धित विषयमा वा मध्यस्थलाई सुम्पिएको शर्त विपरीत वा मध्यस्थलाई सुम्पिएको क्षेत्रबाहिर गई निर्णय भएको,

(घ) नेपाल कानून प्रतिकूल सम्झौता भएकोमा बाहेक मध्यस्थताको गठन विधि वा त्यसको काम कारवाही पक्षहरुबीच सम्पन्न सम्झौता अनुरुप नभएको वा त्यस्तो सम्झौता नभएकोमा यस ऐन अनुसार नभएको।

यसैगरी सोही ऐनको उपदफा (३) मा देहायको अवस्थामा मध्यस्थको निर्णय बदर गर्न सक्ने भनी उल्लेख भएको छ :

(क) मध्यस्थले निर्णय गरेको विवाद नेपाल कानूनबमोजिम मध्यस्थद्वारा निरोपण हुन नसक्ने भएमा।

(ख) मध्यस्थले गरेको निर्णय सार्वजनिक हित वा नीति प्रतिकूल हुने भएमा।

१३. मध्यस्थको निर्णय के कुन अवस्थामा अदालतबाट बदर हुने हो वा के कुन अवस्थामा अदालतबाट हस्तक्षेप गरिनुपर्ने हो भन्ने सम्बन्धमा सम्मानित सर्वोच्च अदालतबाट विभिन्न मुद्दाहरुमा व्याख्या भएको देखिन्छ । मध्यस्थता करारीय प्रकृतिका विशेष मुद्दाहरूमा नियमित अदालतभन्दा विषय विज्ञसहितको वैकल्पिक विवाद समाधानको उपाय हो । यसमा सामान्यतया मध्यस्थ ट्राईबुनलमा छनौट भएका सम्बन्धित विशेषज्ञको विशेषज्ञता, निष्पक्षता सँगै शीघ्र न्याय सम्पादनको परिकल्पना गरिएको हुन्छ । यही प्रयोजनको लागि मध्यस्थता ऐन, २०५५ को दफा ३० ले केही खास अवस्थामा मात्र मध्यस्थ ट्राईबुनलको निर्णय प्रमाणित आधारमा टेकेर पुनर्विचार गर्न सक्ने वा सम्बन्धित ट्राईबुनलमा पठाउन सक्ने परिकल्पना गरेको पाइन्छ । विशेषज्ञद्वारा छिटो न्याय निरूपण गर्न सकियोस् भन्ने उद्देश्यसहितको मूल भावना रहेको मध्यस्थता ऐन, २०५५ को दफा ३०(२) को व्यवस्थाले पुनरावेदन सुन्ने अदालतलाई मध्यस्थले गरेको निर्णय क्षेत्राधिकारको अभावमा असक्षम पक्षले गरेको करार, नेपाल कानून प्रतिकूल मध्यस्थताको गठन, पक्षहरूबिच सम्पन्न सम्झौताअनुरूप नभएको वा त्यस्तो सम्झौता नभएकोमा यस ऐनअनुसार नभएको भन्नेलगायतका विषयमा सीमित क्षेत्राधिकार प्रदान गरेको पाइन्छ । मध्यस्थबाट भएको निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३०(२) को विद्यमानता नरहेको अवस्थामा उक्त मध्यस्थको निर्णय बदर गरी पुनः निर्णय गर्न पठाउने गरी तत्कालीन पुनरावेदन अदालत पाटनबाट भएको

