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An Analytical Study on Commercial Arbitration Law : a Nepalese Perspective

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1) MEANING AND CONCEPT OF COMMERCIAL ARBITRATIONS:

"Honest men dread arbitration more than they dread law suits."[1] The notion articulated in this statement is gradually changing by the cause of future course of business activity needs to solve accordingly. Modern business community cannot tolerate delay on settlement of dispute and they are aware of delay on formal judicial system. Hence the commercial arbitration as an alternative means of private dispute settlement which provides expeditious and expertise forum is growing up as a civilized way of resolving the many differences of opinion which may arise as a normal incident of commercial life. As a result, concept of commercial arbitration service has also been growing in Nepal.

It is an alternative mechanism for resolving of disputes different from traditional and established judicial system. It could not define historically. However, there are certain features usually found in arbitration they are: the need for an agreement to refer a matter to arbitration, the privacy of the proceedings, adjudication and the finality of the decision. These are the accepted and common principle of arbitration. Especially in commercial disputes both parties wish an effective, amicable, inexpensive and expeditious manner for setting civil disputes which is quite impossible from the prevailing traditional mechanism of justice due to their working manner, resources and lack of other technical expertise. Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matters in difference between parties.[2] Arbitration is an effective method for the settlement of commercial dispute. It is a process of resolution of dispute which arises between two or more parties of an agreement or a contract in which a neutral third party (a person or group of persons) called the arbitrator renders a 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. So, there is possibility of compromise and in the case of disagreement, the arbitrators can render award of binding nature.

2) CONCEPTUAL DEVELOPMENT OF COMMERCIAL ARBITRATION IN NEPAL:

Nepal introduced the statutory recognition to the arbitral process of dispute settlement only in 1958. But pre-statutory legal history of Nepal also cannot be undetermined, mainly because of the two reasons: Tuman in Kirat period, Panchali in Lichhivi period, Pancha Pradhan in Malla period and

1 Anthony Walton, *Russell on Arbitration*, 19th ed., Stevens & Sons, London, quoted from Robertson's History, 1979, p.1
2 *David St. John & Sutton, Russel on Arbitration, Sweet & Maxwell, London, 1997, p.3*

Kachahari in early Shah Regime, though were political bodies, engaged themselves as people's court in dispute settlement at grass root level.[3] Settlement of dispute among the Nepalese businessman in Tibet (Kothi Mahajan) by Kaji Bhim Malla in 1445-50 BS is considered a notable event in Nepalese legal history of arbitration.[4]

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 villagers to render an impartial decision in the settlement of disputes between the members of villages. Since early times he decisions of Panchayats were acceptable and binding on the parties. Panchayat as private tribunal was a different system of arbitration and was subordinate to regular court of law.

In the Lichhavi period, the Panchali which was known as pancha seva, was empowered to decide disputes at the local level. This form of dispute settlement mechanism was practiced for a long period should be considered as the foundation of the concept of the arbitration in Nepalese context, but now the same as the modern notion o arbitration. In Nepal, the concept of arbitration in its modern sense was first found in government contracts.[5]

The history of modern notion of commercial arbitration in Nepal is brief. Before the enactment of general legislation on commercial arbitration in 1981, Arbitration Act, 2038 B.S., was the first legislation that provided comprehensive provisions governing the entire arbitration process for voluntary arbitrations. Before, this act arbitration provisions were scattered around in different legislation.[6] Such a provision first appeared in section 9 of the current Development Board Act, 1957 which provided provision for the resolution of a dispute under a contract which the board is party.[7]

The Arbitration Act, 1999 repealed the Arbitration Act, 1981 and came into force on 15th April, 1999. Arbitration Act, 1981 was the first comprehensive general legislation on commercial arbitration, which aimed to govern modern arbitration in Nepal. Before the enactment of that act in 1981 all the disputes relating to contractual relationships were adjudicated by the regular court of law excepting to certain specific statutory or ad hoc arbitration held at different times. Since the commencement of Arbitration Act, 1981 the regular court are not entertaining any cases relating to arbitration, in so far as, their jurisdiction has been limited to certain interventions in arbitral proceedings of the tribunals before or after rendering ward.

In present context the globalization of trade and commerce and liberalization created need for effective implementation of economic factor. Is realized that the old arbitration act 1981 is not effective

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3 *B. Khanal, Judicial System of Nepal: An Historical review, 2nd ed., Athrai Book Store, 2050,pP.11*

4 *Genendra Dev Pathak, 'Arbitration', Nayadoot, No. 22, NBA, Nepal, 1977, p.23*

5 *Dr. Bharat Bahadur Karki, 'UNICTRAL Model Law on International Commercial arbitration (1985) and Nepalese Arbitration Law', NEPCA Half Yearly Bulletin, No. 8, 2061*

6 Dr. Bal Bahadur Mukhiya, Comparative Jurisprudence: Theories and Trends of Jurisprudence, Social Economic and Political Dimensions of Law, 1st ed., Mrs. Malati Mukhiya and Agam Mukhiya, Kathmandu, 2004, p. 216

7 *Bed Prasad Uprety, 'Evolution of Commercial Arbitration in Nepal: Issues and Challanges', NJA Law Journal, vol. 2, Ramshah Path, Kathmandu, Nepal, 2008, p.208*

enough to meet the person daily requirements. The multinational companies, enterprises are pouring in Nepal in the field of banking, insurance, electricity, telecommunications etc. There are commercial activities and the dispute shall be determined and settled in accordance with the Arbitration Act, 1999.

There are some weaknesses in the Arbitration Act, 1981 such as; It could not address the need of liberal economy that the country followed in the decade of 1990s, the Arbitration Law was not based on UNCITRAL Model Law, 1985, it lacked the provisions of enforcement of international or foreign award, it could not comply with the fairness and speediness required in the arbitration process, it allowed excessive involvement of the court in arbitral process. There are various reasons for the replacement of the old Arbitration Act, 1981, amongst which are the basic ones as its ineffectiveness and inadequacy,[8] and others related were;[9]

- Incompleteness and inadequacy of the Act, by which the defaulters were benefited.
- Unnecessary delay and interference made by the courts in the arbitral process.
- Appointment of insufficient arbitrators lacking knowledge of arbitral process and who often favoured to their nominators.
- Paucity of literatures relating to arbitration.
- Lack of institutions supporting arbitrations.
- Drafting of defective arbitration clauses in contracts.
- Lack of law providing action against the biased arbitrators and
- Lack of proper arbitral knowledge among the judges, arbitrators and lawyers also.

The arbitration Act, 1999 is based on UNCITRAL (United Nations Commission on International Trade Law) Model Law and also incorporates provisions compatible with the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958, as it has been applicable to Nepal since 2nd July, 1998.

Arbitration Act, 1999 encompasses some important characteristics of arbitration. Such as; Principle of competence and separability, non-intervention by the court in matters of arbitration agreement, fairness and speediness in the arbitral process, enforcement of domestic and foreign arbitral award by the court limited grounds for setting aside of the arbitral award, party autonomy on choosing law, language, place and procedures of arbitral process etc.

3) EVOLUTION OF SPECIFIC LAW OF COMMERCIAL ARBITRATION IN NEPAL:

(a) Arbitration Act, 1981

Domestic commercial arbitration law was evolved in Nepal by Arbitration Act, 1981 (2038). Under this Act, any disputes of a commercial nature arising out of all agreement may be settled through arbitration as provided for in such an agreement. If the agreement providing for arbitration fails to

8 *Bharat Raj Uprety, 'Issues raised by Arbitration Act, 1999', Nyayadoot, Vol. 30, Nepal Bar Association, Kathmandu, 1999, p.23*

9 *Prof. Dr. Bharat Bahadur Karki, 'Changing Dimensions of Legal Regime of Commercial Arbitration of Nepal', Annual Survey of Nepalese Law, Vol. IV, Nepal Bar Council, Kathmandu, 2004, p.3*

provide rules to determine the number of arbitrators or to provide the rules governing substantive or procedural law, provisions of the Arbitration Act would apply as default legal rules. There were many legal inadequacies and lacunae, and the Act was silent on the procedure of arbitration proceeding, appointment procedure of arbitrators, time limitations to request in the court for appointment for arbitrator etc. are few of them. The Act had not provided the provisions regarding to applicable law, language seat etc. Similarly, the Act had not empowered tribunal to determine its jurisdiction according to doctrine of "Kompetenz-Kompetenz". Similarly, the old Act had ignored to "Doctrine of separability" in the Act. There was lack of adequate "Party- autonomy" in the Act. The intervention of the court in arbitration is against the spirit of arbitration but Act had not minimized to unreasonable intervention of the court. The Act was not aimed to make arbitration more fair, speediest and accountable. The requirement of reasoned award had not imposed in the Act. The procedure and conditions to enforce foreign arbitral award was not comprehensive and according to the international standards of New York convention, 1985. Despite these inadequacies and lacunas, the whole Act was not according to standards of international commercial arbitration, in the context of economic liberalization process of Nepal, it was essential to reform in its laws as well as policies. So, that Act was subject to heavy reforms. Then it becomes urgent to liberalize to its legal environments and policies accordingly. In this context, accusation of the New York convention by Nepal is one of the elementary causes to enact the new Arbitration Act, 1999 accordingly.

(b) Arbitration (Court Procedure) Rules, 2002

The rules deal with procedural matter relating to Arbitration Act, 1999. Under the delegation of power to make rules the Supreme Court of Nepal prepared this rule. The rules clarified and prescribed the provisions in respect of court fee, arbitration panel, interim order, annulment and enforcement of foreign and domestic award etc. which helps to facilitate arbitration process (facilitated by NEPCA).

(c) Arbitration Act, 1999

Why this Act is needed in the present context? It can help to provide answer of following questions and observations:

There are various reasons for the replacement of the Arbitration Act, 1981, amongst which the basic one is its ineffectiveness and the others related to it were: (1) incompleteness and inadequacy of the Act, by which the defaulters were benefited; (2) Unnecessary delays and interferences made by the courts in the arbitral process; (3) Appointment of inefficient arbitrators lacking knowledge of arbitral process and procedure who often favored to their nominators; (4) lack of institutions supporting arbitrations; (5) paucity of literatures relating to arbitration; (6) drafting of defective arbitration clauses in contracts; (7) lack of law providing action against the biased arbitrators.[10]

The Arbitration Act, 1999 has enforced in since 15 April 1999. In very short span of time it is difficult and impracticable to seek problems within the Act. Similarly, it is not sufficient time to evaluate the practical problems in the course of following the Arbitration 1999. It is true that many legal as well as practical problems have solved by this new Act, 1999. It has already mentioned that the Act is adoption

10 Prof. Dr. Bharat Bahadur Karki, 'Changing Dimensions of Legal Regime of Commercial Arbitration in Nepal', Annual Survey of Nepalese Law, 2003, Vol. IV, Nepal bar Council, Kathmandu, 2004, p. 9.

of the UNICITRAL Model Law of International Commercial Arbitration, 1985.Though, in the Act, it has made appropriate modifications. However, the Act is not beyond the fault. A bitter reality of our practice is that, the system of dispute resolution by alternative means of dispute resolution is not so advance in Nepal. So that, some practical problem has been created form outside of the Act. Similarly, lack of perpetual and attitudinal knowledge among the appliers of the arbitration law is one of the critical problems in Nepal. It is essential to establish the fair system of arbitration to support the economic liberalization policies of Nepal.

In the context of unification and harmonization to rule of arbitration of different legal system, it is appropriate to compare the Nepalese law of arbitration with law of foreign country. Though, it is rare to find extra – ordinary differences among the law of arbitration of the most countries who have adapted to the UNCITRAL Model law. There may be different in structure and contents in the arbitration laws among the most countries of the world, because state has power to appropriate modify into the UNCITRAL Model law.

In the context of unification and harmonization to rule of arbitration of different legal system, it is a approach to compare the Nepalese law of arbitration with law of foreign country. Though, it is rare to find extra – ordinary differences among the law of arbitration of the most countries who have adapted to the UNCITRAL Model law. There may be different in the world, because, state has power to appropriate modify into the UNCITRAL model law.

It is obvious that, the modern trade and commerce is not limited within the local boundary of any nations. But, in the context of the Nepal, still it is necessary to take care of the trade and commerce joke. In this regard it is important question that whether the adoption of the new of new Arbitration Act, 1999 is favorable and adequate to the domestic businessmen? Whether this new Act, can fulfill the legal inadequacy and legal as well as practical problems, which were not solved by old arbitration Act, 1981? Where the new Act is fully able to cope the modern trends and achievement of international commercial arbitration? Whether this Act is sufficient to establish the fair arbitration system in Nepal? And in totality, whether this new Act can maintain to the norms and spirit of the arbitration? Similarly, whether this Act able to minimize to the unreasonable intervention of the court? Whether this Act is able to maintain to the norm of party autonomy? Whether this Act is able to sufficient to provide procedural law for domestic as well as international commercial arbitration? Whether this Act is adequate to enforce in other legal environments to support the fair and comprehensive system of arbitration?

This is prevailing law of law and mostly influenced by UNCITRAL Model law. Arbitration agreement is defined as "An agreement between the parties to refer present or future disputes arise or to be arisen in respect of defined legal relationship that may be contractual or not"[11] but not defined the commercial arbitration on this new legislation also.

Award given by arbitrator, conduction fraud, bribery or other malpractices are appropriate reason to make void the award by court universally but this new law is silent in this regard directly. Though,

11 Arbitration Act, Nepal, 1999, s 2 (a).

we have to see the other section of this legislation to curb this problem. Section 30(3) (b) of this Act provides that to protect the public interest and policy court has power to quash the award. Fraud or bribery or other malpractices are such phenomena which directly hamper the public morality as well as breach the public policy. The term, "public policy" is defined as "Broadly, principles and standards regarded by the legislature or by the courts as being fundamental concern to the state and the whole of society More narrowly, the principle that a person should but be allowed to do anything that would tend to injure the public at large."[12] So, in this regard, we can conclude that court has given the duty by legislation itself to control such misconduct in the name of public policy if arbitrator's decision appeared so but till the date no interpretation found in this line in our context.

It is mandatory for the parties to submit their dispute contractual in nature that may be commercial nature or not, does not make any difference, in front of arbitrator if so provided in the arbitration agreement or arbitration clause.[13] This provision is broadening the scope of arbitration. But for the court referred arbitration, a dispute should be of both nature could not be solved through the court commercial and civil.[14] So that, every dispute even of civil nature could be solved through the court referred type of arbitration as per this new law. Some dimensions of Arbitration Act, 1999 are discussed here in blow:

i) **Severability clause**: This is a new provision of arbitration law articulated in section 16 of 1999's Act. It also called severability clause under the principle of contract. As per Black's Law Dictionary this clause is known as "A provision that keeps the remaining provision of a contract or statute in force if any portion of that contract or statute is judicially declared void, unenforceable, or unconstitutional."[15] We must know the severable contract to understand severability clause in regards to arbitration. Severable Contract means "A contract that includes two or more promises each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promissory in breach of the entire contract."[16] Here, if it is provided that arbitration clause or agreement is embodied with original contract that is supposed to be separated ipso facto from original subject of contract even if it is invalidated original one by arbitrator or court.[17]

ii) **Enforcement of Arbitral Award**: - Enforcement of international commercial arbitral award is much challenging than domestic award in previous days but now by the result of harmonization under treaty law it became easier yet not completely successful. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 which was forced since June 7, 1959[18] has acceded by Nepal on October 1997.[19] As per section 34 of our prevailing Arbitration Act to enforce international arbitral award in Nepal there must be mutual provisions of law in the nation of plaintiff.

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12 Black's Law Dictionary

13 Arbitration Act, Nepal, 1999, s 3 (1).

14 Arbitration Act, Nepal, 1999, s 3 (2).

15 Black's Law Dictionary

16 Ibid

17 Arbitration Act, Nepal, 1999, s 16 (3).

18 NEPCA, International and domestic Arbitration Kit, NEPCA, KTM, 1998, p.2.

19 Prof. Dr. Bharat Bahadur Karki, 'Changing Dimensions of Legal Regime of Commercial Arbitration in Nepal', Annual Survey of Nepalese Law, 2003, Vol. IV, Nepal bar Council, Kathmandu, 2004, p. 9.

iii) **Public Interest Clause**: - Section 30 (3) (b) of present Act states that an award can be set aside by court on the basis of "public interest" If the award is against it. The term "public interest" is never defined by our judiciary or any legislation and also not easy too. "This is fraught with dangers. It should be limited to "public policy" as propounded by UNCITRAL Model Law"[20] unless the term is not explained. Public interest and public policy is not the same thing but they may overlap.[21] In UK, both terms are adopted in section 1 (b) and 33 of Arbitration Act, 1996. But, "Public interest has been explained in the DAC Report in terms of the mandatory duty imposed on a tribunal by s. 33 of the Arbitration Act, 1996."[22]

iv) **Immunity: -** Regarding the arbitral immunity of arbitrator, this act is very silent and court has not yet developed any standards in this relation. In the case of M.D. Chandra Krishna Jha v. pro. Dinesh Bhakta ET. al. (2059), Supreme Court has ordered to submit counter affidavit to the members (arbitrators) of arbitral tribunal. What will be the policy implication by this tendency of court? Nobody will be ready to be an arbitrator in future because he may face litigation even if he is acting in good faith and fairly. So that, some standards should be developed. As a general rule, an arbitrator enjoys testimonial immunity and may not be required to testify regarding the merits of an award. There are, however, exceptions to this rule.[23]

4) JUDICIAL INTERPRETATION REGARDING ARBITRATION IN NEPAL:

1) B.S. Dutta co. V. Kankai Irrigation Project[24]

The dispute in the foreside case was regarding construction contract between petitioner Construction Company and Kankai Irrigation Project, a government institution. The petitioner cannot complete the work in the stipulated time. The contractor request to extend the time period and the government Institution reject the request of the contract was breached.

Regarding in this case the Supreme Court while deciding upon the issue observed that the ICC rules of Arbitration were not automatically applicable to any arbitration like National Laws, and the Arbitration Rules regarding the settlement of international trade disputes which are not raised by the contract cannot replace the existing National laws.

2) Department of Roads et. al. vs. Waiwa Construction Pvt. Ltd.[25]

The dispute in the a foreside case regarding a construction contract between Department of Roads and contractor Waiwa Construction to make Kalikot Jumla Road. During the construction of the road the situation of the country was not normal. Due to this situation explosives could not be available for blasting rock; excavation of rock could not be performed by blasting of the rock which causes the delay in execution of work and raise in cost to perform work. A claim made by a defendant contractor for

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20 Dr. Bindeshwar Yadav, 'Problems Faced in Nepal in the settlement of disputes through Arbitration', Half Yearly Bulletin, NEPCA, Vol, 11, KTM, 2059, p.10.

21 David & St. John Sutton, RUSSEL ON ARBITRATION, Sweet & Maxwell, London, 1997, p. 17.

22 Ibid

23 Jacqueline M. Nolan-Haley, Alternative Dispute Resolution, St. Paul, Minn., West Publishing Co., 1992, p. 154.

24 B.S. Dutta co. V. Kankai Irrigation Project, NKP 2067, Vol. 6, Decision No. 8397, P. 1021.

25 Department of Roads et. al. vs. Waiwa Construction Pvt. Ltd., NKP 2067, Vol. No. 10, Decision No. 8479, P. 1685.

extension of the period and revision of rate for manual excavation of rock which was greater than initially agreed rate. The Department of Roads was not satisfied with the decision of the adjudicator and then approached to arbitrator. There also case was decided in favor of the contractor and Appellate Court also in favor of the decision of arbitrator.

In this case Supreme Court categorically stated that "Arbitrator is the last judge and court is not competent to examine the facts of the dispute or decision of the arbitrator". The court observed that courts can examine an arbitral award only to limited extent as provided for in the Act, namely on the following grounds as laid down in Section 30(2),[26] i.e. i) Capacity of the parties to contract ii) Serving of due notice about arbitration process and appointment of arbitrator, iii) Where the arbitrator decides on matter not referred for arbitration or decides beyond its jurisdiction and iv) where agreement has been signed contrary to the laws of the country, or the procedure appointment of arbitrator is contrary to the agreement or where is no such agreement, if the law has contained incapability of Nepalese law and public interest and public policy.

3) Vikram Pandey the authorized representative of Kalika, Swachhanda Kanchanjungha JV vs. Ministry of Physical Planning and Works, Department of Roads[27]

In this case Supreme Court observed that since UNCITRAL Arbitration Rule 1(2) provide that in case of conflict between the UNCITRAL Arbitration Rules and National laws in such situation National Law will prevail. Accordingly, section 7(2), Arbitration Act, 1999 would prevail and the arbitrator could for the parties to choose the applicable procedure under section 3 of Arbitration Act 1999 regarding appointment of the authority. The result of making such blanket observation would be that freedom accorded to the parties by the act to choose procedure to be made redundant and the procedure laid down in the act would always supersede the UNCITRAL Arbitration Rules.

4) National Construction Company Nepal vs. Appellate Court Patan[28]

The dispute in the foreside case was regarding construction contract between National Construction Company Limited, a government owned Construction Company and Friend's Construction Pvt. Ltd., a construction company and Janakpur Zone Hospital regarding construction of hospital building. The contractor Friends Construction was not able to complete within the limitation and further after passing of a considerable amount of time after the final payment in the matter, made a claim for additional amount of money with the petitioner National Construction Company then what was agreed to in the contract. The agreement had a clause referring any dispute in the matter of arbitration and petitioner Government Company however refused to participate in the process and refused to appoint its choice of arbitrator. The contractor approached the Appellate Court accordingly served notice on the petitioner government company filed a petition before the Supreme Court seeking to quash these proceedings was illegal as it is in the matter and that claim was barred by limitation.

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26 Arbitration Act, Nepal, 1999, s 30(2).

27 Vikram Pandey the authorized representative of Kalika, Swachhanda Kanchanjungha JV vs. Ministry of Physical Planning and Works, Department of Roads, NKP 2067, Vol. 8, Decision No. 8437, P. 1346

28 National Construction Company Nepal vs. Appellate Court Patan, NKP 2065, Vol. 2, Decision No. 7933

The Supreme Court after discussing several International cases inter alia held that if an agreement contains an arbitration clause the same could not be frustrated by any party for any reason. The court also held therein that arbitration clause was separate and independent provision and that it would survive any breach or termination of the contract. This finding was clearly established the importance of arbitration clause and those arbitration clauses will be taken seriously by the courts.

5) Kailash and Company v. HMG Ministry of Education

Supreme Court of Nepal has given verdict in regards of different issues of commercial arbitration. Supreme Court held that the division bench of appellate court is the proper authority to hear the arbitration relating issue.[29]

6) Anangaman Sherchan v. Chief Engineers of RTO

The basic difference between arbitration and litigation is recognized by court by saying that it is a special means of dispute settlement rather than litigation to provide legal remedy to the suffering party.[30]

7) G.M. Water supply corporation v. middle regional court

Court has provided very limited role by law in arbitration matter. This notion was supported by court by stating that there will be no right to appeal against the order of appointment of the arbitrator.[31]

8) On behalf of NEE, Kriti chand v Appllate Court Patan

Another dispute decided by Nepalese Supreme Court in the question of arbitrator's ad hoc order regarding to stop bank guarantee was held ultra- virus and illegal. Court said that arbitrator has no such legal power to stop bank guarantee because it is a matter of different contract between plaintiff and Nepal bank Ltd. as third party.[32] This case was decided by court under the writ jurisdiction. This decision was held on B.S. 2055-11-25 and Arbitration Act, 2055 was promulgated on the date of B.S. 2056-1-2 by stating in section 21(1) (D) that arbitrators has right to take bank guarantee only from foreigner party if there is any.

9) Surya man v. Cottage and Rural power Development Committee

Regarding the Statutory arbitration, the Supreme Court of Nepal held that if the Act itself pronounced that dealing with the party under the Act arises any dispute needs to settle through the arbitration is a mandatory provision of law and needs to follow accordingly.[33]

10) ON Behalf of Flowra Nepal Pvt. Ltd. Chandra Kumar Golcha v. Appellate Court Patan

On behalf of flower Nepal Pvt. Lt. Chandra Kumar Golcha v. Appellate court patan et. al., Supreme Court of Nepal held that appellate court has only such rights to appoint the arbitrator in case of appointment of arbitrators through court procedure because here parties are failed to appoint arbitrator. Besides this court has no any jurisdiction to inter into the merit of dispute.[34]

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29 Kailash and Company v. HMG Ministry of Education, quoted from NEPCA Bulletin, vol. 7, Kathmandu, 2057, p. 24.

30 Anangaman Sherchan v. Chief Engineers of RTO, NKP 2020, Vol. 11, p. 201.

31 G.M. Wate supply corporation v. middle regional court, NKP 2044, Vol. 11, p. 201.

32 On behalf of NEE, Kriti chand v Appllate Court Patan et. al. (2055), precedent Laid down by Supreme Court, Part 4, 2063, p. 548.

33 Surya man v. Cottage and Rural power Development Committee, NKP 2040, p. 291.

34 ON Behalf of Flowra Nepal Pvt. Ltd. Chandra Kumar Golcha v. Appellate Court Patan et. al. (2061), Precedent laid down by Supreme Court, part 4, at 276 (2063).

11) On behalf of Agriculture Goods Corp., M.D. Chandra Krishna Jha v. Pro. Dinesh Bhakta

Since the general legislation enacted in 1981, it was paradoxical that what sort of judicial control or intervention is necessary with reference to arbitration award. In this regard, two issues were unsettled viz; (a) what about writ jurisdiction in arbitral award? (b) After the first instance of judicial control on the limited aground of arbitration legislation, whether or not right to appeal for dissatisfies party should be provided. Arbitration law was silent on the is two issues continuously though Supreme Court has tried to develop some standard on the basis of creative interpretation in line with international practices and principle of ADR. The attempt of court clearly manifested in the case of M.D. Chandra Krishna Jha v. Pro. Dinesh Bhakta et.al. (2059), however, is not satisfactory for the settlement of commercial dispute. In this case court held that if there is no any alternative remedy upon the Appellate court decision regarding the arbitration, writ jurisdiction could be prevailed in Supreme Court.[35] By this precedent, it ultimately produces that every case falls within the section 30 of present general Arbitration Act, 1999, needs to provide writ jurisdiction on Supreme Court if parties are interested to check the validity of award which is not the intention of parliament. Beauty or advantage of commercial arbitration relies on its speedy, less procedural, decision by experts and less costly informal justice system but in the other hand we are making its process lengthier by providing writ jurisdiction on every case falls under section 30 of Arbitration Act, 1999.

However, in aforementioned case, the court strictly rejected the notion of appeal upon the appellate court decision which is a very positive interpretation to facilitate and promote commercial arbitration in Nepal. Since then our legal system is also providing stability in this regard which gives sound and predictable message towards international or domestic community. Supreme Court thus appear to be very clear regarding the finality of any matter referred to arbitration and take particular care that the court do not intervene in such proceedings outside the mandate of the Act.

5) FINDINGS:

- Arbitration, as a method of commercial dispute resolution is popular because it provides party participation, finality, enforceability, cost reductions, privacy, speedy relief, more amicable post-dispute relations, and a neutral and expert forum.
- The arbitrator has very broad power under section 21 of the Arbitration Act, 1999 to issue interim orders but it does not provide for measures to insure execution of such power. The act is quiet as to measure of penalties to be given to parties who disobey the orders of arbitrators.
- The modern international commercial arbitration as a technocratic mechanism of dispute settlements, with a particular set of rules and doctrines, is began to emerge in 20^{th} century. Recently it is obvious fact that arbitration is the dominant method of settling international disputes; and at the same time it has become and almost self- sufficient institution with a worldwide consensus on the principles such as party autonomy, fair hearing and equal treatment to the parties, independences and impartial arbitrators, limited court interference, recognition

35 On behalf of Agriculture Goods Corp., M.D. Chandra Krishna Jha v. Pro. Dinesh Bhakta et.al., NKP, 2059, p. 285.

and enforcement of award etc. However, it is still relied upon the domestic legal framework and formal court for several purposes.

- Adoption of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 is currently the most successful multilateral convention in international commercial law. However, application of the New York Convention does not affect the validity of provisions of other international treaties, nor the convention replaces national law governing the enforcement of foreign arbitral awards.
- Further the most prominent development in relation of development of international commercial arbitration was the establishment of UNCITRAL; this was established by a resolution of the UN General Assembly in 1966 to promote harmony and unity in international trade. And important development spread of international arbitration was the adoption of the arbitration rules by the UNCITRAL in 1976. Rules have been acceptable in large segment by almost all legal system of the world.
- In addition, UNCITRAL in 1985 issued a Model Law on International Commercial Arbitration that has influenced the modern national arbitration legislation of various countries and played a significant role to harmonizing the disparate national laws on arbitration.
- However, the New York Convention regarded the state would remain the source of arbitration law. Likewise, The Model Law is also not complete, it must be supplemented by additional provisions at time of enactment and it has by most states that have adopted it. The Model Law is currently amended in 2006 considering several measures that are accepted to enhance its effectiveness.
- Nonetheless, because of dependency of New York Convention on national laws, the enforcement procedure of foreign awards is considered the weakest link in the chain of international dispute resolution. Still, there are dominant place of national legislation because the awards are binding and enforceable only in accordance with the rules of procedure in force in the host state.
- Since the New York Convention provides room to domestic law of each county to determine the kind of control of arbitral awards, so there are disparities in national legislation which as regards the types of recourse against an arbitral awards available to the parties presents a major difficulty in harmonizing international arbitration legislation even after enforcement of New York Convention.
- The most significant development in national legislation was the enactment of a new Arbitration Act, 1999, which has influenced by UNCITRAL Model Law 1985, has ensured to conduct international commercial arbitration in Nepal without unwanted judicial instruction. Following the Model Law, the act has highly regarded to the universally desired norms of harmonizing process of the arbitration. Such as, party autonomy, fair and equitable treatment to the parties, limited and clear grounds of judicial supervision, enforcement of foreign awards etc.

- The grounds for setting aside as set out in the Model Law as well as Arbitration Act, 1999 are almost identical. An application for setting aside may only be made to a court in the state where the award was rendered whereas an application for enforcement might be made in a court of any state. For that reason, the grounds relating to public policy and non- arbitrability still may vary in substance with the law applied by the court.
- Arbitration (court procedure) Regulation, 2002 has prescribed same fees for the enforcement of the awards made by either domestic or foreign arbitrators. It has also not provided substantially more onerous conditions of the recognition or enforcement of foreign awards in comparison of the domestic awards. In this light, the Nepalese law has given a confirmation to the obligation so as provided by the Article III of the New York Convention, 1958.
- Major problem of Nepalese arbitration system is the delay in court procedure, which has put the objective of arbitration into peril. The time consumed by the court is alarmingly high even now as in the past.
- Judiciary is not reforming, it is most vital are of commercial arbitration. The provisions of Arbitration Act are sometime seen to be exercise by the Appeal Court Judges without a proper understanding of provisions. So, there is not improvement of disposal and cases which are locked between the Arbitrational tribunal and Courts, where the parties instead of getting justice imperiously have to bear with unreasonable and considerable delays.
- Local self-Government Act, 1999, which has mentioned provision of arbitration to settlement of disputes of village and municipal areas but until now but lack of rules and regulations the Act is not active so to settle small disputes the people are compelled to go the court by walking 2 or 3 days, it is being very difficulty.
- Code of Conducts is not made which is necessary for the arbitrators for the satisfied to the parties and justice

6) CONCLUSION:

Arbitration as a privatized system of dispute resolution has the great importance in the present context of free trade, liberalization, privatization and globalization and inter-dependent world economy. After the establishment of WTO and its worldwide influence in the world trade and world economy, and the expansion of trade and commerce, the importance of arbitration is increased both in national and international level. Arbitration is the submission of a dispute to a neutral, non-judicial third party (arbitrator) who issues a binding decision by resolving the dispute. In another words, arbitration is a procedure in which a dispute is submitted, by the agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties choose for a private dispute resolution procedure instead of going to court. To arbitrate means to settle a dispute between parties by referring it to an arbitrator instead of going to court.

There are various methods of dispute settlement mechanisms like state provided mechanism as court

adjudication, alternative methods as arbitration and conciliation. The decision is one that depends on the relative advantages and disadvantages of the available methods. As the number of the international disputes increases so too does the use of arbitration to resolve them. The non-judicial nature of arbitration makes it both attractive and effective for several reasons. Today, it is an uncontested fact that arbitration is the dominant method of settling international commercial disputes because of more or less uniformities and harmonization of the arbitral process. Several arbitral institutions are emerged to provide effective and expertise services in the fields. It has developed as a more technical and sophisticated mechanism of international commercial disputes settlement. The practice of settling disputes through arbitral intuitions still lacks in Nepal.

The ambition of the business-friendly arbitration law has been the minimum control and maximum assistance of the court to arbitration system. Modern approach of arbitration law is minimization of the participation of the court in arbitration system to the lowest level because arbitration is rooted in the principle of freedom of contract. So, the parties can exclude the jurisdiction of courts and choose arbitration as dispute settlement method by means of arbitration agreement.

The Arbitration Act, 1999 which is based on UNCITRAL Model Law, has in order to address the present momentum of global economic relations with the Nepalese economy, tried to incorporate improvements on old laws. But the act has many deficiencies which makes it difficult to provide an effective mechanism for the settlement of commercial disputes. As the member of WTO, Nepal has to improve the act in accordance with the changing national and international scenario.

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 under the public international law

7) RECOMMENDATIONS:

- The Arbitration Act 1999 has been enacted in the line with the UNCITRAL Model law, but the objective of the act has not been spelled out in its preamble, so it has to be clarified in its subsequent amendment.
- Silence of the act to define the words "commercial", "arbitration", "award", "international arbitration", "foreign award" have necessitated their definitions to be made in the act.
- Lack of definitions of the words "public policy" and "public interest" used in section 30 of the act, has been a subject matter of ambiguity for the reason that there is a danger that by exercising its discretionary power of interpretation the court may reject any award. Therefore the words should be precisely defined.
- Institutional Arbitration need to be recognized in line with article 2(a) of the Model Law. The government should encourage to private sectors in all segments of economic activities and help to establish and strengthen the institutions of the respective fields.
- Under the modern arbitration law, award is not subject to appeal on the merits. There is mo

authentic authority to take charge of supervision over the performance of the arbitrators, which may cause of injustice and malpractice in the arbitration process. In his regard, code of conduct for arbitrators should be provisioned.

- Arbitral tribunals should have the primary power to order provisional and conservatory measures. The state courts should not interfere on such matters rather it must provide assistance to arbitral tribunal upon their request, i.e. by issuing orders or letters of request.
- The Arbitration Act, 1999 does not provide space for conciliation so it is important to include conciliation proceedings along with arbitration in the act.
- Even Nepalese law regarding arbitration has been valued for being in line with Model Law; it has number of deficiencies remains which provisions are obvious to harmonize with Model Law.
- Delay on finality regarding arbitration award made by arbitrator should be avoid. For this writ jurisdiction should not entertained by Supreme Court in the name of alternative remedy in all case but make specific interpretation to address genuine issue of law not fact.
- Delay itself increases the cost. It can be reduced by speedy proceeding and schedule hearing by arbitrators. Arbitrators are engaged on their own profession and their business may postpone the date of arbitral hearing. So, it should be managed accordingly.
- Commercial bench is running in nursery phase for the dispute resolution. court mediation and arbitration is necessary for the disputing parties .so, Nepalese commercial bench should be most effective by making special man power, trainings dividing proper budgets, physical materials
- It isn't necessary to recognize any particular arbitral organization by organizations for the proceeding of arbitration. And, up to date, court is not seen reluctant to hear petition upon voluntary arbitration award.
- When making contract, every factual situation may arise in future can't be incorporated. It indicates that parties must be aware in the making of 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.
- Both, arbitral and testimonial immunities are necessary for arbitrators. For this, it needs to develop certain rule or standards which may enable the arbitrators to think that they are protected when acting in fair manner.
- Law should be clear in regard to court appointed umpire and third arbitrator.

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CONSTRUCTION DISPUTES: HOW TO RESOLVE THEM

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Introduction:

How do construction disputes arise?

Before we delve into ways to resolve construction disputes, it is essential to closely assess what causes construction disputes. Construction disputes stern as a result of disagreement between the parties involved in a contract. The violation may be perceived or confirmed violation of the contractual obligations by either party. The three primary factors that lead to construction disputes are issues with contracts, behavior, and contractual problems.

Issues with contracts:

Typical forms of contracts pre-describe the obligations and risks each party is willing to bear. Due to the rigid nature of such agreements, they become unsustainable over extended periods, and it forces the parties involved in the contract to operate under uncertain terms. When conditions of uncertainty arise in a contract, they lead to a shift in the risks and obligations among the parties involved. Consequently, disputes may occur due to the perceived change in risk allocation in the contract.

Behavior:

Since contracts do not cover every eventuality, problems may arise in areas where the contract remains silent. When such disputes arise, parties may want to gain as much as possible from each other. Equally, the parties may have different perceptions of the facts surrounding the contract. One party may have unrealistic expectations, thus affecting the ability to reach amicable agreements. Also, a party may refuse to perform their contractual duties in a bid to avoid liability.

Project Uncertainty:

Project uncertainty is the difference in the amount of information needed to start a project and the available information. The information required depends on the complexity of the performance requirements, project scope, time, and budget. The information available is dependent on planning effectiveness, collection, and interpretation of the information at hand.

When there is a high level of uncertainty, the stakeholders cannot plan for every project detail before work commences. With such a high level of uncertainty, project details and specifications may change, leading to disputes.

Common types of construction disputes:

Due to the nature of construction projects, there are various ways in which construction disputes can arise. Below are some of the common types of construction disputes.

1. Change of finish date:

All of us are familiar with the adage that "time is money." In modern construction projects, this adage is also true. A change in the finish date may lead to increased project costs. Contractors may incur additional fees from idle labor or equipment. Rental charges of equipment may accrue even though the equipment is lying idle. Supervisors and workers may also be idle, leading to unrecoverable costs. Therefore, these changes in finishing dates put a lot of pressure on contractors and may even affect their other projects. This will result in a considerable loss in profit.

2. Delays:

When delays occur, the party responsible should issue a notice in writing, letter, or electronic mail. The written notices clarify and pass on complete information to all the involved project stakeholders. Delays bring about disputes as to who should bear the responsibility for them. Most construction contracts deal with delays by extending the time of completion. The owner can keep the rights to recover the damages from the delays from the contractor. FIDIC conditions of contracts state that a contractor is supposed to give notices on circumstances that may lead to delays beforehand, or else they may lose the rights for time extension or compensation.