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निर्णय कानूनसम्मत मान्न मिलेन ।[१] मध्यस्थताको माध्यमबाट विवाद समाधान गर्ने विषयमा अदालतको सीमित दायराभित्र रहने गरी न्यूनतम हस्तक्षेपको अवधारणा रहेको देखिन्छ । कतिपय करारका विषयवस्तुले नै विशेष प्रकृतिको विशेषज्ञताको संलग्नताको अपेक्षा गर्दछ, चाहे त्यो करारको परिपालनाको लागि होस् वा करारबाट उत्पन्न विवादको निराकरण गर्न । आजको युगमा यस्ता विभिन्न जटिल प्रकृतिको करार हुने गरेको, त्यस्ता करारहरूको जटिलतालाई विचार गर्दा सामान्य कानूनी उपचारभन्दा आफूले स्वतन्त्ररूपमा निर्णय गर्न सक्ने एवं सम्बन्धित क्षेत्रमा विद्वता र अनुभव हासिल गरेको भनी विश्वास गरेका विज्ञहरूसमेतको माध्यमबाट विवादको समाधान गरी गराई निकास निकाल्ने उद्देश्यबाट वैकल्पिक उपचारको मार्गको रूपमा मध्यस्थता अपनाईँदै आएको छ । सैद्धान्तिक रूपमा नै मध्यस्थताबाट विवाद समाधान गर्नेसम्बन्धी विषयमा अदालतमा मुद्दा नचल्ने, अदालतलाई मध्यस्थको निर्णयलाई पुनरावेदन हेरे सुनेझैं प्रमाणको मूल्याङ्कन गरी निर्णय गर्ने अधिकार नभई सीमित अवस्थामा सीमित दायरामा रही सुधारात्मक प्रकृतिको आदेश दिने अधिकार रहेको तथा प्रचलित मध्यस्थता ऐनले तोकेको पूर्वावस्थाको स्पष्ट विद्यमानता देखिएमा मात्र न्यायका मान्य सिद्धान्तहरू अवलम्बन गर्दै मध्यस्थको निर्णयमा सीमितरूपमा हस्तक्षेप गर्न सकिने।[२] विवादसँग सम्बन्धित तथ्य केलाउने र तथ्यगत रुपमा मध्यस्थको निर्णयको परीक्षण गर्ने अधिकार अदालतलाई हुँदैन । विवादको विषयसँग सम्बन्धित तथ्य केलाउने र उक्त तथ्यको विषयमा निर्णय गर्ने अन्तिम अधिकार मध्यस्थलाई नै हुन्छ । मध्यस्थ नै विवादमा सम्बद्ध तथ्य केलाउने र यसको बारेमा निर्णय गर्ने सबैभन्दा सक्षम निर्णयकर्ता (Last Judge) हो । खास गरी प्राविधिक प्रकृतिको कामसँग सम्बन्धित सम्झौता वा ठेक्कासँग सम्बन्धित विवाद निरोपण गर्दा प्राविधिक प्रकृतिको तथ्यहरू केलाउनु पर्ने । विवादको मूल विषयवस्तुको रुपमा रहेको सम्पन्न भएको कामको मूल्याङ्कन गर्ने कार्य र कति काम सम्पन्न भयो भन्ने कुरा यकीन गर्न विभिन्न तह र चरणमा हुने कामको नाप (Measurement) गर्नुपर्ने विषयमा अदालतभन्दा मध्यस्थ नै बढी विज्ञ हुने हुँदा मध्यस्थको निर्णयउपर पुनरावेदन लाग्ने व्यवस्था नगरी मध्यस्थको निर्णयमा गम्भीर कानूनी त्रुटि देखिएको आधारमा मात्र मध्यस्थको निर्णय बदर गराउन नियमित अदालतमा निवेदन लाग्ने[३] । मध्यस्थता ऐनले निर्णयउपर पुनरावेदन लाग्ने व्यवस्था नगरी मध्यस्थको निर्णय बदर हुने अवस्था उल्लेख गर्नुको साथै मध्यस्थको निर्णयमा चित्त नबुझ्ने पक्षले उक्त निर्णय बदर गराउन पुनरावेदन अदालतमा निवेदन गर्न पाउने व्यवस्था गरेको छ । यस्तो निवेदन परेपछि मध्यस्थको निर्णयमा कुनै कानूनी त्रुटि भएको अवस्थामा त्यस्तो निर्णय बदर गरी पुनः निर्णय गर्नु भन्ने आदेश अदालतले दिनसक्ने, यस्तो आदेश जारी गर्दा अवस्था हेरी अघि निर्णय गर्ने मध्यस्थ वा अरु मध्यस्थबाट निर्णय गराउने गरी अदालतले निवेदन सहित मिसिल पठाउन सक्ने व्यवस्था गरिएको छ । उक्त कानूनी व्यवस्थाअनुसार मध्यस्थको निर्णयमा उक्त ऐनको कानूनी व्यवस्थाको त्रुटि भएको देखिएमा सो निर्णय बदर गरी

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[१] **नेपाल कानून पत्रिका, २०७७ अंक १० निर्णय नं. १०५८६**

[२] **नेपाल कानून पत्रिका, २०७७ अंक ३ निर्णय नं. १०४६१**

[३] **नेपाल कानून पत्रिका, २०६७ अंक १० निर्णय नं. ८४७९**

सिम्पल मिडिया प्रा.लि. विरूद्ध कामख्या डिजिटल केबल नेटवर्क प्रा.लि., मुद्दा : मध्यस्थको निर्णय बदर, ०७७-FJ-०१५९, ०७७-FJ-०१५६, नि.नं. ५३९ र ५४० को फैसला, पाना **१५** मध्येको पृष्ठ **८**

पुनरावेदन अदालत आफैले उक्त त्रुटि सच्याई सबूद प्रमाणको आधारमा निर्णय गर्नसक्ने पुनरावेदकीय अधिकारक्षेत्र पुनरावेदन अदालतलाई प्रदान नगरिएको ।[४] मध्यस्थद्वारा विवादको समाधान गर्नका लागि पक्षहरू सहमत भई विवाद मध्यस्थ समक्ष जान्छ भने त्यस्तो अवस्थामा अदालतले तथ्यगत प्रश्नमा प्रवेश गरेर विवादको निरोपण गर्न नहुने । पक्षहरूबीच भएको करारमा उल्लेखित शर्त भन्दा बाहिर गएर मध्यस्थले करारको व्याख्या गर्दछ भने त्यस्तो व्याख्या करार कानूनको परिधि भित्र रही भएको छ छैन भन्ने कानूनी प्रश्न उत्पन्न हुन्छ र यस्तो कानूनी प्रश्न समावेश भएको यस्तो विषय न्याय निरोपण योग्य (justifiable) हुने ।[५] मध्यस्थद्वारा विवाद समाधानको उपाय पक्षहरुको स्वेच्छाले अवलम्वन गरिने हुँदा कानूनद्वारा सुस्पष्टरुपमा तोकिएको सीमित आधारमा वाहेक यसरी भएको मध्यस्थको निर्णय तथ्यगत तथा कानूनी (Fact and Law) दुवै रुपमा अन्तिम हुने। मध्यस्थले गलत निर्णय गरेको अवस्थामा पनि सीमित आधारमा वाहेक अदालतलाई त्यस्तो गलत निर्णयको प्रतिस्थापन गर्ने निर्णय दिन सक्ने अधिकार प्रदान गरिएको नहुने।[६] भनी व्याख्या भएको छ ।