3. Design:

Mistakes in design can also lead to additional costs, which become the cause of delays. There is no planning sequence followed for the release of design information, which impacts construction. Design teams may also abrogate their responsibility leaving the Contractor in harm's way to solve design problems independently. In so doing, the Contractor unknowingly assumes the risks of impending design failures.

4. Goals:

Subcontracted firms engaged in large construction contracts may employ a lot of personnel. Each of these firms may have its own goals and commitments that are not compatible with the goals of other key players in the project. As expected, this may lead to disputes.

5. Quality of materials:

Sometimes disputes may come up as a result of the quality of materials used. Specifications may be vague on the conflicts, and each party may have different views on whether the quality is in accordance to contract specifications. The parties may have different opinions as to whether the quality and craft are sufficient. This can lead to additional contract costs that may lead to many costly disputes if left unresolved.

6. Difficult projects:

The project stakeholders may need to carry out proper risk management before a project commences, and more often than not, this is not done. Projects take longer than planned if there is insufficient accounting of possible risks associated with a project's complexity. The delays and claims remove the owner's rights to claim for delays or damages.

How to resolve a dispute:

It is unlikely for a project to run from start to finish without a dispute arising. Unfortunately, most dispute resolution procedures are an afterthought by Contractors who focus on scope and price. However, it takes just one bad experience for one to handle dispute resolution more seriously. There are primarily four main methods in resolving contractual construction disputes, as discussed below.

1. Negotiation:

Usually, negotiation is the first part of dispute resolution. Negotiation is when the parties in dispute try to reach amicable conclusions between themselves before moving further to other means of dispute resolution. It is the easiest, least expensive, and could yield the most immediate productive results. If it does not deliver results, it at least maps out the actual points of disagreement so that the parties know where they stand.

2. Mediation:

Mediation is when the parties in dispute involve a neutral third party to help in resolving the dispute. Mediation is not a legally binding method of conflict resolution but is one of the most effective ways to get out of a situation before it worsens. The parties attempt to reach a just resolution outside the court before moving to other means.

3. Arbitration:

Arbitration is the method,Contractors and Lawyers prefer when it comes to dispute resolution. Most Contractors list it as the way to address disputes in contractual terms. If the parties opt for arbitration, they must choose a neutral third party with the relevant experience to bring them to an amicable solution. Unlike in mediation, the arbitrator gives the final verdict to the conflict, whereas in mediation, the mediator only assists the parties to conclude. The costs of arbitration are significantly higher, and the decisions are legally binding in some jurisdictions.

4. Litigation:

Litigation involves trials that are enforceable and legally binding. It is the most thorough, complex, and costly dispute resolution process. It is also very slow, so most parties opt for other dispute resolution processes instead.

Preventing disputes:

Disputes in construction are prevalent, and preventing a conflict is better than solving one in the first place. Sometimes parties end up aborting entire projects if they cannot make successfully deliberate on disputes. Below are some of the best ways of preventing conflicts/disputes.

1. Clear contract documents:

It is fundamental that the contract documents are as clear as brief as possible, incorporating balanced risk sharing provisions between the Employer and the Contractor. The contract specification must be clear and complete in all respects.

2. Adequate site investigations:

Design should be based on adequate site investigations to minimize disputes.

3. Clear payment terms:

Most construction projects work based on interim payment cycles. A contract should have agreed on dates where payment applications should be made, related payment notices issued, and the actual payment release. This system of predetermined payment dates and terms reduces the likelihood of disputes.

4. Communication:

Disputes also arise when the parties fail to maintain communication. Most Developers and Contractors communicate when the project commences and expect everything to run smoothly according to plan.

This is often not the case, and parties should share at every stage of the project to address any challenges that pop up during the construction process.

5. Keep records:

Having a normal gentleman's agreement is the worst mistake you can make in construction. Always ensure that you put everything in writing. Records should include notices, letters, emails, photos, and diaries. Construction is an expensive affair, and you risk losing a lot of money if you do not put everything in writing. Record keeping removes any doubts about agreements made by the parties.

6. Follow the contract:

The involved parties should ensure that they understand the contract in place with all the clauses, terms, and amendments. Most projects adopt a standard building contract and make changes to transfer the risks. These changes need to be negotiated and understood. Once both parties understand the contract, they should follow all the contract provisions uninterruptedly throughout the project's lifecycle.

Conclusion:

A project's success depends on how fast critical problems are identified and communicated to the appropriate parties to resolve them. Dispute shall be immediately resolved as far as possible, not keep pending until the construction is completed. Implementation of construction contracts with proper contract admiration helps achieve success and prevents the never-ending disputes likely to drown the project's success.

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अनुबंध समाप्ति

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सार्बजनिक खरिद प्रक्रियामा अनुबंध अथवा करार (Contract) को बहुतै ठुलो महत्व छ । "करार" भन्नाले दुई वा दुईभन्दा बढी पक्ष बीच कुनै काम गर्न वा नगर्नका लागि भएको कानून बमोजिम कार्यान्वयन गर्न सकिने सम्झौता सम्झनु पर्छ । प्राय: सबै खाले खरिद प्रक्रियामा यसको प्रयोग गरिन्छ खरिद प्रक्रियाको महत्व कुनै बस्तु, सेवा वा निर्माण कार्यको प्राप्ति हो । करारले नेपालको कानुन अनुसार कानुनी मान्यता प्राप्त गरेको हुँदा यसको महत्व अझ बढेको छ ।

सार्वजनिक निकायहरुमा प्राय: खरिद प्रक्रियाको समाप्ति पछी प्रक्रियागत तवरले अनुबंध समाप्ति (Contract Closeout) गरिएको पाइदैन । जबकी यो प्रक्रिया सम्बन्धित निकायहरुको लागि अति महत्वपूर्ण हुन्छ । यसको महत्व त्यस बेला महशुस गरिन्छ जुन बेला कुनै किसिमको एतिहासिक तथ्यांकको आवश्यकता पर्दोरहेछ ।

एक अनुबंध समाप्ति गतिविधि त्यति बेला सम्पन्न गरिन्छ, जब अनुबंधन दायित्वहरू (Contractual Obligations) पूरा भएको हुन्छ । यसमा ती प्रशासनिक कार्यहरू समावेश हुन्छन, जुन अनुबंधमा आवश्यक हुन्छ ।

यस कार्यलाई मुख्य रुपले निम्न खरिद कानुनी व्यवस्थाले उत्प्रेरित गर्दछ ।

- सार्बजनिक खरीद ऐन - (५७), (५९), (६०)
- सार्बजनिक खरीद नियमावली - (११७), (२१२), (१२३), (१२४), (१२५ निर्माण कार्य), (१२७),

उद्देश्य:

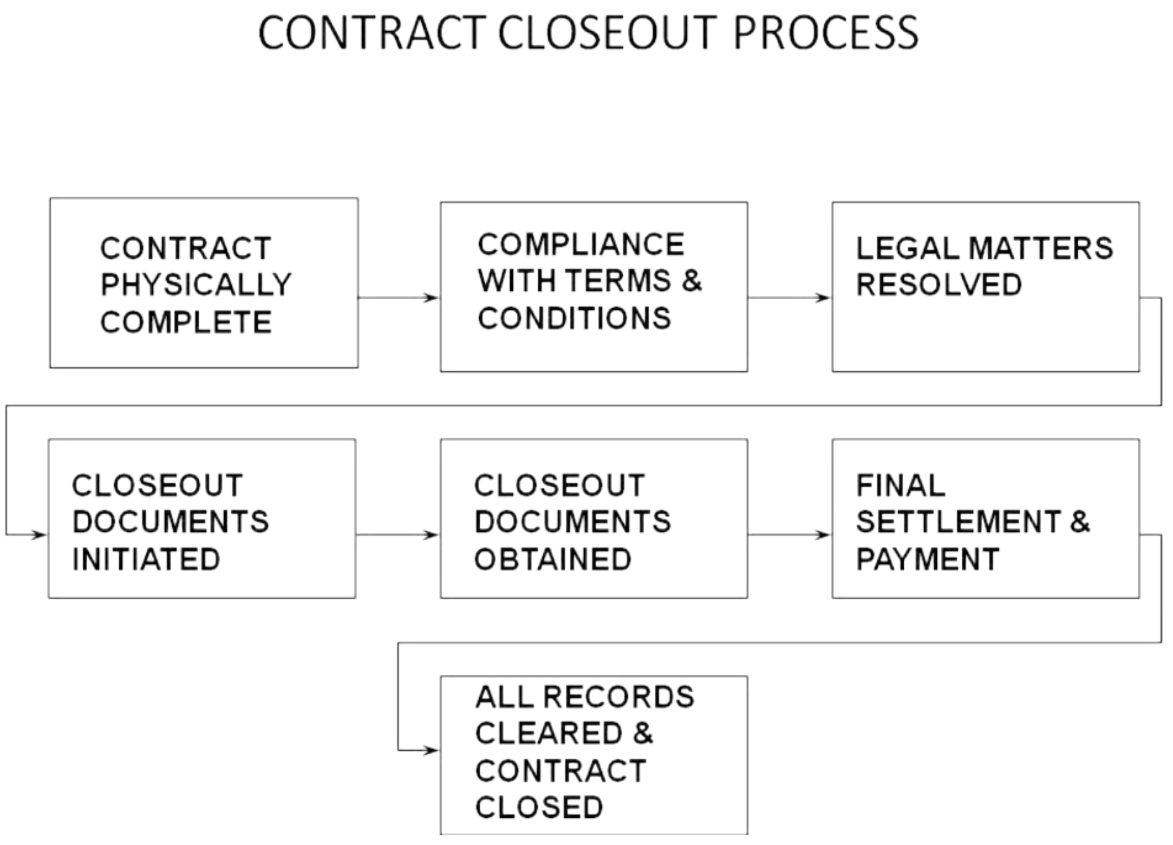
यो कार्य सम्पादन गर्नाले खरिद गर्ने निकायले अनुबंध समाप्ति अघि कागजात अनुसारका प्रक्रियागत प्रावधानहरु सम्पूर्ण रुपले सम्झौता अनुपालन भएको प्रमाणित गर्दछ ।

यस प्रक्रियाले कुनै अतिरिक्त दायित्व अथवा म्याद सकिएको कोष फुकुवा गर्न बाध्य पार्छ । त्यति मात्र होइन, यसाले सम्झौता समाप्तिको अनुशासन समेत स्थापना गर्दछ र यसले "सक्रिय" अनुबंधहरू (Active Contract) को साथसाथै भविष्यमा हुने खरिद प्रक्रियाको लागि प्रशासनिक बोझ पनि कम गर्दछ ।

कहिले गर्ने:

जब यो मानिन्छ, कि भौतिक रूपमा पूर्णत: सम्झौता अनुसार सम्पूर्ण कार्य, सेवा, मालसामान आपूर्ति, निरीक्षण र स्वीकार गरिसकिएकोछ भने वा सम्झौता बमोजिमका शर्त वा विकल्पहरू (option) को अवसान (Expire) भएको

५ वा अनुबंध समाप्त (Contract Termination) भएको छ भने र साथै प्राशासनिक रूपमा सबै प्रशासनिक तथा कानुनी कार्यहरू सम्पन्न भएर कार्यान्वयन गरिएको छ भने र अन्तिम भुक्तानी सम्पन्न भएको छ भने अनुबंध समाप्ति (CONTRACT CLOSEOUT) को प्रक्रिया आरम्भ हुन्छ ।



अनुबंध समाप्तिको लागि आवश्यक पर्ने कार्यहरूको लागि चेकलिस्टः

Technical Specification अनुसारको वर्गीकृत सामग्रीको प्रकृति (disposition) पूरा भएको सुनिश्चित गर्ने ।

- ✓ अन्तिम पेटेन्ट/रोयल्टी रिपोर्ट क्लियरेन्स प्राप्त गर्ने ।
- ✓ कुनै उत्कृष्ट मूल्य इन्जिनियरिङ (value engineering) परिवर्तन प्रस्तावहरू पुरा हुन् बाकीं भए नभएको सुनिश्चित गर्ने ।
- ✓ सम्पत्ति क्लियरेन्स (property clearance) रेकर्ड प्रमाण पेश गरिएको सुनिश्चित गर्ने ।
- ✓ आवश्यक भए प्लान्ट क्लियरेन्स रिपोर्ट प्राप्त गर्ने ।
- ✓ सबै अन्तरिम वा अस्वीकृत (interim or disallowed costs)लागतहरू मिलाउने ।

- ✓ पूर्ण मूल्य संशोधनलाइ चेक गर्ने ।
- ✓ मुख्य व्यवसायीले (Prime contractor) उपव्यवसायीको (Subcontracts) सम्पूर्ण दायित्व (liabiliy) फर्छ्यौट गरेको सुनिश्चित गर्ने ।
- ✓ यदि आवश्यक छ भने अघिल्लो वर्षको अप्रत्यक्ष लागत दरहरू मिलाउने ।
- ✓ अन्तिम उप-कन्ट्र्याक्टिङ प्लान रिपोर्ट पेश भए नभएको सुनिश्चित गर्ने ।
- ✓ समाप्ति तालिका पूरा गर्ने ।
- ✓ अनुबंध लेखापरीक्षण (Contract Audit) सम्पन्न गर्ने ।
- ✓ स्वीकृति प्रमाणपत्रहरू (Acceptance Certificates) जारि भए नभएको सुनिश्चित गर्ने ।
- ✓ Contractor को अन्तिम इनभ्वाइस/भाउचर Final Invoice/Voucher) को समीक्षा (Review) गर्नुहोस् र कार्बाहिको लागि पेस गर्ने ।
- ✓ अन्तिम भुक्तान गरिएको सुनिश्चित गर्ने ।
- ✓ पूर्ण अनुबंध कोष (Contract Fund) समीक्षा (Review) गर्नुहोस् यदि अतिरिक्त कोष छ भने त्यसलाई आवश्यक कारबाहीका साथ् बन्द गर्ने ।

निम्न अवस्थामा अनुबंध समाप्तिको कार्यहरू गर्नुहुन्

१. कुनै ठेक्का कुनै किसिमकाको litigation को अवस्थामा रहेको वा कुनै किसिमको appeal मातहत रहेको छ भने ।

२. कुनै किसिमको अनुसन्धान वा कुनै विवाद द्वारा कुनै किसिमको स्थगन छ भने ।

३. समझौतामा value engineering proposals स्थगन वा त्यस अनुसारका कार्य सम्पादित भएको छैन भने ।

४. ठेक्का Terminated अवस्थामा भएको र Termination मा उल्लेखित क्रियाकलाप सम्पन्न नभएको अवस्था भएमा ।

अनुबंध समाप्ति प्रतिवेदन (CONTRACT CLOSEOUT REPORT):

अनुबंधको अन्तिम उद्देश्य पूरा गर्दा सन्तोषजनक हुन सक्छ, तर अन्तिम कागजी कार्य पेश नगरेसम्म र यसलाई स्वीकृत नगरेसम्म उक्त कार्य आधिकारिक रूपमा समापन हुँदैन। यो अन्तिम कागजी कार्यलाई क्लोजर रिपोर्ट भनिन्छ, र यो महत्त्वपूर्ण छ किनभने यो प्राय: वरिष्ठ व्यवस्थापन र सरोकारवालाहरूलाई बहुमूल्य जानकारीको दिने श्रोत बन्दछ । उपयुक्त प्रविधि प्रयोग गरि सजिलैसँग यी रेकर्डहरू सिर्जना गर्न सकिन्छ ।

क्लोजर रिपोर्ट भनेको खरिद योजनाको अन्त्यमा पेश गरिएको अन्तिम प्रदेय (Deliverable) हो, र यसले उक्त योजनाको समग्र सफलता मापन गर्छ । वरिष्ठ प्रबन्धकले योजनाको प्रत्येक चरणको विवरणहरू रेकर्ड गरेको हुन्छ जसबाट कसले केकति काम गर्यो वा के गरेन त्यसको विधिवत रेकर्ड उपलब्ध हुन्छ । यसले खरिद निकायलाई भविष्यमा कसरी सुधार गर्ने र भविष्यका खरिद कार्यहरूको लागि उत्तम अभ्यासहरू विश्लेषण गर्न जानकारी

उपलब्ध गराउछ। त्यति मात्र होइन, यी प्रतिवेदनले टीमको कडा परिश्रम र उनीहरूले आफ्नो विशिष्ट उद्देश्यहरू कसरी पूरा गरे भन्ने प्रमाण समेत देखाउँछ। काम गर्ने सरोकारवालाहरू र टीमका सदस्यहरूबाट प्राप्त प्रतिक्रिया पनि समावेश गर्न सकिन्छ।

अनुबंध समाप्ति प्रतिवेदनमा समावेश हुने कुराहरु:

ठेक्काको आकार र जटिलताको आधारमा प्रतिवेदनको लम्बाइ वा सामग्रीमा भिन्नता हुनसक्छन्, तर सामान्यतया केही आधारभूत जानकारी समावेश गर्नुपर्ने हुन्छ। केहि सामान्य विवरणहरूको सूची तपसिलमा उल्लेख गरिएको छ।

१. मूल दिशानिर्देशहरू, सरोकारवालाका अनुरोधहरू, बजेट र समयरेखा सहितका क्रियाकलापका विवरण

२. उद्देश्य/लक्ष्यहरू पूरा भएको प्रमाण

३. सरोकारवालाहरुको माग पुरा भएको प्रमाण

४. आपूर्तिकर्ता, सरोकारवाला वा अन्य स्रोतहरूबाट प्राप्त बीजकहरू फर्छ्यौटको प्रमाण

५. सरोकारवालाहरुलाई आवश्यक रेकर्ड जारी वा स्थानान्तरण

६. MileStone अनुसार प्रत्येक चरणमा विस्तृत कार्यसम्पादन समीक्षाको विवरण

७. व्यवस्थापन टोलीका सदस्यहरू र सरोकारवालाहरूबाट प्राप्त प्रतिक्रियाको संक्षिप्त विवरण

८. अभिलेखीय उद्देश्यका लागि कागजातहरूको रेकर्ड आदि,

उपसंहार:

खरिद कार्यमा Contract Closeout बहुतै महत्वपूर्ण प्रक्रिया हो जसलाई सबै खरिद निकायले निष्ठा पूर्वका सम्पन्न गर्नुपर्दछ। प्राय: नेपालका खरिद निकायहरुले ठेक्का बमोजिम कार्य सम्पन्न भए उप्रान्त यसतर्फ ध्यान नदिने गरेको पाइन्छ, जसको कारण पछी हुने खरिद कार्य समेत प्रत्यक्ष वा अप्रत्यक्ष रुपले प्रभावित भइरहेको हुन्छ। एउटा तथ्य हामि सबैले के बुझ्नुपर्छ भने प्रत्येक खरीद कार्य कुनैनकुनै हिसाबले अद्वीतिय हुँदो रहेछ, जसले स्यानो वा ठुलो पाठ सिकाएको हुन्छ। यसै पाठलाई हामीले भविष्यको खरिद कार्यमा प्रयोग गर्नुपर्ने हुन्छ। त्यसैले पनि यस्ता पाठको लागि भएपनि अनुबंध समाप्ति कार्य गर्नैपर्छ। अर्को महत्वपूर्ण पक्ष तथ्यांकलाइ ब्यबस्थित गर्ने हो। हामीले प्रत्येक खरिद कार्यको तथ्याकलाइ ब्यबस्थित रुपले राख्दा आफुलाइ मात्र होइन नेपालका अन्य सार्बजनिक निकायहरुले यसबाट लाभ उठाउने अवसर पाउन सक्छन। यसको लागि पनि अनुबंध समाप्ति प्रतिवेदन तयार गर्ने अभ्यास गर्नुपर्छ।

COVID - 19 and its Contractual Implications on the Contracts

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Keywords: COVID -19 impacts in public health, Shutdown, Transport disruptions, Manufacturing works close down, Travel restrictions, delays,rising costs of services and materials, contractual provisions, insurances, rights and penalties etc.