१४. उल्लिखत कानूनी व्यवस्था तथा सर्वोच्च अदालतबाट प्रतिपादित कानूनी सिद्धान्तको सादृश्यतामा मध्यस्थको निर्णय यस अदालतले सबै अवस्थामा बदर गर्न नसक्ने र उल्लिखित केही सीमित अवस्थामामात्र बदर गर्न सक्ने हुन्छ । मूलत अपबादात्मक अवस्थामा बाहेक सामान्यतः मध्यस्थले गरेको निर्णय अन्तिम हुने मध्यस्थतासम्बन्धी दार्शनिक, विधिशास्त्रीय तथा सैद्धान्तिक मान्यता रहेको हुन्छ र विधिकर्ताले पनि यही मान्यतालाई आत्मसात गरी उल्लिखित कानूनी व्यवस्थाको तर्जुमा गरेको देखिन्छ । यसैले यो अन्य मुद्दामा गरिने पुनरावेदन प्रकृतिको विषय होइन । अदालतले विवादका तथ्यगत प्रश्नहरुमा केलाउने कार्य नगरी माथि उल्लिखित दफा ३० मा व्यवस्थित कानूनी व्यवस्थाका आधारमामात्र सीमित रहेर मध्यस्थताबाट भएको निर्णय हेर्न र परीक्षण गर्नुपर्ने हुन्छ । मध्यस्थको निर्णय बदर हुने उल्लिखित अवस्थाको विद्यमानता रहेको कुरा बदरका लागि निवेदन दिने पक्षले पुष्टि गर्नुपर्ने हुन्छ ।

१५. दोस्रो प्रश्न अर्थात **मध्यस्थताबाट भएको निर्णय मध्यस्थलाई सुम्पिएको शर्त विपरित वा क्षेत्राधिकारभन्दा बाहिर गई भएको छ वा छैन ? भन्ने तर्फ** हेर्दा सिम्पल मेडियाको तर्फबाट यस अदालतमा पर्न आएको मध्यस्थको निर्णय बदर गरी पाउँ भन्ने निवेदनमा सम्झौता रद्द गर्दा सम्झौताको दफा १० बमोजिमका व्यवस्था पालना भयो, भएन भन्ने कुरामा सीमित रही सम्झौताको अन्त्य गरेको विषयलाई निरोपण गर्नुपर्नेमा सम्झौताका शर्तको पालना गरी समझौता रद्द गरिएकोमा अरु कुनै प्रकृया पुरा गर्नुपर्ने थियो, थिएन वा सुधारको अवसर दिनुपर्ने थियो, थिएन भनी शर्त बाहिर गई मध्यस्थले हेर्न क्षेत्राधिकार नभएकोले मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) को खण्ड (ग) बमोजिमको आधार विद्यमान रहेको भनी जिकिर लिएकाले सो सन्दर्भमा हेर्दा,

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[४] **नेपाल कानून पत्रिका, २०६७ अंक ६ निर्णय नं. ८३९७**

[५] **नेपाल कानून पत्रिका २०६४, अङ्क ११, निर्णय नं. ७९०५**

[६] **नेपाल कानून पत्रिका, २०५९ अङ्क ५/६, निर्णय नं.७०८९**

उल्लिखित खण्ड (ग) को कानूनी व्यवस्थामा *मध्यस्थलाई नसुम्पिएको बिवादसँग सम्बन्धित विषयमा वा मध्यस्थलाई सुम्पिएको शर्त विपरीत वा मध्यस्थलाई सुम्पिएको क्षेत्रबाहिर गई निर्णय भएको* भन्ने उल्लेख देखिन्छ । त्यसैले, मध्यस्थलाई निवेदकले जिकिर लिए अनुसार सम्झौता अन्त्यको विषयमा निर्णय दिने अधिकार रहे नरहेको हेर्नुपर्ने देखियो । सम्झौताको दफा १५ मा पक्षहरुबीच सम्झौताका विषयमा कुनै विवाद सृजना भएमा पक्षहरुले एकापसमा विवाद समाधान हुन नसकेकमा मध्यस्थबाट विवाद समाधान गरिने भनी उल्लेख भएको देखिन्छ । सिम्पल मिडिया नेटवर्कले सम्झौताको दफा १० का आधारमा सम्झौता अन्य गरेका कारण सम्झौताका पक्षहरुबीच विवादको सृजना भएको कुरामा विवाद छैन । विवाद उपस्थित भएपछि मध्यस्थताबाट विवादको समाधान गर्न यी निवेदक पक्ष पनि सहमत भई आफ्नो तर्फबाट समिर शर्मालाई मध्यस्थ नियुक्त गरेको अवस्था छ । यसरी मध्यस्थबाट विवाद समाधानका लागि सहमत भई मध्यस्थसमेत नियुक्त गरेको र त्यसमा कुनै चुनौती नदिई सबै प्रकृयाहरुमा सहभागी भएको देखिन्छ । सम्मानित सर्वोच्च अदालतबाट मध्यस्थको नियुक्तिलाई स्वीकार गरी मध्यस्थताको हेरेक प्रकृयामा सामेल भएको अवस्थामा अहिले आएर मध्यस्थको निर्णयलाई चुनौती दिन मिल्ने हुँदैन [७] भनी व्याख्या भएको छ। सम्झौताको दफा १५ ले मध्यस्थले प्रस्तुत विवाद हेर्ने क्षेत्राधिकार दिएको र निवेदकले जिकिर लिए बमोजिम सो दफामा यति हदमा मात्र हेर्ने भनी कुनै शर्त बन्देज रहे भएको अवस्था पनि नदेखिएकाले मध्यस्थलाई नसुम्पिएको बिवादसँग सम्बन्धित विषयमा वा मध्यस्थलाई सुम्पिएको शर्त विपरीत वा मध्यस्थलाई सुम्पिएको क्षेत्रबाहिर गई निर्णय भएको, भन्ने देखिन आएन ।

१६. तेस्रो प्रश्न अर्थात **मध्यस्थताबाट भएको काम कारबाही पक्षहरुबीच सम्पन्न सम्झौता अनुरुप भएको छ वा छैन?** भन्ने तर्फ हेर्दा मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) को खण्ड (घ) बमोजिमको आधार विद्यमान रहेको भनी सिम्पल मिडियाले जिकिर लिएकाले सो सन्दर्भमा हेर्दा, उल्लिखित खण्ड (घ) को कानूनी व्यवस्थामा *नेपाल कानून प्रतिकूल सम्झौता भएकोमा बाहेक मध्यस्थताको गठन विधि वा त्यसको काम कारवाही पक्षहरुबीच सम्पन्न सम्झौता अनुरुप नभएको वा त्यस्तो सम्झौता नभएकोमा यस ऐन अनुसार नभएको* भन्ने व्यवस्था रहेको छ । प्रस्तुत विवादमा विवादका पक्षहरुको सहमतिमा नै मध्यस्थताको गठन भएकोले मध्यस्थताको गठनमा कुनै विवाद देखिंदैन । मध्यस्थको काम कारवाही सम्झौता अनुरुप नभएको भन्ने निवेदन जिकिर रहे पनि, के कुन काम कारबाही सम्झौता विपरित रहेको भन्ने स्पष्ट रुपमा जिकिर रहेको निवेदनबाट देखिंदैन । जहाँसम्म मध्यस्थता ऐन, २०५५ को दफा २७ बमोजिम क्षतिपूर्ति के कुन आधारमा भराइएको हो निर्णय गर्दा नखुलाइएको भन्ने जिकिर छ, तत्सम्बन्धमा हेर्दा, सम्झौता हुँदाका अवस्थामा प्रचलनमा रहेको करार ऐन, २०५६ को दफा ८३ करार उल्लंघन भएमा त्यसको क्षतिपूर्ति पाउने कानूनी व्यवस्था रहेकोमा हाल प्रचलनमा रहेको मुलुकी देवानी संहिता, २०७४ को दफा ५३७ मा पनि सो व्यवस्था रहेको छ । सम्झौताको दफा १३ मा करार ऐन, २०५६ र प्रचलित नेपाल कानूनले सम्झौता नियमित (Governed) हुने व्यवस्था गरेको छ। करार ऐनका व्यवस्था आकर्षित हुने कुरामा पक्षहरुबीच विवाद रहेको पनि देखिंदैन । यस अवस्थामा क्षतिपूर्ति भराउने कानूनी व्यवस्था

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[७] **नेपाल कानून पत्रिका, २०७८ अंक २/३ निर्णय नं. १०६४५**

सिम्पल मिडिया प्रा.लि. विरूद्ध कामख्या डिजिटल केबल नेटवर्क प्रा.लि., मुद्दा : मध्यस्थको निर्णय बदर, ०७७-FJ-०१५९, ०७७-FJ-०१५६, नि.नं. ५३९ र ५४० को फैसला, पाना **१५** मध्येको पृष्ठ **१०**

नरहेको भन्ने अवस्था देखिँदैन । मध्यस्ताबाट भएको निर्णयको प्रकरण १२ मा क्षतिपूर्ति भराएको आधार र कारण सम्बन्धमा विस्तृत रुपमा विश्लेषण गरिएको देखिन्छ । वेरितपूर्वक सम्झौताको मूल शर्त विपरित सम्झौता रद्द गरेकाले क्षतिपूर्तिको उपचार पाउने ठहर मध्यस्थताले गरेको देखिन्छ। यसरी सो प्रकरणमा मध्यस्थले निर्णयमा पुगेको आधार र कारणहरु विस्तृत रुपमा विश्लेषण गरेको देखिएको अवस्थामा निर्णयमा क्षतिपूर्तिको आधार र कारण नखुलाएको भन्ने देखिन आएन ।