This article is intended to bring about attention to the burgeoning problems in the development works due to the Covid-19 and its related impacts on the existing and new contracts which were started pre and post Covid -19 period in the year 2020 till early 2022. The impacts born were of various market situations, import problems, manufacturer's constraints, disruptions due to lock downs and shut downs, travel and transport restrictions implemented by various countries. Apart from this there were other commercial and cost issues, delays and extension of time, contractual provisions such as force majeure, insurance coverage and delay penalties etc. All these issues complicated the matter rendering the contract performance to a minimum or a complete shutdown.

The commencement of the contract is an agreement betweentheemployer and the service provider to carry out the designated works or services for an agreed amount, time and quality as per the employer's specification. While carrying out the work the contractor is expected to perform and complete the works or services within the stipulated cost and time. The contractor or the service provider is not entitled to ask or recover any additional cost or time for carrying the works unless provided in the contract. The specification typically states the design, material to be used and quality of the work to be performed.

It is understood that while carrying out the said work, main standard provisions in the contract are to be followed. But during the execution the work they may be facing different disruptive conditions and issues such as covid-19 or such. The uncertainties of the working condition, labor issues, force majeure issues, trading conditions, supplier's delays, import /export restrictions, travel and transport disruptions and similarmany more conditions may render the contracts to be stalled or stopped. It is important that the contract signed between the parties be fulfilled and the challenges of such contentious issues are overcome through suitable resolution mechanism protecting the future of the contracts and maintaining harmonious contractual and commercial relations between the parties.

Under such circumstances what relief can be sought by the contractor and or the employer this is the main question before all the major contracts being implemented. In all of the above-mentioned cases it is essential to look into the provisions of the contract and consider how to address those pertaining

issues as described above for the delays, disruptions, rising costs etc. It may be by allocating and sharing of the risks, so unusual in nature, and not essentially defined in the contract, between the parties and identifying the liabilities clauses and seeking resolution through provisions of insurances and or sharing of the costs to complete the work in the interest of both the parties.

It is important that both parties understand and discuss the potential risks and liabilities and be clear about it. What provisions are provided in the contract. Is covid 19 essentially a force majeure issue? Can it be considered to be natural and unavoidable circumstance contributing adversely to the contract performance. Likewise, whether the contract clearly defines such pandemic as force majeure issue. It is observed, normally a force majeure clause allows for extension of time without any financial compensation. But in this covid -19 case its scale of impact nationally and internationally is significantly large affecting all sectors of the society including travel, transport, manufacturing, etc. which are essentially components to the contract performance. This has also affected the commercial and cost related issues.Its resolution and compensation mechanism should be sought primarily through the provisions of the contractsand or suitably agreeing to amend and address the particular issue in question.

Information about has government taken any lawful compensation or relief decisions in this context? Or,

Has it been considered, that the disruption of the contractis unbearable and the services un-procurable and un-performable., then to take extreme steps including mutual consent to terminate the contract if the consequence is beyond the anticipated proportions?

Potential Resolution:

First of all, it is important to analyze step by step the problem encountered. Understanding the problem, its provisions in the contract and the relation between covid -19 and the specific relief to be provided. Thereafter suitable resolution should be discussed and agreed to provide suitable relief package sought by the contractor.

Force majeure provision usually mentions epidemic, pandemic or outburst of a disease etc. In such cases covid -19 is pandemic and certainly fits into the definition of the force majeure to provide the suitable relief.

However, if the force majeure specifically mentions events involving the nature then covid -19 pandemic may not fall under the force majeure definition. Then in such case Pandemic may not be relevant and therefore no compensation or relief be provided. In such cases suitable legal solution may be sought to address the dispute in question.

There could be other references made as "unforceability' or 'Act of God' where the parties have specifically mentioned pandemic, wars, riots, hurricanes, flood, epidemics, natural disaster etc. then in such cases covid -19 may likely be the case for the compensation.

It should also be noted that timely notification of force majeure has been issued. Is time limit and the procedure followed.

As there are no general clauses in the contract for this kind and extent of worldwide issue,discussion should be held whether to allow the force majeure issue grant time extension without any corresponding price adjustment or with price adjustment. Covid -19 has certainly caused delay and disruption in the performance of the contract. The relief sought is in terms of time extension and the cost compensation. If such relief is not mutually accepted contract termination could be an eventuality. The contractor or the employer may seek legal provision against or for the termination given by the either party.

Possible way out and Recommendations:

To avoid further disruption of the work and the performance of the contract both parties agree for a consented review of the provisions of the contract to suitably address the relief mechanism.

Identify the specific area of the impact and specifically seek relief for compensation without affecting the entire scope of the work. Take mitigating steps such as change of vendor or sub suppliers, manufacturer, etc. Formulate the plan for way forward to reduce the impact of covid -19 mutually sharing the risks and incentives.

Communicate the entire realistic situation to the vendors, sub suppliers and the other related labor force and technical man power and equipment suppliers etc. to identify the impacts and risks for effective and clear understanding of the factual information to deal with the situation in amore productive and business-like manner.

Avoid frustration and impossibility to perform with suitable application of the resolution tools like adjudication, mediation or court assisted mediation or use of applicable common law to proceed and complete the designated obligation.

Proper Law of Contract vs. the Law of Seat: Saga on Which Determines the Proper Law of Arbitration Agreement

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Introduction

International commercial arbitration has been a dominant dispute resolution mechanism for parties involved in cross-border transactions. This dominance is particularly due to various advantages offered by international arbitration over courtroom litigation namely, provision for a single neutral forum, subject matter expertise of arbitrator(s), efficiency, finality and readily enforceability of the arbitral award, and confidentiality of the process.

The other defining feature of international commercial arbitration is party's autonomy to choose different laws which operate simultaneously on a different aspect of arbitration. Parties may, either expressly or impliedly choose different laws applicable to the arbitration based on what they perceive to be most advantageous or favorable.

So, what are the different laws governing an arbitration agreement? In *Black Clawson International Ltd. v. Papierwerke Waldhofaschaffenburg A.G.*[1], Justice Mustill held that there are potentially three relevant laws governing arbitration agreement, namely (i) the law governing the substantive agreement (the "proper law of contract"); (ii) the law governing arbitration agreement (the "proper law of arbitration agreement"); and (iii) the law of the seat (the *lex fori* or curial law).

The proper law of contract is generally determined by the place of its execution or performance or the nationalities of parties executing it. Law of seat may be same as the proper law of contract. However, parties may also choose the law of seat based on their desire for a neutral forum and in such case it shall vary from the proper law of contract.

Each of the above laws has different significance in the arbitration process. The proper law of contract regulates the substantive rights and obligations of the parties to the underlying contract from which a dispute has arisen. The law of arbitration agreement governs the formation, validity, scope, termination waiver and termination of the arbitration agreement. Similarly, the law of seat signifies the acceptance of the law of the country chosen as seat to govern arbitral process and its courts to have supervisory jurisdiction over the arbitral proceedings. In other words, law of seat is signifies a legal place of arbitration.

For instance, a German Company (say "X") and an American Company (say "Y") enter into a contract whereby Y agreed to supply semiconductors to X. The Contract under the governing law clause stated "This Contract shall be governed and construed in accordance with the law of Germany". Further, the arbitration agreement clause which formed a part of the main agreement stated, (i) The law of arbitration agreement shall be of USA, and (ii) The seat of the arbitration shall be Singapore. Supposedly, Y defaults in the supply of semiconductors as per the contract and X institutes arbitration against Y. In the arbitration, arbitrator shall determine the issue

1 [1981] 2 Lloyd's Rep. 446.

as to whether Y was bound to supply semiconductor and if yes, has Y failed to fulfill its obligation and whether Y is liable to pay any damage to X as per the proper law of Contract i.e., the German Law. Further, whether a particular dispute falls under the scope of the arbitration agreement or whether Z - a subsidiary of Y can be made a party to the arbitration shall be determined as per the law of arbitration agreement i.e., the US laws. Since the seat of arbitration is in Singapore, courts in Singapore shall have supervisory jurisdiction over the arbitration proceedings. Further, seat of arbitration also determines the law of arbitration. Hence, in the present case, the Arbitration Act 2001 of Singapore will be applicable to the arbitral proceedings. In case the award-debtor wants to challenge the arbitral award, it must be challenged before courts in Singapore.

Thus, each of the above laws have specific significance in the arbitration process. However, it is observed that majority of the contracts only specify the governing law of the contract and the seat of arbitration (also mentioned interchangeably as the place of arbitration). As such, only in rare circumstances, parties expressly provide the law of arbitration agreement. This was also noted by Moore-Bick LJ of England and Wales Court of Appeals ("**EWCA**") in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA*[2] ("**Sulamerica**") where he held, "*It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it*..**"**.

Then, what is the proper law of arbitration agreement when parties have not expressly stated the same in the contract or arbitration agreement? Courts have encountered this issue for many years and have developed a different jurisprudence on discerning the proper law of arbitration agreement. The jurisprudence is mainly divided into contract-centric approach (i.e., proper law of arbitration agreement shall be same as the proper law of underlying contract) and a seat-centric approach (i.e., proper law of arbitration agreement shall be same as the law of seat).

In this article, the author explores and analyzes how courts in major arbitral jurisdictions, particularly, United Kingdom ("UK"), Singapore and France have approached this issue. The author has chosen these jurisdiction, considering (i) the significance of each in international arbitration and (ii) the different approach taken by the courts in France as opposed to the courts in England and Singapore.

United Kingdom

The courts in UK have been long grappling with the issue of determination of proper law of contract for many years. The author discusses the significant judgment particularly the recent one shall be discussed hereunder.

In *C v. D*[3], EWCA was dealing with a dispute regarding an insurance claim. The insurance contract stated that the law governing the insurance policy was the law of New York, USA whereas the seat of arbitration was London, UK. The contract, however, was silent on the law of arbitration agreement. In an appeal before ECWA, the insurance company argued that the proper law of arbitration agreement was the law of New York since in the absence of express provision, it follows the law of contract.

It is pertinent to note here that which law governed the arbitration agreement was not the primary issue among parties. Nonetheless, since the insurance company had raised this issue, judges at ECWA decided to express their view (obiter) on it.

ECWA, thereafter, stated that owning to Section 7 of Arbitration Act, 1996, the agreement to arbitrate is separate from the underlying insurance contract and thus, the law of arbitration agreement must be determined separately. ECWA, then relying on the "closest and most real connection test" stated that the law of seat of arbitration has most real and closest connection to the agreement to arbitrate than the proper law of contract. As per ECWA, the proper law of arbitration agreements is the law of seat i.e., law of UK.

While ECWA took a seat-centric approach in *C v. D*, it can be observed in the paragraphs below that the courts in England including ECWA have imbibed a more contract-centric approach post *C v. D*.

2 [2012] EWCA Civ 638
3 [2007] ECWA Civ 1282

In 2012, ECWA again faced the issue regarding the determination of governing law of arbitration agreement in *Sulamerica*. It concerned with an insurance contract in connection with the construction of the world's largest hydroelectricity dam in Brazil. Brazilian law was the proper law of contract whereas, the seat of arbitration was in London. Further, courts in Brazil were granted exclusive jurisdiction over the contract.

Court of first instance in England held that the law of the arbitration agreement, in this case, is the the law of seat – the English law, notwithstanding the express choice of Brazilian law as the law governing the contract and the obvious connection of the policy to Brazil. The High Court also upheld the decision of the Commercial Court.

The insured argued before the EWCA, that while they agree that the parties had not made an express choice of law governing arbitration agreement, they had impliedly chosen Brazilian law as the governing law of arbitration agreement, primarily due to the following reasons:

(i) express choice of the law of Brazil as governing law of the contract;

(ii) courts in Brazil had exclusive jurisdiction;

(iii) close connection between the insurance contract and state of Brazil; and

(iv) currency of policy being Brazilian and language being Portuguese.

Insured therefore argued that lower courts failed to consider the implied choice. The insurance company, on the other hand, argued that based on the "separability principle" the proper law of arbitration agreement is separable from the governing law of contract. Further, the law of arbitration agreement has a closest and most real connection with the law of seat i.e. English law. ECWA, however, declined that principle of separability will provide an easy answer in determining the proper law of arbitration agreement.

EWCA, thereafter, held that even if arbitration agreement forms part of the substantive contract, governing law of arbitration agreement may not be the same as the law of substantive contract. Further, proper law of arbitration agreement must be determined through a three-staged inquiry which is:

(i) express choice;

(ii) implied choice; and

(iii) closest and most real connection.

As per EWCA, three stages ought to be embarked on separately on the same order. EWCA also noted that on many occasions inquiry of stage (ii) and (iii) may often merge into each other since the determination of close and real connection is important while determining the implied choice, except in case of free-standing agreement.

EWCA held that in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. EWCA, however, noted that there are two indications to the contrary, i.e.

(i) firstly, parties had impliedly chosen the law of England – the law of seat, as the governing law of arbitration agreement;

(ii) secondly, choice of Brazilian law as the law of arbitration agreement pose serious risk of undermining the intent to arbitrate as under Brazilian law arbitration clause could only be invoked at the consent of both the parties.

Hence, law of arbitration agreement is the law of England. Thus, EWCA reached to the same conclusion as the High Court but through different reasoning.

The three-staged analysis propounded by ECWA in *Sulamerica* has been followed by courts across jurisdictions.

However, *Sulamerica* still laid room for uncertainty as to if Brazilian law did not pose risk to the agreement to arbitrate, would law of England be the proper law of arbitration agreement.

This uncertainty is resolved by the Supreme Court of United Kingdom ("**Supreme Court**") in the recent case of *Enka Insaat Ve Sanayi AS (Respondent) v OOO Insurance Company Chubb (Appellant)*[4] ("**Enka**"). *Enka* is an appeal from the decision of EWCA[5] which held that, "*unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary*".

The Supreme Court in *Enka* reversed the earlier decision of EWCA and held that in case a contract does not provide a proper law of arbitration agreement but mentions the proper law of contract, then the proper law of contract will determine the law of arbitration agreement. However, in case the proper law of contract is not provided then the arbitration agreement will be governed by the law most closely connected with the arbitration agreement, i.e., the law of seat. The Supreme Court in *Enka*, therefore, provided further clarification to the three-stage stage in *Sulemarica*. As parties in *Enka,* had failed to provide proper law of contract in the agreement, the law of seat i.e., London applied.

In a subsequent judgment of *Kabab-Ji SAL (Lebanon) (Appellant) v Kout Food Group (Kuwait) (Respondent)* [6] ("**Kabab-Ji**"), the Supreme Court held that the principle laid down in *Enka* is applicable both for stages before issuance of award (as in *Enka*) and at the stage of enforcement. In Kabab-Ji, the Supreme Court, following *Enka's* principle, held that law applicable to the arbitration agreement is proper law of contract i.e., English law and not the law of seat i.e. the French law.

Thus, it can be observed that the jurisprudence regarding determination of proper law of arbitration agreement is now settled in UK.

Singapore

Jurisprudence on determining proper law of arbitration agreement in Singapore is very much inspired by the developments in the UK. Initially, Singapore courts have taken a seat-centric approach on the arbitration agreement. For instance, in *FirstLink Investments Corpn Ltd v GT Payment Pte Ltd*[7], the Singapore High Court held that the law of seat should generally apply to the arbitration agreement.

However, in the case of *BCY v BCZ*[8], the Singapore Court of Appeal has taken a different stand. *BCY v. BCZ* concerned a dispute regarding share purchase agreement. The governing law of the contract was the New York law and arbitration agreement specified Singapore as the seat of arbitration. However, the law of arbitration agreement was not specified.

Arbitrator held that the proper law of arbitration agreement, in the absence of express choice, was the New York law.

The Court of Appeals adopting the three-staged test laid down in *Sulamerica* uphold the determination of the Arbitrator. As per the Court of Appeals, unless significant indications to the contrary, (i) parties are assumed to have intended to govern whole of their relationship through single agreement and (ii) when arbitration agreement is a part of main agreement, the governing law of contract is a "strong indicator" of the governing law of arbitration agreement. The choice of seat is not sufficient to displace this assumption. The Court of Appeals also noted that in case of a freestanding arbitration agreement, if there is no express choice of law, the law of the seat would most likely be the governing law of the arbitration agreement.

4 [2020] UKSC 38
5 [2020] EWCA Civ 574
6 [2021] UKSC 48
7 [2014] SGHCR 12
8 [2016] SGHC 249

The Singapore Court of Appeal again in *BNA v. BNB & BNC*[9] has adopted the BCY framework in determining the proper law of arbitration agreement.

Thus, it can be observed that similar to the UK, court position in determination of proper law of arbitration agreement is settled in Singapore.

France

Unlike the position in England or in Singapore, the jurisprudence for the determination of proper law of arbitration agreement is very different in France. This is because, France follows a seat-centric approach to the determination of proper law of arbitration agreement as opposed to contract-centric approach.

The *Kabab-Ji* case which concerned with a dispute pertaining to franchise development agreement, was filed both before the courts in London and courts in France. The franchisor had moved before courts in London to enforce the arbitral award rendered through arbitration in France whereas the franchisee initiated proceedings in France to annul the award. The decision of Supreme Court in UK is discussed above.

Courts in France and England both faced a primary issue as to in the absence of express provision which law determined the proper law of arbitration agreement, proper law of contract or the law of seat. In contrary to the determination of UK, Paris Court of Appeal[10] held that based on the principle of 'separability', arbitration clause is independent from underlying contract and thus, the validity and existence of the arbitration clause must be interpreted as per the rules of French law, international public policy and the common will of the parties. Paris Court of Appeals further held that the designation of English law as the law governing franchising agreement, and prohibition on arbitrator to apply rules which are contradictory to the Agreement is not sufficient to establish the common will of the parties to regard English law as proper law of arbitration agreement.

Thus, as per Paris Court of Appeals the proper law of arbitration agreement is the law of seat.

Analysis

The difference in determining proper law of arbitration agreement in UK and Singapore, and in France lies majorly on the how courts have interpreted the 'principal of separability'. In UK and Singapore, the courts have adopted a narrow-approach while interpreting the principle of separability. This is reflected in EWCA's judgment in *Sulamerica* and Supreme Court's judgment in *Enka*, where both courts held that the concept of separability only reflected parties intention that their dispute settlement procedure shall remain effective even in circumstances which rendered the substantive contract ineffective. EWCA in *Sulamerica* thus noted, "*Its [concept of seperability] purpose is to give legal effect to that intention [intention to arbitrate], not to insulate the arbitration agreement from the substantive contract for all purposes.*" Courts in Singapore have also adopted the same interpretation.

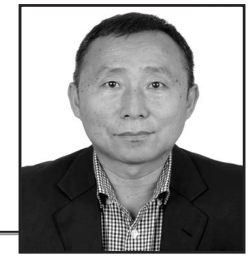
However, French court have undertaken a broad interpretation of principle of separability. Thus, in *Kabab-Ji*, Paris Court of Appeal majorly relied on the same principle while holding that arbitration clause is separate and independent from the law of contract in all aspect.