१७. कामख्या केबल डिजिटलले मध्यस्थको निर्णय उपर यस अदालतमा दिएको निवेदन तर्फ हेर्दा, सम्बद्ध सबुद प्रमाणको मुल्यांकन नगरी सर्वोच्च अदालतबाट प्रतिपादित सिद्धान्त प्रतिकुलसमेत भई मध्यस्थता ऐन, २०५५ को दफा ३०(२) बमोजिम निर्णय त्रुटीपूर्ण भएको भनी निवेदनमा जिकिर लिएको भए पनि दफा ३०(२) बमोजिम के कुन आधारमा निर्णय त्रुटिपूर्ण भन्ने स्पष्ट रुपमा उल्लेख नगरी गोश्वारा रुपमा दफामात्र उल्लेख गरेको देखिन्छ । तर, निवेदनमा जिकिर लिए अनुरुप मध्यस्थ ट्राईबुनलबाट दफा ३०(२) को प्रतिकुल हुने गरी निर्णय गरेको भन्ने स्थापित र पुष्टि हुने गरी जिकिर लिन सकेको देखिँदैन । यस अवस्थामा निजले जिकिर लिए बमोजिम सो दफा ३० बमोजिमका आधारहरुको विद्यमानता रहे भएको देखिन आएन । जहाँसम्म कम क्षतिपूर्ति भराएको भन्ने जिकिर छ, मध्यस्थताबाट तथ्य र प्रमाणको मुल्यांकन तथा विश्लेषण गरी भएको निर्णयको तथ्यभित्र यस अदालत प्रवेश गरी हस्तक्षेप गर्न मिल्ने हुँदैन ।

१८. अब चौथो प्रश्न अर्थात **मध्यस्थबाट भएको निर्णय सार्वजनिक हित वा नीति प्रतिकुल भएको छ वा छैन** ? भन्ने तर्फ विचार गर्दा, मध्यस्थता ऐन, २०५५ को दफा ३०(३)(ख) मा *मध्यस्थले गरेको निर्णय सार्वजनिक हित वा नीति प्रतिकूल हुने भएमा सो निर्णय बदर गर्न सकिने* कानूनी व्यवस्था रहेको छ । तर सो कानूनले सार्वजनिक नीतिको परिभाषा गरेको पाइदैंन । यसैले मध्यस्थताका सन्दर्भमा सार्वजनिक नीति भन्नाले के कस्तो कुरालाई जनाउँछ भन्ने कुरामा विश्लेषण गर्न सान्दर्भिक देखियो । सार्वजनिक नीतिलाई कानूनको नीति (Policy of Law) कै समरुपमा पनि लिने गरिन्छ । यद्दपी, सार्वजनिक नीति र कानून पर्यायवाची वा एउटै होइनन् । सार्वजनिक नीति कानूनभन्दा पनि व्यापक हुन्छ जसले कानून तर्जुमाका लागि पनि मार्गदर्शन गरेको हुन्छ र कानूनहरु पनि सार्वजनिक नीति प्रतिकुल हुनु हुँदैन । सार्वजनिक हित र नीतिले कुनै वैयक्तिक भन्दा पनि राज्य र आम जनसाधारणको हित चाहन्छ । सार्वजनिक नीति संविधानमा व्यवस्थित गरिएका मौलिक हक तथा राज्यका निर्देशक सिद्धान्त र नीतिहरु, प्रचलित कानून, राज्यद्वारा अख्तियार गरिएका विभिन्न क्षेत्रगत नीतिहरु जस्ता कुराहरुमा प्रतिबिम्बित भएका हुन्छन् । यस्ता नीतिले बहुजन हितायको मान्यता राख्दछन् । यसरी नै सार्वजनिक हितमा वैयक्तिक भन्दा पनि जनसमुदायको सामूहिक हित अन्तरनिहित रहने मानिन्छ । मूलतः सार्वजनिक हितमा मुलुक र बृहत्तर नागरिकको हित, न्याय र नैतिकता जस्ता विषयहरु सन्निहित हुन्छन् ।

१९. मध्यस्थताका सन्दर्भमा सार्वजनिक नीतिको बृहत्त अवधारणामा मध्यस्थताबाट निर्णय गर्दा व्यापक रुपमा अनियमितता भएको तथा मध्यस्थको आचरणको गम्भीर उल्लंघन भएको छ र त्यसले निवेदकलाई चरम अन्याय भएको छ भने त्यस अवस्थामा मध्यस्थताको निर्णय सार्वजनिक नीतिको परिधिभित्र परी अदालतबाट हस्तक्षेप गर्ने आधार बन्ने र मध्यस्थताको निर्णय अदालतले सच्याउन

सिम्पल मिडिया प्रा.लि. विरूद्ध कामख्या डिजिटल केबल नेटवर्क प्रा.लि., मुद्दा : मध्यस्थको निर्णय बदर, ०७७-FJ-०१५९, ०७७-FJ-०१५६, नि.नं. ५३९ र ५४० को फैसला, पाना **१५** मध्येको पृष्ठ **११**