While courts across jurisdiction continue to dwell on this issue, it is advisable for parties to specifically state the proper law of arbitration agreement in their contract in order to avoid risk of prolonged litigation.

9 [2019] SGCA 84

10 N° RG 17/22943 - Portalis N° 35L7-VB7B-B4VAV

Arbitration: Is it Overlapping of the Jurisdiction onto District Court?



Suman Kumar Rai
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Arbitration is a process or method of disputes (parties) resolution having regarded Development, Construction, Industrial, Trade, else as well under laws which is out of the jurisdiction of District Court in Nepal. So it is not overlapping to the jurisdiction of District Court which is accorded of acts, regulations: validity. Procedures of arbitration are fixed or termed in flexible than District Court; parties of contract may decide (opt) procedures, it depends on their mutual and written consent or understanding. Actor of award may be appointed on the base of by the selection of parties (option) as they believe on actor (arbitrator); expenditure are to bear themselves that tends onto the grounds of Judge (court) expenditure shall be cut or remove (avoid).Moreover arbitrators are more skilful on concerned sector, expert can deal and judge perfect and correct award which provides satisfaction to parties in awards; therefore arbitration is more rational than court. By the writ, jurisdiction -in the Supreme Court of Nepal- may be prevailed in some conditional stage of cases or disputes, it may be appealed against award of arbitrator (Arbitration) if one who argue on award. But writ or appeal is not against arbitration which is only more and extra examination or refinement of award as per existing laws. Thus the Jurisdiction of arbitrator (Arbitration) is not overlapping.

In Evidence Act 2031 section 23 (1), it is provisioned that District Court can entertain expert opinion if it requires[1] as if which leads to against or unnecessary of arbitrations; judge (Court) can deal the resolution of disputes by the dint of experts; though short procedures, privacy of parties, right to select of parties for resolution approach, exclusion to the burden of Judge recruitments (court), deduction to overload of cases in court tend to alternative resolution approach are logic of the relevancy to arbitration.

Relevancy to Arbitration

A. Arbitration / Presumption Against intending injustice or absurdity

Normally it is presumed that laws are prevailed or enacted to avoid injustice or absurdity in state, no one can interpret or stand on injustice or absurdity. If it remains omission and errors which are to be amend or interpret as soon as possible on the context of justice or rational.

As per law relating to arbitration are justice and rational because it deals and allows of parties petitions or options to resolve disputes as per laws or procedures if parties have belief of quick award to save time, privacy of parties, low expenditure of fees. Furthermore on the context of state, burden of cases in court may cut off by arbitration.

1 ■ ***Suman Kumar Rai*** *is an Advocate , Lifelong Member & Member of Panel in Nepal Council of Arbitration (**NEPCA**) and Legal Advisor of Riddhi Siddhi Construction Pvt. Ltd.. He has experiences in the field of legal advocacy(15 years) and Settlement of Dispute on Works and Goods Contracts in Nepal. Evidence Act 2031 Section 23(1), Act Collection of Nepal Part -2, 2074, Law Books Management Board, Kathmandu, Nepal, P.90-91*

It is interpreted onto the aforesaid presumption against regarding to injustice or absurdity2 to maintain justice. So it is not intended to overlap District Court(jurisdiction) on the behalf of laws or provision to concern of arbitration.

B. Arbitration / Presumption against intending what is inconvenient or unreasonable

It is presumed that laws (statute) are to be under convenient and reasonable if it prevails inconvenient or unreasonable which are to amend or repeal or interpret for convenient and reasonable .

As per laws relating arbitration are in favour of convenient and reasonable because parties of dispute may opt or petition as they believe of quick award, privacy of parties, shortcut procedures as well are base of convenient and reasonable logic.

It is asserted that general objects of legislature which regards to laws are to be convenience and reason:

In determining either the general objects of legislature or the meaning of its language in any particulars passage, it is obvious that the intention which appears to be most in accord with convenience, reason...[3] . Furthermore It is explained that to exclude or avoid the context of inconvenient and unreasonable of laws:

Unreasonable and inconvenient result are to be avoid.[4]Thus the laws of arbitration are convenient and reasonable. On the base of aforesaid stands and standards which are rational logic on the ground of arbitration(laws) it is not intended to overlap District Court(jurisdiction).

Arbitration / Separation of Power (Check & Balance)

Separation of power (Check & Balance) is confined to the Jurisdiction of government organ in state. Executive, Legislature, Judiciary(court) organ of government are that is demarcated with their Jurisdiction under The Constitution of Nepal 2072, laws as well. Normally judiciary (court) is obligated to resolve to disputes having concerned to Legislature and Executive bodies(organs), institutions, individual as well. Besides, but non Judiciary organ: tribunal or quasi judiciary bodies are also obligated or confined to resolve disputes of parties as per the sprit and words of The Constitution of Nepal 2072 and laws (act, regulation, by laws etc.).

Aforesaid reasons or instances, arbitration, a kind of tribunal which is concerned to resolution process or approach of disputes is not against or rival of separation of power in circumstantial or conditional issues or disputes having concerned to article 127(2) in The Constitution of Nepal 2072[5].

Arbitration (tribunal) has right to resolve the disputes especially Development, Construction, Industrial, Trade, else[6]under the constitution of Nepal, laws (*Arbitration Act 2055, Statute of The Nepal Council of Arbitration 1991, Arbitral Procedure Regulation of Nepal Council of Arbitration 2016, Civil Procedure Code of State 2074, Judicial Administration Act 2073 etc.*); on the base of the constitution and laws to arbitration is valid so it does not overlap to judiciary organ (Court) or Jurisdiction of Court. Moreover it is authorised to arbitration to resolve cases to parties of disputes.

Overload of cases in court are being prevailed which pressurise to judge (court) whereas parties have right to select the resolution approach as per their requirements that tend to require the jurisdiction of Arbitration.

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2 *P.St. J .Langan Maxwell on The Interpretatiom of Statules 12th ed.(1969), Lexisnexis, Butterworths, Wadhwa, Nagpur, P. 208- 210*

3 *P.St. J .Langan Ibid P. 199*

4 *Ibid P. 199*

5 *The Constitution of Nepal 2072, Article 127 (2), Law Books Management Board, Kathmandu, Nepal , 4th ed. (2016), P.87*

6 *Statute of Nepal Council of Arbitration (NEPCA) 1991, Nepal, Council of Arbitration (NEPCA), Kathmandu, Nepal, P.1*

Arbitration / The constitution of Nepal 2072

In The Constitution of Nepal 2072, it is permitted arbitration (tribunal) as an alternative bodies or approach to resolve disputes of parties which is allowed or confined under The Constitution of Nepal 2072 Article127 (2) is concerned to permission of arbitration (tribunal) :

... judicial bodies may be formed at local level to try cases under laws or other bodies as required may be formed to pursue alternative dispute settlement method.[7]

The constitution does not mention the term of arbitration though it declares or permits to form body to resolve dispute settlement approach as alternative body; arbitration is also alternative tribunal or body to resolve disputes of parties thus on the base of the constitution is in favour of Arbitration: so between arbitration and constitution, it does not exist or remain rival, therefore **Arbitration Vs. Constitution** is not true which is alternative approach to resolve disputes if parties plan or agree. Besides it is legalised or formed arbitration under the constitution. So **Constitution Vs. Arbitration** is also not fact or true. Moreover it has no contradiction between the constitution and arbitration. So laws regarding to arbitration (tribunal) are constitutional or valid.

Arbitration / Statute of The Nepal Council of Arbitration (Nepal) 1991

Under Nepal Council of Arbitration (NEPCA), Arbitration is asserted and inserted the Parameter of Development, Construction, Industrial, Trade, else as well. The preamble of NEPCA has clearly ensured the demarcation of arbitration as an alternative method disputes settlement:

An institution by name of Nepal Council of Arbitration has been established to administer arbitration and other alternative method of dispute resolution in expeditions an less expensive manner by arranging cooperation from the concerned sector and to do institutional development of acts and proceedings related thereto for the settlement of national and international dispute of development, construction, industrial, trade, and other nature which are to resolve[8]. Besides the statute of NEPCA, objectives are permitted and promoted to arbitration activities.[9]

Arbitration / Arbitration Act 2055

In Arbitration Act 2055, it is not defined-formally- arbitration but it has been traced out that disputes may be resolved by arbitration (tribunal); parameter of functions and Jurisdictions have been mentioned.

Arbitration Act 2055, Section 2(A) has directed that disputes may be settled by arbitration which has indicated and termed process or system of resolution to disputes.[10]

Arbitration Act 2055 section 2 (I) has defined to term of Arbitrator who involves on the resolution of disputes[11] though it is has no definition of Arbitration in the section, but it can be defined arbitration to awards, proceedings, tribunal as well : if it is analysed overall sections of the act, arbitrator is actor of award and arbitration is activities and functions of arbitrator having regarded to awards, processes of arbitration tribunal.

Arbitration Act 2055 section 3(1)(2) have mentioned procedures for the resolution of disputes.[12] Arbitration Act 2055 section 39 has fixed or pointed out the jurisdiction of arbitration which confined the jurisdiction of arbitration and furthermore the jurisdiction of District Court has been excluded or discarded:

... as per the act, no jurisdiction of court shall be permitted[13]

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7 *The Constitution of Nepal 2072, Article 127 (2), Ibid, P.87*
8 *Statute of The Nepal Council of Arbitration (NEPCA) 1991 Ibid, P.1*
9 *Ibid Section 5(A)(1) (2) (3) (4) (5) (6) P:3, 5 (B) (1) (2) (3) (4) (5) (6) P.2-5*
10 *Arbitration Act 2055 section 2(A), Act Collection of Nepal, Part-2, 2074, Law Books Management Board, Kathmandu, Nepal P.187*
11 *Ibid 2(I) P.188*
12 *Arbitration Act 3(1)(2) Ibid P.188,189*
13 *Ibid 39, Ibid P.203*

Arbitration / Arbitral Procedure Regulation of Nepal Council of Arbitration (NEPCA) 2016

The regulation of arbitration has been prescribed on the context of the commencement to the arbitration process pursuant to section 3 to 14 [14] section 11(1) has mentioned the Jurisdiction of NEPCA; parties of disputes have to follow or opt contract provisions[15]which encircles to the jurisdiction of arbitration.

Arbitration / Civil Procedure Code of State 2074 / District Court

Civil Procedure Code of State 2074 Chapter 3 has confined the jurisdiction of District Court form section 16 to 26.[16]On the Jurisdiction, arbitration is not allow to resolve the disputes of parties in this connection -so- arbitration can not obstruct to the jurisdiction of District Court. Hence it has no confusions or contradictions between the Jurisdiction of Arbitration and District Court in which is not allowed to overlap.

Arbitration / Judicial Administration Act 2073

Judicial Administration Act 2073 section 7(1) (4) has pointed out jurisdiction[17] besides it is excluded the jurisdiction of District Court, by section 7(1) (4)[18] as well. It is proclaimed and indicated out of Jurisdiction of District Court that is contained in various law (Constitution, Act ,Statute, Regulation etc.)

The Jurisdiction is excluded of District Court that prevails in different laws in Nepal is proof of the existing of Jurisdiction to other bodies, tribunal, institution as well. Furthermore it is also contained the jurisdiction of District Court[19].

Thus Judicial Administration Act 2073 has also admitted or allowed to various Jurisdiction of tribunals, bodies, institutions, arbitration (tribunal) as well that are confined to each of the jurisdiction therefore it does not remain contradiction between the jurisdiction of arbitration and District Court: no overlapping has prevailed between the jurisdiction of arbitration (tribunal) and District Court.

Arbitration / Presumption Against Ousting Established Jurisdiction

It is confined and defined the jurisdiction of courts, tribunals, bodies and else as per constitution, acts (statutes), regulations as well which are enacted by legislature or any institutions, furthermore jurisdictions can not be ousted without amendment or new laws.

It has been remarked on the presumption against ousting established jurisdiction[20]which has rational logic because it may be dilemmas and disputes on the jurisdiction of concern authorities regarding to overlapping or ousting. If it remains overlapping or ousting of the jurisdiction, Justice and Judgement may not be fair. So for the maintain Jurisdiction, the assumption is indispensable to District Court and Arbitration (tribunal)

The Jurisdiction of Arbitration and District Court have been confined in no doubt, hence the jurisdiction of arbitration has not ousted or overlapped to District Court which are contained as per existing laws.

Arbitration / Presumption Against Creating New and Enlarging Established Jurisdiction

Jurisdiction of court and tribunals are confined to resolve chaos or disputes having regarded judicial administration, the jurisdiction are confined by constitution and laws. Existing or established law cannot

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14 Arbitral Procedures Regulations of Nepal Council of Arbitration (NEPCA) 2016, Nepal Council of Arbitration (NEPCA), Kathmandu Nepal, P.17-23

15 Ibid P.20

16 Civil Procedure Code Act of State 2074 Law Books Management Board, Kathmandu, Nepal, P.255-258

17 Judicial Administration Act 2073 Section 7(1) (2) (3) (4) Act Collection of Nepal Part-1 2073, Pairavi Publication Kathamndu, Nepal, P. 17-18

18 Ibid P.18

19 . Ibid P.17-18

20 P.St.J. Langan, Ibid P. 153

affirm and insert to create and enlarge jurisdiction but if constitution or laws are amended it may be possible of creating and enlarging jurisdiction.

So, it is pointed out to the presumption against creating new and enlarging established jurisdiction[21] as it remains or ascends contradiction in each other.

Arbitration laws in Nepal are enacted under The Constitution of Nepal 2072[22] which creates and enlarges laws of arbitration (jurisdiction)it differentiates to District Court (jurisdiction), so which is legal and validity of arbitration as well therefore the jurisdiction of arbitrations(tribunal) does not overlap to District Court (jurisdiction).

Conclusion

Arbitration in Nepal is based on laws including constitution District Court (jurisdiction) and Arbitration (jurisdiction) are not rival in each other. Moreover these assumption and its jurisdiction are alternative for in each other in specific parameter having based on mutual consent of parties(dispute).So jurisdiction of them are not collision, Arbitration is approach of resolution of disputes particularly on development, construction, industrial, trade else as well in no proper because lack of knowledge and trust of parties(dispute), underdevelopment state(Nepal), whereas District Court(jurisdiction) has possessed the jurisdiction of holistic disputes including aforesaid disputes or the jurisdiction of arbitration in Nepal. On the ground, arbitration laws are focused to expert tribunal (arbitration) is - owing to expertise -more rational an reasonable for the resolution of disputes(parties).Ultimately it is not motion of argument of neither District Court Vs. Arbitration nor Arbitration (jurisdiction) Vs. District Court(jurisdiction). Hence the jurisdiction of Arbitration is not prevailed in the overlapping to District Court (jurisdiction) which is moulded or permitted by laws. Arbitration is an alternative of District Court in aforementioned parameter of jurisdiction: it may lead to save and maintain time (short procedures), money (low fees of arbitration), privacy of parties, right to select resolution approach, deduction to burden of over appointment judge (Court) deduction cases in District Court (jurisdiction), if every parties of disputes may trust with responsible in favour of arbitration laws.

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The Constitution of Nepal 2072, Law Books Management Board, Kathmandu, Nepal , 4th ed. (2016)

21 Ibid P.159

22 The Constitution of Nepal Article 127(2), Ibid P. 87

Strategic Tools and Techniques of Option Generation

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We know mediation is a process in which a neutral third party assists in resolving a dispute between two or more parties. Once again, we would like to remind ourselves that the role of a mediator is strictly confined within the functions of a facilitator that helps to make communication between the disputed parties and assist them in focusing on the real issues of the disputes and finding out the remedial aspect of the contentions involved therein by generating the options that can meet the interest or needs of all the disputed parties in an effort to resolve the conflict. Of course, the role of a mediator is exclusively limited to the extent of helping the disputed parties to develop the probable solution by themselves. The mediator generally confined themselves as a processing person helping the disputed partiesthereby in defining the agenda to be discussed therein, identifying the issues, communicating more effectively in finding out the common grounds in helping to negotiate the disputed parties fairly and finding out the amicable agreement between the disputed parties themselves. In the process of mediation different available technique may be chosen to ensure the effective resolutions that may satisfy the disagreed parties themselves. The linear approach applied by the mediator in the process helps to define the issues involved in the subjectmatter of the disputes by defining the existed elements separately therein and trying to resolve them one by one. Of course, this approach may not be quite helpful as it ignores the effectiveness of the dynamic interplay between the issues involved in the disputed subject matters. On the other side of the technique the system approach method lays stress on framing the elements of the dispute and try to find out the apparent connection between those elements of the disputes in an analytical way so as to find out the cause and effect towards the subject matter of the disputes. In other words, this method tries to find out the elements involved in the disputes and by identifying the parameters and their connections between the elements existed therein which will be helpful to pave the path towards the final agreement in resolving disputes. The primary steps towards acquiring the goal of options generation between the disagreed parties in the disputed subject matter is to set the stepwise process to be followed in the communicating session by the parties themselves. The process to be adopted must be the creation of their positive willingness communicated by the parties themselves. This will bind the disagreed parties into a single sense of joint ownership. The two-fold interlinked issues of the subject matter of the contention must be categorically separated from each other & must not be discussed jointly. The disputed contention consists of the element of relational issues and of the substantive issues that combines itself and resulted in the subject matter of the disputes that causes the contention itself that brings its effect towards the inner feeling & behavior of the parties. So, always

separate the relational issues from that of substantive issues and discuss separately that will help to find out a concrete solution towards the resolution process. During the discussion always focus on common interest of the parties & let the parties feel themselves about the interdependence of the factual involvement of the elements that may be of quite helpful towards satisfying the interest of the parties themselves. The creation of the problem-solving agenda is of utmost importance towards the options generation process. By preparing& creating questionnaire seeking solutions let the parties participate themselves in the inquisitive discussion & mentally prepared them towards amicable solutions. The preparation& establishment of the problem-solving agenda further paves the way towards identifying the desired information & documentation that helps in accumulating the facts & factual data and the elements behind the disputes and its solutions. Identify the desired outcome & sort out the interest and positive intention of the parties as shown in the discussion forum. It is an essential home work that helps in developing the options based upon the discussion & it reflects the positive intention of the parties involved in the disputes but separate yourself from the evaluating process. The aggregate of options generation as sort out from the discussion forum leads the series of options that has to be prioritized and to be evaluated on the basis of the participant desires based upon their criteria ofmutual satisfaction. Among these aggregate of negotiation there will be some options to explore the resolutions that may come into the zone of possible agreement & that agreement would be optimal to reach towards the settlement.In other words the selected options that leads into the settlement process would be of mutual beneficial towards the disputed parties and it must satisfy the norms of the best alternative to a negotiated agreement (BATNA) that leads the disagreed parties into the Win – Win concept.

The successful communicating process between the disputed parties during the process of mediation is a vital ingredient and also a skillful art of the mediator that helps to explore the new options. The communicating platform between the disputed parties created by the mediator helps to explore the grievances of the parties and restore ways to short out the new options towards the conflict resolution that will give more satisfactory response towards the interest of the disputed parties themselves. Options generation is a platform where the issues of the disagreed parties are to be opened, discussed and scrutinized towards their interest. The active participation of discussion in the platform of options generation will open the door of mutual satisfaction of the parties involved therein. In this respect the mediator should be cautious towards the inner feeling of the parties in disputes and must avoid making premature judgement on the disputed subject matter and should avoid the possibility of a single answer of the issues confining into the concept of a single pie. He must try to invent more alternative options of expanding the pie and keeping up the deciding step in the last. In order to generate options in the disputes platform it is advised to design the purpose itself with a view to acquire plenty of gains for both the disagreed parties that will provide the maximum amount of mutual satisfaction to concerned parties. We know tri-partite trust building process between the disputed parties on the one hand and the mediator on the other hand is a fundamental phenomenon that determines the positive outcome of the options generation process. Therefore, first of all build trust at the opening session. We know the disputed parties and the mediator have different interest and perceptions rather than commonalities. Both the disputed parties try themselves to gain more and win more at the cost of other party on the other hand the primary aims of the mediator is based upon the concept of win and win for the mutual satisfaction of the disagreed parties. In the mediation proceeding one party may suggest something

which in a real sense seems to be quite practical and be actual solution but it may be outright rejected by the other party. Of course, that rejected idea may lead to other ideas which result in the final solution. This process, we can specifically term it as a phase of option generation. The basic interrelated elements for ensuring successful option generation is to create free and fair recognition of the concept of equality among the parties involved therein. The creation of an informal atmosphere encourages the parties to communicate with the other party that will help to put forward the grievances of the disputed parties on the subject matter of the disputes. Of course, the creation of the hazel free and informal atmosphere is to be created by providing no judgmental attitude and devoid of any ideas and proposal put forth during the communication process between the disputed parties. During the tripartite communicating process among the disputed parties and the mediator always be aware about the psychological factor of the disputed parties where they begin from the very beginning of their instinct that may be quite contradictory and of opposite to each other. Encourage the parties to communicate each other. Let them feel themselves that the ideas expressed in the discussion is only a way towards bridging of the disputes between themselves and not let them think it as a part of final solution, therefore always try to break the nexus between ideas and the final decision and try to differentiate the expressed ideas during discussion with that of the solution itself. After the completion of the communication process the opened forum of discussion should be diverted towards the exploration of the multiple options and let the parties invent themselves the best options and let them divert these options into a multiple solution instead of a single one. Of course, the strange ideas may sometimes be quite helpful to come into the final solution, so encourage the disputed parties to put forth the bold, unrelated and strange ideas towards the subject matter of the disputes. Those ideas will be of quite help full and effective in making the process of generating options.

We know the successful steps of the option generation can be followed by involving the disputed parties themselves in finding out the alternatives towards the solutions. For this the preliminary steps is to find out the cause of disputes between the parties. The cause of the disputes may be of the personal ego and self- interest of the parties involved there in triggered with the perception and may be of fear and intimidation existed felt by the either parties in the disputed subject matter thereby. The interest-based option generation approach always focuses on the inspiration factor thereby motivating the disagreed parties in finding out the positive and long-lasting alternative and effective option generation process. The pious effort of the mediator in solving the disputes between the disputed parties is very crucial because of the aggressive attitude of the parties towards each other. Nay, the concept of me versus you and the effort of meeting own want either in a forceful manner closing all the communication doors with other party is the prime condition existed beforehand the negotiation. In such an existed precondition of the options generation process there may be of quite complex one to initiate towards the resolutions. To create the cooperative attitude towards the disagreed parties at each other in a mutual feeling of openness the concept of expanding the pieplays a positive role by persuading each other in communicating themselves with a feeling of maximizing their needs in a cordial atmosphere. Besides this, there are different ways and tools of achieving fruitful options generation process helping both the disputed parties in finding out the mutual beneficial solution. Multiple Equivalent Simultaneous (MESO) offer is a process where the mediator proposes the offers without the commitment or preference of any proposed offer thereby and give the opportunity to select any one of the offers that may be agreeable to

the disagreed parties themselves. That is why it is a flexible offer and helps to understand the preference of the involved parties that may provide the inner instincts towards the preferred alternatives that will resulted in breaking through the issues of the disputes. The application of the MESO helps to select the parties more than a single agenda of the disputed subject matter for discussion in accordance with their priority and help them to find out the probable solution for each of the issues independently. In this respect let the parties themselves involved into the brain storming process in creating the mutual beneficial option generations. Of course, those option generations ought to be convertible into reality from the view point of the remedial aspect of the subject matter of the disputes.

In short, options generation process refers the development of a range of tools that represent the various ways of meeting objectives of the mediation process between different parties involved into the disputes on certain matters where the resolution on the contention of the subject mattercan be solved by mutual agreement of the parties involved into the disputes. It is an appraisal process on the outcome of the discussion held by the disputed parties on the subject matter of disputes that helps in finding out the relevant ideas & statements held during the communicating process between the parties involved therein that may help in solving the disputes of the parties.

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   Hugh Corder University of Cape Town April, 22 2021 on SAST

Nepal Council of Arbitration (NEPCA) Sub-Committees

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

a. Membership Scrutiny Committee

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

b. Arbitrator/Adjudicator/DB Appointment Committee

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

c. Panelist Committee

i.	Mr. Birendra Bahadur Deoja	- Coordinator
ii.	Mr. Bhoj Raj Regmi	- Member
iii.	Prof. Khem Nath Dallakoti	- Member

d. Publication Committee

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

e. Training Committee

i.	Ms. Gosai K.C.	-Coordinator
ii.	Mr. Matrika Prasad Niraula	-Member
iii.	Mr. Naveen Mangal Joshi	-Member

f. NEPCA Secretariat Improvement Committee

i.	Mr. Baburam Dahal	-Coordinator
ii.	Ms. Gosai K.C	-Member
iii.	Dr. Rajendra Prasad Adhikari	-Member
iv.	Mr. Matrika Prasad Niraula	-Member

g. NEPCA Arbitration Rules Amendment Committee

i.	Mr. Birendra Bahadur Deoja	-Coordinator
ii.	Prof. Khem Nath Dallakoti	-Member
iii.	Mr. Sailendra Kumar Dahal	-Member

Activities of NEPCA/Seminars & Trainings

1. On 9th August to 13th August, 2021, NEPCA conducted 5 days training on "Construction Management and Dispute Settlement" at NEPCA training hall, Kupondole, Lalitpur. All together 50 participants were participated physically and Virtual on the training program. Law practitioners, Government Officials, Private Companies and Individual Professionals also took part in training. Treasurer Mrs. Gosai K.C, Executive Member Sr. AdvocateMr. Matrika Prasad Niraula and Former General Secretary Er. Gyanendra Prasad Kayasthadistributed the certificate to the participants. Finally, training closed withgroup photo.


2. On December 17, 2021 (02 Poush 2078), Nepal Council of Arbitration (NEPCA) organized Joint meeting between NEPCA Executive Committee, Former Chairperson of NEPCA Mr. Surya Nath Upadhyay, Former Justice of Supreme Court Mr. Bala Ram K.C and NEPCA panel list/ Former Chairperson of Nepal Engineering Council Er. Satya Narayan Shah at Royal Singi, Kathmandu.


3. On March25, 2022 (11Chaitra 2078), Nepal Council of Arbitration (NEPCA) organized Interaction Program on "Improving Quality of Arbitration in Nepal" with different Government Organization at Hotel Himalayan, Lalitpur. The Program was officially inaugurated by the Chief Guest Honorable Justice of Supreme Court Mr. Anil Kumar Sinha by lighting up the flame on Panas. The Program were started with welcome remarks by chairperson Er. Dhruva Raj Bhattarai focusing on the purpose and importance of the Program. The Intermitted Past President of NEPCA Er. Birendra Bahadur Deoja

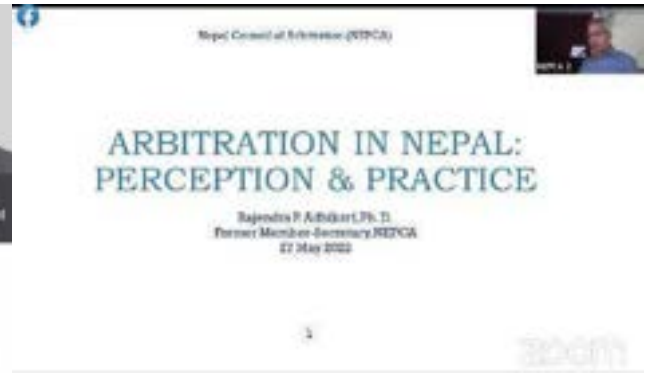
present a paper on “Improving Quality of Arbitration in Nepal”. The Former Justice of Supreme Court Mr. Bala Ram K.C. add his remarks on the Presentation.At the end vice-chairperson Senior AdvocateMr. BipulendraChakravartty declared end of the program along with his remarks.The total of 50 participants from different Government Office were participated in the Interaction Program with keen interest.



4. On 28th March to 1stApril, 2022, NEPCA conducted 5 days training on "Contract Management and Dispute Settlement” at NEPCA training hall, Kupondole, Lalitpur. 51 physical and 20 Virtual participants were participated on the training program from different background of Law practitioners, Government Officials, Private Companies and Individual Professionals. Chairperson Er. Dhruva Raj Bhattarai, Vice-Chairperson Sr. Advocate BipulendraChakravartty, General Secretary advocate Mr. Baburam Dahal and Former General Secretary Er. Gyanendra Prasad Kayasthadistributed the certificate to the participants. At the end Chairperson Er. Dhruva Raj Bhattarai declared the end of program along with his remarksFinally, training closed withgroup photo.




5. On May 27, 2022 (13 Jestha 2079), Nepal Council of Arbitration organized an Online Webinar titled as "Arbitration in Nepal – Perception and Practice" for its valued members. Key policy makers, senior management executives, project management specialists, contract specialists, arbitrators, senior officer from bureaucracy, senior lawyer, engineers and contractors were participated in the webinar. Officially, webinar started with welcome remarks by chairperson Er. Dhruva Raj Bhattarai focusing on the purpose and importance of webinar. General Secretary AdvocateMr. Baburam Dahal moderated the session. Executive Member of NEPCA and Construction/Project Management Expert Dr. Rajendra Prasad Adhikari made key presentation on the subject. At the end General Secretary Advocate Mr. Baburam Dahal declared the end of program along with his remarks.The total of 110 participants from different field participated in the webinar with keen interest.



6. On 8th August to 12thAugust, 2022, NEPCA conducted 5 days training on "Construction Management and Dispute Settlement" at NEPCA training hall, Kupondole, Lalitpur. 41 physical and 10 Virtual participants were participated on the training program from different background of Law practitioners, Government Officials, Private Companies and Individual Professionals. Chairperson Er. Dhruva Raj Bhattarai, General Secretary advocate Mr. Baburam Dahal and Former General Secretary Er. Gyanendra Prasad Kayastha distributed the certificate to the participants. At the end Chairperson Er. Dhruva Raj Bhattarai declared the end of program along with his remarks Finally, training closed withgroup photo.

7. On 4th September to 8th September, 2022, NEPCA conducted 5 days training on "Construction Management and Dispute Settlement" at NEPCA training hall, Kupondole, Lalitpur. 34 physical and 10 Virtual participants were participated on the training program from different background of Law practitioners, Government Officials, Private Companies and Individual Professionals. Chairperson

Er. Dhruva Raj Bhattarai, General Secretary advocate Mr.Baburam Dahal and Former General Secretary Er. Gyanendra Prasad Kayastha distributed the certificate to the participants. At the end Chairperson Er. Dhruva Raj Bhattarai declared the end of program along with his remarks Finally, training closed withgroup photo.

8. On 30th November to 2nd December, 2022, NEPCA conducted 3 days training on "Construction Management and Dispute Settlement" at Hotel Shaara, Lakeside, Pokhara. All together 48 participants were participated on the training program from different background of Law practitioners, Provincial Government Officials, Private Companies and Individual Professionals. The Training was officially inaugurated by General Secretary advocate Mr.Baburam Dahal by lighting up the flame on Panas. Chairperson Er. Dhruva Raj Bhattarai, General Secretary advocate Mr. Baburam Dahal and Former General Secretary Er. Gyanendra Prasad Kayastha distributed the certificate to the participants. At the end Chairperson Er. Dhruva Raj Bhattarai declared the end of program along with his remarks Finally, training closed withgroup photo.

9. On December 02, 2022 (16 Mangshir 2079), Nepal Council of Arbitration (NEPCA) organized Interaction Program on "नेपालमा मध्यस्थता, कानुन र प्रयोग" with Pokhara High Court Judges, Kaski District Court Judgesand different Provincial Government Organization at Hotel HotelShaara, Lakeside, Pokhara. The Program was officially inaugurated by the Chief Guest Honorable Chief Judge of Pokhara High Court Mr. Dilli Raj Acharya by lighting up the flame on Panas. The Program were started with welcome remarks by chairman Er. Dhruva Raj Bhattarai focusing on the purpose and importance of the Program. The Intermitted Past President Er. Birendra Bahadur Deoja present a paper on "नेपालमा मध्यस्थता, कानुन र प्रयोग". The Chief Guest Honorable Chief Judge of Pokhara High Court Mr. Dilli Raj Acharya add his remarks on the Presentation. At the end Executive Member of NEPCA and Construction/Project Management Expert Dr. Rajendra Prasad Adhikarideclared the end of program along with his remarks.The total of 45 participants from Pokhara High Court, Kaski District Court and different Provincial Government Organization were participated in the Interaction Program with keen interest.

Panel List of NEPCA

S.N	Name	Profession	Address
1	Mr. Babu Ram Dahal	Advocate	Anamnagar, Kathmandu
2	Mr. Bhoj Raj Regmi	Engineer	Baluwatar, Kathmandu
3	Mr. Bhola Chhatkuli	Engineer	Kritipur, Kathmandu
4	Mr. Bhoop Dhoj Adhikari	Former Judge	Old Baneshwor, Kathmandu
5	Mr. Bindeshwar Yadav	Engineer	Baneshwor, Kathmandu
6	Mr. Bipulendra Chakraworty	Advocate	Jahada, Biratnagar, Morang
7	Mr. Birendra Bahadur Deoja	Engineer	Baneshwor, Kathmandu
8	Mr. Birendra Mahaseth	Engineer	Kathmandu
9	Mr. Dev Narayan Yadav	Engineer	Kathmandu
10	Mr. Dhruva Raj Bhattarai	Engineer	Gyaneswor, Kathmandu
11	Mr. Dinker Sharma	Engineer	Mandikatar, Kathmandu
12	Mr. Dipak Nath Chalise	Engineer	Maligaun, Kathmandu
13	Mr. Durga Prasad Osti	Engineer	Baneshwor, Kathmandu
14	Mr. Dwarika Nath Dhungel	Social Sciences Researcher	Baneshwor, Kathmandu
15	Dr. Gokul Prasad Burlakoti	Lawyer	Babarmahal, Kathmandu
16	Mr. Gyanendra P. Kayastha	Engineer	Sanepa, Lalitpur
17	Mr. Hari Prasad Sharma	Engineer	Baneshwor, Kathmandu
18	Mr. Hari Ram Koirala	Freelancer Consultant	Baneshwor, Kathmandu
19	Mr. Indu Sharma Dhakal	Engineer	Mahankal, Kathmandu
20	Mr. Kanak Bikram Thapa	Dean Law Faculty	Ratopul, Kathmandu
21	Mr. Keshav B. Thapa	Engineer	Babarmahal, Kathmandu
22	Prof. Khem Nath Dallakoti	Engineer	Battisputali, Kathmandu
23	Mr. Kul Ratna Bhurtel	Advocate	Dhobighat, Lalitpur
24	Mr. Lekh Man Singh Bhandhari	Engineer	Sainbhu-2Ka, Lalitpur
25	Mr. Madhab Prasad Paudel	Chief Commission	Jagritinagar, Kathmandu
26	Mr. Mahanedra Bahadur Gurung	Engineer	Hadigaun, Kathmandu
27	Mr. Mahendra Nath Sharma	Engineer	Battisputali, Kathmandu
28	Mr. Matrika Prasad Niraula	Sr. Advocate	Anamnagar, Kathmandu
29	Mr. Mohan Man Gurung	Engineer/Advocate	Bagbazar, Kathmandu
30	Mr. Murali Prasad Sharma	Advocate	Baneswor, Kathmandu
31	Mr. Narayan Datt Sharma	Advocate/Engineer	Gyaneshwor, Kathmandu
32	Mr. Narayan Prasad Koirala	Advocate	Naya Baneshwor, Kathmandu
33	Mr. Narendra Kumar Shrestha	Fromer Deputy Attorney General, Advocate	Naya Baneshwor, Kathmandu
34	Mr. Naveen Mangal Joshi	Engineer	Kobahal Tole, Lalitpur
35	Mr. Niranjan Prasad Poudel	Structural Engineer	Kathmandu
36	Mr. Poorna Das Shrestha	Civil Engineer	Balkot-5, Bhaktapur
37	Mr. Rajendra Kishore Kshatri	Lawyer	Lainchour, 237, Kathmandu
38	Mr. Rajendra Niraula	Engineer	Balkhu kathmandu
39	Mr. Rajendra P. Kayastha	Engineer	Maharajgunj, Kathmandu
40	Dr. Rajendra Prasad Adhikari	Project Mgmt, Advocate	Bishalnagar, Kathmandu
41	Mr. Ram kumar lamsal	Engineer	Bhimsengola, Kathmandu
42	Mr. Rameshwar Prasad Kalwar	Engineer	Balkhu-14, Kathmandu
43	Mr. Rishi Kesh Wagle	Advocate	Tokha, Kathmandu
44	Mr. Sanjeev Koirala	Engineer	Balkumari, Lalitpur
45	Mr. Satya Narayan Shah	Engineer	Lalitpur, Nepal
46	Mr. Shambhu Thapa	Advocate	Tinkune, Kathmandu

S.N	Name	Profession	Address
47	Mr. Sharada Prasad Sharma	Engineer	Baneshwor, Kathmandu
48	Mr. Shree Prasad Agrahari	Engineer	Gairidhara, Kathmandu
49	Mr. Som Bahadur Thapa	Engineer	Madhyapur, Thimi, Bhaktapur
50	Mr. Som Nath Paudel	Engineer	Teku, Kathmandu
51	Mr. Subash Chandra Verma	Engineer	Gothatar, Bhaktapur
52	Mr. Suman Kumar Rai	Advocate	Ithari, Sunsari

S.N	Name	Profession	Address
53	Mr. Sunil Kumar Dhungel	Electrical Engineer	Baneswor-10, Kathmandu
54	Mr. Suresh Kumar Regmi	Engineer	Maligaun-5, Kathmandu
55	Mr. Surya Nath Upadhyay	Advocate	Ghattekulo, Kathmandu
56	Mr. Tul Bahadur Shrestha	Engineer	Anamnagar, Kathmandu
57	Mr. Tulasi Bhatta	Advocate	Anamnagar, Kathmandu
58	Mr. Udaya Nepali Shrestha	Law Reform Commission	Satdobato, Lalitpur
59	Mr. Varun P. Shrestha	Engineer	Baneshwor, Kathmandu