सकिने मानिन्छ ।[८] मध्यस्थताको सन्दर्भमा सार्वजनिक नीतिमा प्राकृतिक न्यायको सिद्धान्त, स्वच्छ सुनुवाईका मान्यता र कानूनको उचित प्रकृयाको पालना जस्ता कार्यविधिगत सार्वजनिक नीति पनि महत्वपूर्ण मानिन्छ । भारतको The Arbitration and Conciliation Act, 1996 को दफा ३४(२) मा रहेको सार्वजनिक नीतिको सोही दफामा व्याख्या (Explanation) पनि गरिएको छ । जस अनुसार मध्यस्थको निर्णय धोखाघडी वा भ्रष्टाचार (fraud or corruption) गरी भएको वा सो ऐनको दफा ७५[९] र ८१[१०] को उल्लंघन भएको वा भारतको कानूनको मूलभूत नीति प्रतिकुल वा न्याय र नैतिकताको आधारभूत मान्यता प्रतिकुल भएको जस्ता कुराहरुलाई सार्वजनिक नीति प्रतिकुल हुने मानिएको छ । साथै भारतको कानूनको मूलभूत नीतिको प्रतिकुल भएको भन्ने आधारमा विवादको तथ्यभित्र प्रवेश भने नगरिने पनि स्पष्ट पारिएको देखिन्छ ।[११] भारतको सर्वोच्च अदालतबाट सार्वजनिक नीतिका बारेमा विभिन्न मुद्दामा व्याख्याहरु भएका छन् । **Renusagar Power Co. Ltd vs General Electric Co on 7 October, 1993 को मुद्दामा** [१२] विदेशी ट्राईबुनलबाट भएका निर्णयको

[8] http://www.legalservicesindia.com/article/1224/Public-Policy-under-Arbitration-Law.html in its broader view, courts of law may intervene permitting recourse against an arbitral award based on irregularity of a kind which the court considers has caused or will cause substantial injustice to the applicant. Extreme cases where arbitral tribunal has gone so wrong in its conduct of arbitration that justice calls out for it to be corrected may justifiably fall within the ambit of the doctrine of 'Public Policy of India" to enable

[9] Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

[10] The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

[11] https://www.latestlaws.com/bare-acts/central-acts-rules/alternative-dispute-resolution-laws/arbitration-and-conciliation-act-1996/ *[Explanation 1.* - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. - For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[12] https://indiankanoon.org/doc/86594/ "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public

सिम्पल मिडिया प्रा.लि. विरूद्ध कामख्या डिजिटल केबल नेटवर्क प्रा.लि., मुद्दा : मध्यस्थको निर्णय बदर, ०७७-FJ-०१५९, ०७७-FJ-०१५६, नि.नं. ५३९ र ५४० को फैसला, पाना **१५** मध्येको पृष्ठ **१२**

कार्यान्वयनको कुराका सन्दर्भमा सार्वजनिक नीति कानूनको सामान्य उल्लंघनभन्दा अरु बढी कुराबाट हेरिन्छ भन्दै विदेशी ट्राईबुनलबाट भएका निर्णय भारतको कानूनको आधारभूत नीति, भारतको हित र न्याय वा नैतिकता प्रतिकुल कुरालाई सार्वजनिक नीतिको प्रतिकुल मानी यस्ता निर्णय कार्यान्वयनमा इन्कार गर्न सकिने व्याख्या भएको देखिन्छ । **Oil & Natural Gas Corpn.Ltd vs Western Geco International Ltd on 4 September, 2014 को मुद्दामा** [१३] पनि यस अघि सार्वजनिक नीतिको रुपमा ब्याख्या भएका भारतको कानूनको आधारभूत नीति, भारतको हित र न्याय वा नैतिकताका अतिरिक्त निर्णय स्पष्ट रुपमा गैर कानूनी भएमा (if it is patently illegal) पनि सार्वजनिक नीति प्रतिकुल हुने ब्याख्या भएको छ । साथै भारतको कानूनका आधारभूत नीतिका सन्दर्भमा ब्याख्या गर्दै यसमा तीनवटा आधारभूत न्यायिक सिद्धान्त (fundamental juristic principles) लाई अभिन्न रुपमा (part and parcel) बुझ्नुपर्छ भनिएको छ । यस्ता आधारभूत न्यायिक सिद्धान्तमा पहिले निर्णय गर्दा न्यायिक मनको प्रयोग गर्नुपर्ने[१४] दोस्रो प्राकृतिक न्यायको सिद्धान्तको अबलम्बन[१५] र तेस्रोमा एक समझदार स्वतन्त्र मानिसको दृष्टिमा निर्णय अस्वीकार्य वा अनुचित छ भन्ने देखिनु हुँदैन[१६] भनी बोलिएको छ ।

२०. माथिल्ला प्रकरणमा उल्लेख गरिएका कुराहरुसमेतको सापेक्षतामा हेर्दा मध्यस्थताका सन्दर्भमा सारवान सार्वजनिक नीति (Substantive public policy) र कार्यविधिगत सार्वजनिक नीतिका (Procedural public policy) आधारमा अदालतले मध्यस्थताको निर्णय सीमित अवस्थामा परीक्षण गर्नुपर्ने हुन सक्छ । सारवान सार्वजनिक नीतिमा निर्णयको विषयबस्तुले राज्यका आधारभूत कानून र सिद्धान्तको उल्लंघन गरेको छ छैन जस्ता कुरा हेरिन्छ । कार्यविधिगत सार्वजनिक नीतिमा कानूनको उचित पालना (due process) सुनुवाईको अधिकारको पालना (the right to be heard) , मध्यस्थताको स्वतन्त्रता (independence of arbitrators) र मध्यस्थको कारबाहीमा धोखाघडी र भ्रष्टाचारजन्य कार्य नभएको, (the absence of procedural fraud or corruption in the arbitral process)

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policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

[13] https://indiankanoon.org/doc/136518863/

[14] The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration.

[15] Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice.