NEPCA Life Member

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

S.N	Name	Profession
30	Mr. Bindeshwar Yadav	Engineer
31	Mr. Binod Shrestha	Civil Engineer
32	Mr. Bipulendra Chakravartty	Senior Advocate
33	Mr. Birendra Bahadur Deoja	Engineer
34	Mr. Birendra Mahaset	Civil Engineer
35	Mr. Bishnu mani Adhikari	Lawyer
36	Mr. Bishnu Om Baade	Engineer
37	Dr. Bishwadeep Adhikari	Advocate
38	Mr. Bodhari Raj Pandey	Justice, Supreme Court
39	Mr. Buddha Kaji Shrestha	Insurance Professional
40	Mr. Chabbi Lal Ghimire	Lawyer
41	Mr. Chandeshwor Shrestha	Advocate
42	Mr. Chandra Bahadur KC	Engineer
43	Mr. Daya Kant Jha	Engineer
44	Mr. Deo Narayan Yadav	Engineer
45	Mr. Deukaji Gurung	Engineer
46	Mr. Devendra Karki	Engineer
47	Mr. Dhanaraj Gnyawali	Secretary, PMO (Law)
48	Mr. Dhruba Prasad Paudyal	Engineer
49	Mr. Dhruva Raj Bhattarai	Engineer
50	Mr. Dhundi Raj Dahal	Engineer
51	Mr. Digamber Jha	Engineer
52	Mr. Dilip Bahadur Karki	Engineer
53	Mr. Dilli Raman Dahal	Legal
54	Mr. Dilli Raman Niraula	Engineer
55	Mr. Dinesh Kumar Karky	Lawyer
56	Mr. Dinesh Raj Manandhar	Engineer
57	Mr. Dinker Sharma	Engineer
58	Mr. Dipak Nath Chalise	Engineer

S.N	Name	Profession
59	Mr. Dipendra Shrestha	Engineer
60	Mr. Durga Prasad Osti	Engineer
61	Mr. Dwarika Nath Dhungel	Social Sciences Researcher
62	Mr. Fanendra Raj Joshi	Engineer
63	Mr. Gajendra Kumar Thakur	Engineer
64	Mr. Gandhi Pandit	Advocate
65	Ms. Gauri Dhakal	Justice, Supreme Court
66	Mr. Gaya Prasad Ulak	Engineer /Consultant
67	Mr. Ghan Shyam Gautam	Engineer
68	Mr. Girish Chand	Engineer
69	Mr. Gokarna Khanal	Civil Engineer
70	Dr. Gokul Prasad Burlakoti	Lawyer
71	Dr. Gopal Siwakoti	Law Practice
72	Mr. Govinda Kumar Shrestha	Judge High Court
73	Mr. Govinda Prasad Parajuli	Judge High Court
74	Mr. Govinda Raj Kharel	Advocate
75	Mr. Gunanidhi Nyaupane	Lawyer
76	Mr. Gyanendra Prasad Kayastha	Civil Engineer
77	Mr. Hari Bahadur Basnet	Judge High Court
78	Mr. Hari Bhakta Shrestha	Engineer
79	Mr. Hari Kumar Silwal	CA / Lawyer
80	Mr. Hari Narayan Yadav	Enginer
81	Mr. Hari Prasad Dhakal	Engineer
82	Mr. Hari Prasad Sharma	Engineer
83	Mr. Hari Ram Koirala	Engineer
84	Mr. Hari Ram Koirala	Ret. Chief Judge
85	Mr. Hari Ram Shrestha	Civil Engineer
86	Mr. Harihar Dahal	Advocate
87	Mr. Hariom Prasad Shrivastav	Engineer
88	Mr. Hom Nath Koirala	Construction Entrepreneur

S.N	Name	Profession
89	Mr. I.P. Pradhan	Engineer
90	Mr. Indra Lal Pradhan	Engineer
91	Mr. Indu Sharma Dhakal	Engineer
92	Mr. Ishwar Bhatta	Engineer
93	Mr. Ishwar Prasad Tiwari	Engineer
94	Mr. Ishwori Prasad Paudyal	Joint Secretary,
95	Mr. Jagadish Dahal	Advocate
96	Mr. Jaya Mangal Prasad	Advocate
97	Mr. Jayandra Shrestha	Adviser/Finance
98	Mr. Jayaram Shrestha	Lawyer
99	Mr. Jivendra Jha	Engineer
100	Mr. Kamal Kumar Shrestha	Joint Secretary, PMO
101	Mr. Kamal Raj Pande	Engineer
102	Prof. Kanak Bikram Thapa	Former Dean, Law Faculty/ Advocate
103	Mr. Kedar Man Shrestha	Engineer
104	Mr. Kedar Nath Acharya	Justice, Supreme Court
105	Mr. Kedar Prasad Koirala	Advocate
106	Mr. Keshari Raj Pandit	Judge High Court
107	Mr. Keshav Bahadur Thapa	Engineer
108	Mr. Keshav Prasad Mainali	Advocate
109	Mr. Keshav Prasad Ghimire	Engineer
110	Mr. Keshav Prasad Pokharel	Engineer
111	Mr. Keshav Prasad Pulami	Engineer
112	Prof. Khem Nath Dallakoti	Engineer
113	Mr. Khem Prasad Dahal	Accountant
114	Mr. Kishor Babu Aryal	Engineer
115	Mr. Komal Natha Atreya	Engineer
116	Mr. Krishna Prasad Nepal	Civil Engineer
117	Mr. Krishna Sharan Chakhun	Engineer,
118	Mr. Kul Ratna Bhurtyal	Judge High Court

S.N	Name	Profession
119	Dr. Kumar Sharma Acharya	Senior Advocate
120	Mr. Kushum Shrestha	Senior Advocate
121	Mr. Lal Krishna K.C.	Engineer
122	Mr. Lava Raj Bhattarai	Engineer
123	Mr. Laxman Krishna Malla	Engineer,
124	Mr. Laxman Prasad Mainali	Advocate
125	Mr. Lekh Man Singh Bhandhari	Engineer
126	Mr. Lok Bahadur Karki	Advocate
127	Mr. Madan Gopal Maleku	Engineer
128	Mr. Madan Shankar Shrestha	Engineer,
129	Mr. Madan Timsina	Engineer
130	Mr. Madhab Prasad Paudel	Chief Commission
131	Mr. Madhav Belbase	Engineer
132	Mr. Madhav Das Shrestha	Advocate
133	Mr. Madhav Prasad Khakurel	Engineer
134	Mr. Madhusudan Pratap Malla	Engineer
135	Mr. Mahendra Bahadur Gurung	Engineer
136	Mr. Mahendra Kumar Yadav	Engineer
137	Mr. Mahendra Narayan Yadav	Engineer
138	Mr. Mahendra Nath Sharma	Engineer
139	Mr. Mahesh Bahadur Pradhan	Engineer
140	Mr. Mahesh Kumar Agrawal	Entreoreneur
141	Mr. Mahesh Kumar Thapa	Advocate
142	Mr. Manoj Kumar Sharma	Engineer
143	Mr. Manoj Kumar Yadav	Engineer/Legal
144	Mr. Matrika Prasad Niraula	Sr. Advocate
145	Mr. Meen Raj Gyawali	Engineer
146	Mr. Min Bahadur Rayamajhee	Former Chief Justice, Supreme Court
147	Mr. Mitra Baral	Civil Service

S.N	Name	Profession
148	Mr. Mohan Man Gurung	Engineer/Advocate
149	Mr. Mohan Raj Panta	Engineer
150	Mr. Mr. Nagendra Nath Gnawali	Engineer
151	Mr. Mukesh Raj Kafle	Engineer
152	Mr. Mukunda Sharma Paudel	Advocate
153	Mr. Murali Prasad Sharma	Advocate
154	Mr. Nagendra Raj Sitoula	Consultant
155	Mr. Narayan Datt Sharma	Advocate/Engineer
156	Mr. Narayan Prasad Koirala	Engineer/Lawyer
157	Mr. Narendra Bahadur Chand	Engineer,
158	Mr. Narendra Kumar Baral	Engineer
159	Mr. Narendra Kumar K.C	Lawyer
160	Mr. Narendra Kumar Shrestha	Former Deputy attorney general, Advocate
161	Mr. Naveen Mangal Joshi	Engineer
162	Mr. Niranjan Prasad Chalise	Engineer
163	Mr. Niranjan Prasad Poudel	Engineer
164	Mr. Om Naraya Sharma	Engineer
165	Mr. Pawan Karki	Engineer
166	Mr. Poorna Das Shrestha	Civil Engineer
167	Mr. Prabhu Krishna Koirala	Advocate
168	Mr. Prajesh Bikram Thapa	Engineer
169	Mr. Prakash Jung Shah	Engineer
170	Mr. Prakash Poudel	Engineer
171	Mr. Pramod Krishna Adhikari	Engineer
172	Ms. Prativa Neupane	Advocate
173	Prof. Purna Man Shakya	Legal
174	Mr. Purnendu Narayan Singh	Engineer
175	Mr. Purusottam Kumar Shahi	Engineer
176	Mr. Puspa Raj Pandey	Lawyer
177	Mr. Radheshyam Adhikari	Advocate

S.N	Name	Profession
178	Mr. Raghab Lal Vaidya	Lawyer
179	Mr. Rajan Adhikari	Advocate
180	Mr. Rajan Raj Pandey	Engineer
181	Mr. Rajendra Kishore Kshatri	Advocate
182	Mr. Rajendra Kumar Bhandhari	Justice, Supreme Court
183	Mr. Rajendra Niraula	Engineer
184	Mr. Rajendra Paudel	Engineer
185	Dr. Rajendra Prasad Adhikari	Project Mgmt, Advocate
186	Mr. Rajendra Prasad Kayastha	Engineer
187	Mr. Rajendra Prasad Yadav	Engineer
188	Mr. Raju Man Singh Malla	Advocate
189	Mr. Ram Kumar Lamsal	Engineer
190	Mr. Ram Prasad Acharya	Lawyer
191	Mr. Ram Prasad Gautam	Lawyer
192	Mr. Ram Prasad Shrestha	Legal
193	Mr. Ram Prasad Silwal	Engineer
194	Mr. Ram Shanker Khadka	Lawyer
195	Mr. Ramesh Kumar Ghimrie	Advocate
196	Mr. Ramesh Prasad Rijal	Engineer
197	Mr. Ramesh Raj Satyal	Auditor
198	Mr. Rameshwar Lamichhane	Engineer
199	Mr. Rameshwar Prasad Kalwar	Engineer
200	Mr. Ravi Sharma Aryal	Justice, Supreme Court
201	Mr. Resham Raj Regmi	Senior Advocate
202	Mr. Rishi Kesh Sharma	Engineer
203	Mr. Rishi Kesh Wagle	Dean KU, Law
204	Mr. Rishi Ram Sharma Neupane	Engineer (Water Mgmt)
205	Mr. Rishiram Koirala	Engineer
206	Mr. Roshan Soti	Engineer

S.N	Name	Profession
207	Mr. Rudra Prasad Sitaula	Lawyer
208	Mr. Rupak Rajbhandari	Engineer
209	Mr. Sahadev Prasad Bastola	Former Judge
210	Mr. Sajan Ram Bhandary	Advocate,
211	Mr. Sanjeev Koirala	Engineer
212	Mr. Santosh Kumar Pokharel	Engineer
213	Ms. Sarala Moktan	Advocate
214	Mr. Sarb Dev Prasad	Engineer
215	Mr. Saroj Chandra Pandit	Engineer
216	Mr. Saroj Kumar Upadhaya	Engineer
217	Mr. Satya Narayan Shah	Engineer
218	Mr. Shailendra Kumar Dahal	Advocate
219	Mr. Shaligram Parajuli	Engineer/Advocate
220	Mr. Shambhu Thapa	Senior Advocate
221	Mr. Shankar Prasad Pandey	Lawyer
222	Mr. Sharada Prasad Sharma	Engineer
223	Ms. Sharda Shrestha	Justice, Supreme Court
224	Mr. Sher Bahadur Karki	Advocate
225	Mr. Shishir Koirala	Engineer
226	Mr. Shital Babu Regmee	Engineer
227	Mr. Shiva Hari Sapkota	Engineer
228	Mr. Shiva Kumar Basnet	Engineer,
229	Mr. Shiva Prasad Sharma Paudel	Engineer
230	Mr. Shiva Prasad Uprety	Engineer
231	Mr. Shiva Raj Adhikari	Advocate
232	Mr. Shiva Ram K.C	Engineer
233	Mr. Shree Prasad Agrahari	Engineer
234	Mr. Shree Prasad Pandit	Lawyer
235	Mr. Shreedhar Sapkota	Advocate
236	Mr. Shyam Bahadur Karki	Engineer

S.N	Name	Profession
237	Mr. Shyam Bahadur Pradhan	Former Justice
238	Mr. Shyam Prasad Kharel	Engineer
239	Mr. Siddha Prasad Lamichanne	Lawyer
240	Mr. Som Bahadur Thapa	Lawyer
241	Mr. Som Nath Poudel	Engineer
242	Mr. Subash Kumar Mishra	Engineer
243	Mr. Subhash Chandra Verrma	Engineer (Civil)
244	Ms. Sujan Lopchan	Advocate
245	Mr. Suman Kumar Rai	Legal Advocacy
246	Mr. Suman Prasad Sharma	Engineer
247	Mr. Suman Rayamajhi	Chartered Accountant
248	Mr. Sunil Bahadur Malla	Engineer
249	Mr. Sunil Ghaju	Engineer
250	Mr. Sunil Kumar Dhungel	Electrical Engineer
251	Mr. Sunil Man Shakya	Legal
252	Mr. Suresh Chitrakar	Engineer
253	Mr. Suresh Kumar Regmi	Engineer
254	Mr. Suresh Kumar Sharma	Engineer
255	Mr. Suresh Man Shrestha	Advocate/ Former Law Secretary
256	Mr. Surya Dev Thapa	Engineer
257	Mr. Surya Nath Upadhyay	Former CIAA Chief/ Advocate
258	Mr. Surya Prasad Koirala	Advocate
259	Mr. Sushil Bhatta	Engineer
260	Mr. Suvod Kumar Karna	Chartered Accountant
261	Mr. Tanuk Lal Yadav	Engineer
262	Mr. Tara Dev Joshi	Advocate
263	Mr. Tara Man Gurung	Engineer
264	Mr. Tara Nath Sapkota	Engineer

S.N	Name	Profession
265	Mr. Tej Raj Bhatta	Advocate
266	Mr. Tek Nath Achraya	Chartered Accountant
267	Mr. Thaneshwar Kafle(Rajesh)	Advocate
268	Mr. Tilak Prasad Rijal	Lawyer
269	Mr. Trilochan Gauchan	Lawyer
270	Mr. Tul Bahadur Shrestha	Advocate
271	Mr. Tulasi Bhatta	Advocate
272	Mr. Udaya Nepali Shrestha	Former VC, Law Reform Commission
273	Mr. Uddhav Prasad Kadariya	Tax Counselor
274	Mr. Uma Kanta Jha	Engineer
275	Mr. Umesh Jha	Engineer
276	Mr. Upendra Dev Bhatta	Engineer
277	Mr. Upendra Rja Upreti	Advocate/Engineer
278	Mr. Varun Prasad Shrestha	Engineer
279	Mr. Vinod Prasad Dhungel	Former Judge
280	Mr. Vishnu Bahadur Singh	Engineer
281	Mr. Vishwa Nath Khanal	Engineer
282	Mr. Yadav Adhikari	Nepal Police
283	Mr. Yagya Deo Bhatt	Engineer
284	Mr. Yajna Man Tamrakar	Engineer
285	Mr. Yaksha Dhoj Karki	Construction Entrepreneur
286	Mr. Yoganand Yadav	Engineer
287	Mr. Yubaraj Snagroula	Senior Advocate

NEPCA Ordinary Members

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. Ashish Upadhyay	Engineer
6	Mr. Babu Lal Agrawal	Engineer
7	Mr. Bharati Prasad Sharma	Engineer
8	Mr. Bhawesh Mandal	Engineer
9	Mr. Bipin Paudel	Engineer
10	Mr. Chet Nath Ghimire	Advocate
11	Mr. Deepak Man Singh Shrestha	Engineer
12	Mr. Devendra Shrestha	Architect
13	Federation of Contractors' Association of Nepal	Engineer
14	Mr. Gouri Shankar Agrawal	Engineer
15	Mr. Guru Bhakta Niroula Sharma	Advocate
16	Mr. Kalyan Gyawali	Engineer
17	Ms. Kamala Upreti -Chhetri	Advocate
18	Mr. Kashi Raj Dahal	Chief, Administrative Court
19	Mr. Laxman Prasad Adhikari	Engineer
20	Mr. Mahendra Kanta Mainali,	Advocate
21	Mr. Manaj Jyakhwo	Advocate
22	Mr. Narendra Kumar Dahal	Engineer

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

Table 1. Indicative Status of Adjudication Cases in the Year 2078/79 in NEPCA

SN	R.Date	Case Name	Contract Amount	Description of Claim	Admin.Cost	Award Date	Claim Amount	Award Amount	Award Decision	Rules Follwed
1	2076/6/29	ZIEC Vs. PIV, Birgunj Metropolitan	117210112.00	STIUEIP/BRJ/ICB-O2	287500.00	2079/9/16	35000000.00	9686043.00	Claim Accepted	NEPCA Rules
2	2075/10/25	ZIEC - Pappu JV Vs. Butwal Municipality Office	266263584.00	ICB/STIUEP/BM/ISWM/02 Procurement of Works for Butwal ISWM Sub-Project	447500.00	2078/11/3	40742234.26	1405028.00	Claim Accepted	NEPCA Rules
3	2077/6/14	GM Construction Vs. Federal Project Implementation Unit, Surkhet	62194849.30	Contract 1 - 09/067/68 Construction of Health Post Building in Dali, Khagenakot VDC, Jajarkot	131840.00	2078/7/12	7524968.12	4458792.72	Claim Accepted	NEPCA Rules
4	2077/6/14	GM Construction Vs. Federal Project Implementation Unit, Surkhet	73948524.60	Contract 2 - 7/067/68 Construction of Health Post Building in Katkuwa, Birendranagar, Municipalit-6, Surkhet	197763.00	2078/7/12	13183329.00	11503628.00	Claim Accepted	NEPCA Rules
5	2077/10/12	Nepal Pragati Shiva Shakti JV Vs. Mid Western Division Road Office	32870302.93	337ECAM/74/071/72 Road Upgrading Works Along Sukaura-Baibang-Charakmatiya Road in Dang District	120000.00	2078/10/17	43114299.31	24654378.99	Claim Accepted	NEPCA Rules
6	2077/6/16	Prakritik -Shiv JV Vs. MIP, Dept of Irrigation, Nawalparasi	79114062.87	IDD Nawalparasi/Samridda Terai/MIP/W-07/073-074/Turiya- Construction of Headworks, Canal and Canal Structure, of Turiyakhola ISP, Hakuhi Nawalparasi"	157500.00	2078/8/2	5503859.19	4305873.12	Claim Accepted	NEPCA Rules
7	2077/4/8	ZCGIEC-Ashish -Prera JV Vs. PIU, Jhapa	679379995.74	DoLIDAR/RCIP/Works/NCB-01/2074/075	332537.00	2079/3/7	57960616.00	34357720.00	Claim Accepted	NEPCA Rules
8	2077/9/12	DWSSM (Small Town) Vs Kalika Sharma Raman J/V	28799896.25	TSTWSSSP/NCB-13 "Tamasariya _Nawalparasi Town Water Supply & Sanitation Project"	407500.00	2079/3/7	81779135.00	44598894.00	Claim Accepted	NEPCA Rules
9	2077/11/2	M/S Ningbo Ningshing International Inc China Vs. STIUEP, Karve Integrated Water Supply Project	673326110.29	STIUEP/KVIWSP/ICB-01 Construction of Kavre Valley Integrated Water Supply Project	347500.00	2078/6/4	38111202.92	9172313.04	Claim Accepted	NEPCA Rules
10	2077/11/4	DoLIDAR Vs. M/S Pappu Mahavir JV	58461625.56	13/LRBP/NCB/Bagmati/072-73"Construction of Bagmati River, Khokana-Saukhel Road, Lalitpur"	287500.00	2078/11/16	18982999.00	9522999.76	Claim Accepted	NEPCA Rules
11	2078/3/13	M.B. Gauri Parbati JV Vs. CLPIU, Education	261292316.28	ESRP/DOE/NCB/01-Lalitpur -01 "Construction of 5 School Building Complex in Lalitpur District"	189904.53	2078/9/11	29078360.63	8872957.40	Claim Accepted	NEPCA Rules
12	2078/3/27	NITDB Vs. M/S Shanxi -Ashish JV	1447587204.67	NIRTTP/PCO/NITDB/W/ICB-4: Construction of Kathmandu ICD/CFS (Part A - Main Blocks)	527500.00	2079/3/17	138566777.75	22033652.40	Claim Accepted	NEPCA Rules
13	2078/5/16	Shyam Sundar-Gulliver JV Vs CLPIU (Education)	26647806.18	ESRP/MOE/CLPIU/073/74 Nuwakot-04, Construction of 6 School Building Complex in Nuwakot District	121500.00	2078/9/18	4393535.18	4393535.18	Claim Accepted	NEPCA Rules
14	2078/7/11	Shankharmali/Akela JV VsWestern Regional Road Directorate	99325395.96		212500.00	2078/10/13	23789119.00	16589622.62	Claim Accepted	NEPCA Rules
15	2078/7/26	Ashish/C.M./Jaya Baba JV vs DRO Minbhawan	21160678.45	NSKRP/3371454-2072/73-04, "Earthwork for Road Widening and Upgrading Works on Ranighat-Argali Section Palpa Road Project"	182500.00	2078/11/13	10832897.70	10773050.00	Claim Accepted	NEPCA Rules
16	2078/3/4	Ningshing Lumbini JV Vs KUKL	167624019.00	KUKL/DNI/02/06B Lot-1 & Lot-2 Drilling and Development of Tube Well	55129.66	2078/4/1	65786671.30	30219461.88	Claim Accepted	NEPCA Rules
17	2076/4/5	ZIEC - Pappu JV Vs NITDB	145511736.00	NIRTTP/PCO/NITDB/W/ICB-1 Nepal India Trade and Transport Project	332500.00	2078/4/16	47820324.72	19257167.52	Claim Accepted	NEPCA Rules
		Administrative Cost Received from 3 DB Cases			313050.00					
			4240718220.08		**4651724.19**		**662170329.08**	**265805117.63**		
							15.61%	**40.14%**		