[16] No less important is the principle now recognized as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law.

लगायतका कार्यविधिगत नियमका आधारभूत कुराहरुको उल्लंघन भए नभएको हेरिन्छ । यसरी मध्यस्थले निर्णय गर्दा अनिवार्य रुपमा पालना गर्नुपर्ने सारवान सार्वजनिक नीति प्रतिकुल वा प्राकृतिक न्यायका सिद्धान्त लगायत न्यायका मान्य सिद्धान्तको पालना नगरेको वा कानूनको उचित प्रयोग तथा स्वच्छ सुनुवाईका मान्यताको उल्लंघन गरेको वा भ्रष्टाचारजन्य कार्य वा मध्यस्थको आचरण प्रतिकुल वा अन्य यस्तै अनियमितताजन्य कार्य वा न्याय र नैतिकता प्रतिकुल हुने गरी भएका कार्यहरु सार्वजनिक हित र नीति विरुद्धको परिधिभित्र पर्न सक्छन् । यस्ता अवस्थाको विद्यमानताको सीमित अवस्थामा सार्वजनिक हित र नीति विरुद्ध निर्णय भएको भन्ने आधारमा यस अदालतबाट मध्यस्थताको निर्णयमा हस्तक्षेप गर्नुपर्ने अवस्था हुनसक्छ । तर, सार्वजनिक नीति वा हित विरुद्ध रहेको भन्ने आधार र कारण स्पष्ट रुपमा सो जिकिर लिने निवेदकले पुष्टि र स्थापित गराउनुपर्ने हुन्छ । प्रस्तुत निवेदनमा निवेदक सिम्पल मिडिया नेटवर्कले मध्यस्थबाट भएको निर्णय सार्वजनिक नीति र हित प्रतिकुल भन्ने जिकिर लिएको देखिन्छ। तर, के कस्तो सार्वजनिक नीति र हित प्रतिकुल निर्णय भएको भन्ने स्पष्ट रुपमा खुलाउन सकेको तथा प्रमाणित गर्न सकेको देखिँदैन । केबल सार्वजिनक हित वा नीति प्रतिकुल भनी निवेदन जिकिर लिँदैमा सार्वजनिक हित वा नीति प्रतिकुल रहेछ भन्न मिल्ने हुँदैन। मध्यस्थबाट भएको निर्णय के कसरी सार्वजनिक हित वा नीति प्रतिकुल भयो वा के कसरी सार्वजनिक हितमा असर परेको छ भन्ने कुरा वस्तुगत रुपमा पुष्टी गराउनु पर्दछ । प्रस्तुत निवेदनमा सारवान र कार्यविधिगत दुवै सार्वजनिक नीति प्रतिकुल रहेको पुष्टि हुन आएको छैन। तसर्थ निवेदन जिकिर अनुसार यस अदालतबाट मध्यस्थको निर्णय बदर गर्नुपर्ने मध्यस्थता ऐन, २०५५ को दफा ३०(३)(ख) बमोजिमको आधार प्रस्तुत मुद्दामा विद्यमानता रहे भएको देखिन आएन ।

२१. अन्तिम प्रश्न अर्थात **निवेदकहरुको निवेदन जिकिरबमोजिम मध्यस्थता ट्राईबुनलबाट भएको निर्णय बदर हुनुपर्ने हो वा होइन ?** भन्ने तर्फ हेर्दा, माथिल्ला प्रकरणमा विश्लेषण गरिए अनुसार पक्षहरु बीच भएको सम्झौताको वैधानिकताका सम्बन्धमा विवाद उत्पन्न भएको अवस्था छैन । दुबै पक्षले विद्यमान कानून एवम् सम्झौतामा उल्लिखित मध्यस्थता नियुक्तिसम्बन्धी शर्त अनुरुप मध्यस्थ नियुक्ति गरी आफ्ना विवादित विषयमा निर्णय गर्नका लागि मध्यस्थ ट्राईबुनललाई अधिकार प्रदान गरेको र दुवै पक्ष त्यसका सबै प्रकृयाहरुमा सहभागी रहेको देखिएको छ । मध्यस्थ ट्राईबुनलबाट पक्षहरुबीच भएको करार विपरित निर्णय गरेको पनि देखिँदैन । पक्षले आफूलाई दिएको अधिकार प्रयोग गर्ने क्रममा करारका कुनै शर्त विपरीत वा आफूलाई अधिकार नदिएको विषयमा मध्यस्थले निर्णय गरेको पनि देखिँदैन । सिम्पल मिडियाले क्षेत्राधिकार बाहिर गई निर्णय गरेको भन्ने जिकिर लिएपनि सो कुरा प्रमाणित हुने विश्वसनीय प्रमाण पेश भएको देखिँदैन । साथै, विवादको विषयमा निवेदकहरुले मध्यस्थ नियुक्तिसमेत गरी सबै प्रकृयामा सहभागी भएको अवस्थामा अहिले आएर सो निर्णय गर्ने अधिकार मध्यस्थलाई थिएन वा क्षेत्राधिकार नभएको भनी लिएको जिकिरसँग यो इजलास सहमत हुन सक्ने अवस्था रहेन । यसका अतिरिक्त प्रस्तुत विवादमा मध्यस्थबाट भएको निर्णय निवेदकले निवेदनमा जिकिर लिए अनुसार सार्वजनिक हित वा नीति प्रतिकूल भएको भन्ने पनि पुष्टि हुन सकेको छैन । यसैले मध्यस्थ ट्राईबुनलले गरेको निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) र (३) बमोजिमको कुनै पनि अवस्था विद्यमान रहेको देखिन नआएको र तथ्यगत प्रश्नमा प्रवेश गर्ने अधिकार कानूनले अदालतलाई प्रदान नगरेको हुँदा मध्यस्थबाट मिति

२०७७।१२।०२ मा भएको निर्णय बदर गरी पाउँ भन्ने दुवै पक्षको निवेदन जिकिर एवम् दुवै निवेदक तर्फबाट बहस गर्नु हुने विद्वान अधिवक्ताहरुको मध्यस्थको निर्णय बदर गरी पाउँ भन्ने हदको बहससँग सहमत हुन सकिएन ।

२२. तसर्थ, माथिल्ला प्रकरण प्रकरणमा विवेचना गरिएका आधार, कारण, कानूनी व्यवस्था तथा सम्मानित सर्वोच्च अदालतबाट प्रतिपादित सिद्धान्त समेतका आधारमा मध्यस्थ ट्राईबुनलबाट मिति २०७७।१२।०२ मा भएको निर्णय बदर गरी पाउँ भन्ने कामाख्या डिजिटल केबल नेटवर्क प्रा.लि. र सिम्पल मिडिया नेटवर्क प्रा.लि. दुवै पक्षको निवेदन दावी पुग्न नसक्ने ठहर्छ। अरुमा तपसिल बमोजिम गर्नू।

तपसिल खण्ड

१. सरोकारवाला पक्षले प्रस्तुत फैसलाको नक्कल माग गरे उच्च अदालत नियमावली, २०७३ को नियम १२० को प्रकृया पुऱ्याई नक्कल दिनू।
२. मुलुकी देवानी कार्याविधि संहिता, २०७४ को दफा १९८(३) बमोजिम प्रस्तुत मुद्दाको फैसला प्रमाणीकरण भएको विवरण यस अदालतको सूचना पाटीमा टाँस गरी वेबसाइटमा समेत राख्नू।
३. प्रस्तुत फैसलाको विद्युतीयप्रति अपलोड गरी मुद्दाको दायरी लगत कट्टा गर्नु र यस अदालतको मिसिल अभिलेख शाखामा बुझाई मध्यस्थताबाट निर्णय भएको मिसिल मध्यस्थता परिषदमा पठाइदिनू ।

(महेश शर्मा पौडेल)
न्यायाधीश

उक्त रायमा सहमत छु ।

(धीरबहादुर चन्द)
न्यायाधीश

फैसला तयार गर्न सहयोग पुऱ्याउने
इजलास अधिकृतः निशा न्यौपाने
ईति सम्वत् २०७९ साल आषाढ ७ गते रोज ३ शुभम् .....।

प्रमाणीकरण मितिः- न्यायाधीश अदालतको छाप

Note:

NEPCA Staff

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Director

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Asst. Account Officer

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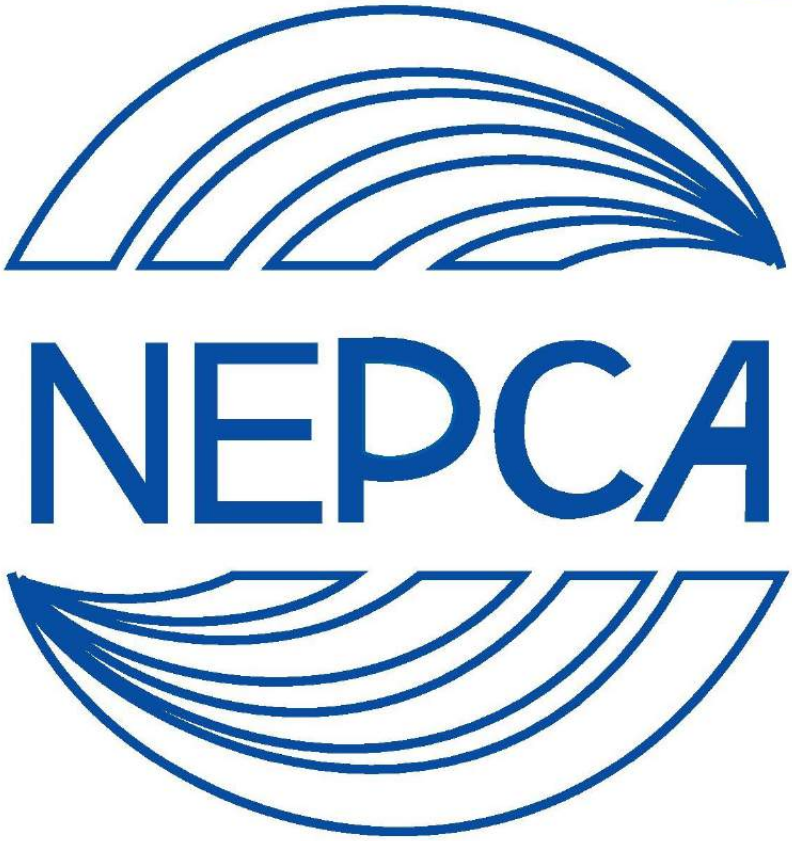

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