Table 2. Indicative Status of Arbitration Cases in the Year 2078/79 in NEPCA

S.N	R. Date	Case Name	Issues	Arbitrators Status	Date of Decision	Administrion Cost	File to District Court	Appeal	Contract Amount	Claim	Award Amount	Award Decision	Appeal Decision	Rules Followed
1	26/07/2017	Tundi Construction Vs Constructora Sanjose S.A.	construction of Airside Infrastructure and Landslide Terminal Improvement at TIA and Rara Airports	L,E,E	2078/4/3	835000.00	2078/5/27	No Record	1621345470.65	400000000.00	145500000.00	Claim Accepted	No info	NEPCA
2	2076/2/24	Batliboi Environmental Engineering Vs. Hetauda Cement Udhyog	design, supply, delivery, civil construction, erection, installation and commissioning of reverse air bag house	L	2079/3/16	149885.00	2079/5/9	No Record	75950000.00	79021468.80	48392558.00	Claim Accepted	No info	NEPCA
3	2073/4/28	Lumbini Jay DC JV Vs. Department of Food, Technology and Quality Control	1-062/63 Construction of SPS Codex and Lab Building	L,E,L	2079/3/14	185000.00	2079/5/9	Appealed	81295406.10	18546437.00	2099856.46	Claim Accepted	No info	NEPCA
4	2076/4/24	Ashish -Apex-Rautaha JV Vs DoR	MHHP/3371384/070-71/031 Construction of Ghurmi - Chatara Koshi Corridor Project	L,E,L	2078/6/12	316390.00	2078/8/6	Appealed	300567996.35	35000000.00	34688905.20	Claim Accepted	No info	NEPCA
5	2076/6/7	DOR Vs. Sharma Danfe Kacharam	AH/MT/1-03/068/69 Improvement of Maitighar - Tinkune Section	L,E,L	2078/6/12	334800.00	2078/8/6	Appealed	806391047.00	58515618.00	26072785.85	Claim Accepted	No info	NEPCA
6	2077/6/23	Rajendra Dev Singh L.B JV Vs. FPIU	DUDBC/Rolpa/Works/NCB/01-073/74	E	2078/7/23	166498.00	2078/9/18	No Record	69960322.91	15366448.02	8404844.77	Claim Accepted	No info	
7	2076/10/6	Ashish Apex Roshan JV VS. DOR	TRIP/337312/RBID/2071/72/01 Upgrading and construction of Rani Biratnagar Itahari Dharan Road To Six Lane	E,E,L	2078/4/8	235206.00	2078/5/27	Appealed	599551983.32	17146151.61	16694157.07	Claim Accepted	No info	NEPCA
8	2077/11/23	Mainachuli BKOI JV Vs. DOR	DRODG/3371574/125-070/71 Steel Truss Bridge Construction Over Mega	E,E,L	2079/3/3	380000.00	2079/5/9	Appealed	79088668.22	45443125.00	34849786.00	Claim Accepted	No info	NEPCA
9	2077/07/16	Elite Shankarmali JV Vs. IDO, Beni, Myagdi	DDC/DDC/W/07/071/72/NCB Construction of Kaligandaki River Bridge, Eklebhatti Kagbeni, Mustang	E	2078/10/28	524688.00	2078/12/13	No Record	117567687.13	101253784.00	1868485.00	Claim Rejected	No info	AAct
10	2077/6/11	Prera Ashish JV Vs. B.P Koirala Memorial Cancer Hospital	Construction of 200 bedded Inpatient Building INCLUDING RT, Bunker Contract Package II	E,E,L	2078/6/8	422005.00	2078/8/6	No Record	727342712.32	71566525.31	33458180.74	Claim Accepted	No info	UNCITRAL
11	2077/3/26	Woodhill Lama JV Vs. DOR	NIRTTP-DOR-W-ICB-2 Contractor's Claim Referral No. 2, 3 and 4.	E,E,E	2078/4/10	460000.00	2078/5/27	Appealed	1111525794.17	127703408.89	51839967.65	Claim Accepted	No info	NEPCA
12	2077/8/10	Kunsaling Construction Pvt. Ltd. Vs. Itahari Sub-Metropolitian	Construction of Tengra Khola Bridge in Itahari Sub Metropolitan City, Itahari-04	L	2078/6/4	175966.00	2078/8/6	No Record	28481754.15	9096648.56	6878009.13	Claim Accepted	No info	NEPCA
13	2076/10/28	SVR Electricals Pvt. Ltd. Vs. NEA	DCS 063/64-09 and DCS 064/65-01: Supply and Delivery of Distribution Transformers	L,E,E	2078/10/17	251401.50	2078/12/12	No Record	200890080.00	125556300.00	125556300.00	Claim Accepted	No info	NEPCA
14	2077/4/12	Supreme -Rautaha JV, Ratopul Vs.DOR	NIRTTP-DOR-W-ICB-3 (km 23+540 to km 35+653), Referral NO.3,4 (4A and 4B)	E,E,L	2079/02/31	186650.00	2079/4/18	Appealed	304268972.90	13183440.80	11374579.40	Claim Accepted	No info	NEPCA
15	2077/4/12	Supreme -Rautaha JV, Ratopul Vs.DOR	NIRTTP-DOR-W-ICB-3 (km 23+540 to km 35+653), Referral NO.1,5 (5A,5B and 5C)	E,E,L	2079/02/31	266856.00	2078/4/18	Appealed	304268972.90	25846106.30	23583426.48	Claim Accepted	No info	AAct
16	2077/11/10	ANK- Kabindra- Satyaswor JV Vs. TU, Kritipur	Construction of Mathematical Science Building	E,E,L	2079/3/12	180000.00	2079/5/27	No Record	101949566.89	20113514.00	7780703.03	Claim Accepted	No info	AAct
17	2077/8/28	Shyam Sundar /N.B. JV Vs. Banganga Municipality, Butwal	Municipal Office Building Construction	E,E,L	2078/9/23	117780.00	2079/11/16	No Record	79247377.00	49552770.77	0.00	Claim Rejected	No info	NEPCA
18	2077/6/26	Shil-Pacific JV Vs. DOR	Road Improvement Project Gorahi-Holari Section	L,E,L	2078/6/4	621862.00	2078/8/6	Appealed	358751011.40	165000000.00	73175293.88	Claim Accepted	No info	Both*
19	2077/6/22	B.S. Trade International Vs. Nepal Army	"Purchase of Bullet Proof Jeep Qty-1 Unit, and Escort Jeep Qty-2 Unit & Bus Qty Unit -1"	L,L,L	2078/10/26	190084.00	2078/12/12	No Record	56800000.00	7677897.00	7677897.00	Claim Accepted	No info	NEPCA
20	2077/6/27	M/S Hira & Namita -Dragon - Shivalaya JV Vs. National Pride Project	CAAN/NPP/SIA-IU/02/River Training/-74/75"River Training and other Associated Works at Bara"	L,L,L	2078/8/14	185000.00	2078/10/10	No Record	44169010.60	9344450.00	7116934.00	Claim Accepted	No info	NEPCA
21	2077/7/16	Tamang Kumar JV Vs. CLPIU, Earthquake Emergency Assistance Project	MoFALD/CLPIU/EEAP/Works/NCB-22/2073-74 Reconstruction and Rehabilitation of Bhirkot-Sahare-Hawa-Jiri Road	E,E,E	2078/8/21	430000.00	2078/10/10	No Record	246703687.42	75025299.00	24394899.00	Claim Accepted	No info	AAct
22	2077/9/1	Lama Construction Vs Department of Roads (02)	EEAP/NCB/DG/02	L,L,L	2079/1/9	381601.00	2079/2/30	Appealed	381279555.36	5683655.60	15640982.10	Claim Accepted	No info	NEPCA

23	2077/10/25	DoR Vs. ZIEC-Sharma-Lama JV	Upgrading/ Improvement of Birendra chowk (Udaypur - Bhiman Section)	E,E,E	2079/3/13	237320.00	2079/4/30	Appealed	7369984218.90	23466006.60	20685992.10	Claim Accepted	No info	AAct
24	2077/10/15	NETSA Vs. Ministry of Women, Children and Social Welfare	DWC/C/RFP/2074/75/01 Dispute regarding Consultant's Service	L,L,L	2078/6/24	279200.00	2078/8/10	No Record	81066200.00	24429539.00	2993764.99	Claim Accepted	No info	UNCITRAL
25	2077/10/7	Lumbini Ashish JV Vs. DOR	DROSKT/3373204/070/071-189 "Construction of RCC Motorable Bridge Over Pasa Gad Khola	E,E,E	2078/8/12	185000.00	2078/10/10	Appealed	25495775.00	10808245.00	1998127.00	Claim Accepted	No info	NEPCA
26	2077/11/11	Kafiya Vs. 1- Charms Entertainment and 2. Sudip Khadka Production	Production and Promotion of Lilli-billi film	L,L,L	2078/9/9	172066.00	2078/10/30	Appealed	15081814.00	14631056.00	7222721.00	Claim Accepted	No info	AAct
27	2077/11/24	Mahavir Shree Inlt P.Ltd. Vs Kaligandaki Hydroelectric Power Plant	KGA-074/075-UW-17 for Under Water Repair Work, Radial Gate No1 & 2	L,E,E	2078/5/28	280000.00	2078/7/22	No Record	45000000.00	21984224.36	1653494.28	Claim Accepted	No info	NEPCA
28	2077/12/6	Lama Nagarjun JV vs. DoR	SRCP/NCB/HD-02 Improvement of Halesi - Diktel Road	E,E,L	2078/12/21	329859.00	2079/2/16	Appealed	158934552.07	25152915.93	19927336.30	Claim Accepted	No info	NEPCA
29	2078/1/7	Kanchanjunga-Golden- Goods PS Vs. DOR	DROKTM/3371494/070/071/096 "Improvement of Mahankal Aarubari-Tinchule Road"	L,L,E	2079/1/15	390000.00	2079/2/30	Appealed	129832183.00	46074038.00	14990119.00	Claim Accepted	No info	NEPCA
30	2078/3/11	Tamang Kumar JV Vs. CLPIU-Earthquake Emergency Assistance Project	MoFALD/CLPIU/EEAP/Works/NCB-24/2073-074	E,E,E	2078/6/11	515113.00	2078/7/30	No Record	246703687.42	135114293.00	26096477.80	Claim Accepted	No info	NEPCA
31	2078/3/18	Bhairab Construction Vs. Irrigation Project	BIP-NCB/P62/075-076: Construction of Patharaiya Khola (Auri) Bridge Bardiya	E	2078/10/20	135000.00	2078/12/6	No Record	29534003.56	5139197.80	2344544.00	Claim Accepted	No info	NEPCA
32	2078/3/18	Bhairab Construction Vs. Irrigation Project	BIP-NCB/P63/075-076: Construction of Fardangwa Khola Bridge Bardiya	E	2078/10/20	135000.00	2078/12/6	No Record	28730886.43	5238196.80	2335994.00	Claim Accepted	No info	NEPCA
33	2078/3/23	Budhi Ganga Hydropower Project Vs. M/S Bkoi Builders	BHP/OB/02-071-72; "Office Buildings and other Facilities Construction Works in Accham District"	E,L,E	2078/10/11	320598.00	2078/12/6	No Record	86800046.70	39718407.00	26137481.76	Claim Accepted	No info	NEPCA
34	2078/4/1	OBCI Pvt. Ltd Vs. Dept of Health Service	DOHSIGICOVID-19/2076-77: "Procurement of PPE and others for COVID-19 Control and Management "	L,E,L	2079/1/15	956946.00	2079/2/30	No Record	103384480.00	870411648.00	352713405.00	Claim Accepted	No info	AAct
35	2078/4/14	Trishuli/Ashraya JV Vs. Suspension Bridge Division	CTP-17/071/72: Construction of Tribeni Maheshpur (Susta) Multispan Suspension Trial Bridge (1571.00m)	E	2079/1/4	380000.00	2079/2/30	No Record	209379476.00	50000000.00	2772928.05	Claim Accepted	No info	NEPCA
36	2078/5/13	Sharma Sagarmatha Vs FWSSM	01/076-77/CF/FWSSMP_Biratnagar: Tankisinwari Co-Financing Water Supply and Sanitation Project	E,E,E	2078/12/23	203750.00	2079/2/30	No Record	275540928.27	12000000.00	12000000.00	Claim Accepted	No info	NEPCA
37	2077/11/10	Atlas- Kabindra- Satyaswor JV Vs. TU, Kritipur	Costruction of Vice Chancellor Office Building	E,E,L	2079/3/12	170000.00	2079/5/6	No Record	149548120.00	18991342.00	10670428.00	Claim Accepted	No info	NEPCA
38	2077/6/16	Kalika - Rasuwa Jv Vs DOWRI	Construction and Remodeling of Western main canel system	E,E,E	2078/5/30	214500.00	2079/7/18	No Record	660607426.90	62058302.28	42423273.82	Claim Accepted	No info	NEPCA
39	2077/6/11	Nepal Adarsh Nirman Sewa Vs Siddarthanagar Municipality	Integrated solid waste management sub-project	E,E,E	2078/6/3	449612.00	2078/7/30	No Record	284534219.25	84806108.00	50068593.72	Claim Accepted	No info	NEPCA
40	2076/12/6	Bajru Guru Vs Madi Municipality	MM/W/NCB/01/074-75 Retaining Structure, Line Drain Works along Ram Mandir Okherbote Road	E,E,E	2078/6/3	197413.00	2078/7/30	No Record	17297212.53	13227375.72	11655015.89	Claim Accepted	No info	NEPCA
						12548049.50			**17614852306.82**	**2938893944.15**	**1315738247.47**			
										16.68%	**44.77%**			

श्री

उच्च अदालत, पाटन

संयुक्त इजलास

इजलास नं. १२

माननीय न्यायाधीश श्री खुशीप्रसाद थारु

माननीय न्यायाधीश श्री नरिश्वर भण्डारी

आदेश

मुद्दा नं. ०७६-FJ-०१३७

निर्णय नं. २६६

नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभागका तर्फबाट अधिकार प्राप्त महानिर्देशक श्री केशव कुमार शर्मा ----------१ **निवेदक**

विरुद्ध

श्री लुम्बिनी विल्डर्स प्रा.लि. काठमाडौं ----------१ **विपक्षी**

मुद्दाः- मध्यस्थको निर्णय बदर ।

मध्यस्थता ऐन, २०५५ को दफा ३० बमोजिम यस अदालतको क्षेत्राधिकार भित्र दायर हुन आएको प्रस्तुत निवेदनको संक्षिप्त तथ्य एवं आदेश यस प्रकार छः-

तथ्य खण्ड

१. नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, हुलाकी सडक पुल आयोजना ववरमहल काठमाण्डौ र विपक्षी लुम्बिनी विल्डर्स प्रा.लि. बीच हुलाकी राजमार्ग अन्तर्गत पर्ने रौतहट र सर्लाही जोडने बाग्मती नदीमा पुल निर्माण तीन वर्षमा सम्पन्न गर्ने गरी वि.सं २०६७।२।३१ (१४ जुन २०१०) मा ने.रु, ३५,८९,०९,४३७।८९ मा भएको ठेक्का नं. 06-HRBP-066-067 बमोजिमको ठेक्का सम्झौता अनुसारको काम तीन वर्षमा सम्पन्न गरिसक्नु पर्ने गरी समयावधि तोकिएको थियो । विपक्षी निर्माण व्यवसायीले सम्झौता बमोजिमको कार्य नगरी बीचैमा कार्यस्थल छोडी हिडेको अवस्थामा नियोक्ताले विपक्षीले भन् जस्तो करारको उल्लंघन हुने कार्य आफूले नगरेको र बाढीको कारण नदिले धार परिवर्तन गरेको अवस्थालाई समेत मध्यनजर गरी उक्त पुलको डिजाइनमा

केही परिमार्जन गर्नु पर्ने देखिएकाले सो प्रयोजनका लागि एवुटमेण्ट क्यापसँग सम्बन्धित कार्यलाई केही समय रोक्न विपक्षी लुम्बिनी विल्डर्स प्रा.लि.लाई मौखिक रुपमा निर्देशन दिइएको थियो । उक्त निर्देशनलाई करार बमोजिमको कार्य गर्न रोक लगाई करारको शर्त उल्लंघन गरेको भन्ने व्याख्या गर्दै करारको सामान्य सम्झौताको शर्त नं. ५८ बमोजिम करार सम्झौता भंग गरेको भनेको विपक्षीको दावीलाई स्वीकार गर्ने मध्यस्थ ट्राइबुनलको निर्णयले निर्माण व्यवस्थापनका आधारभूत सिद्धान्त र करारको व्यवस्था समेतको प्रत्यक्ष उल्लंघन भएको छ । निर्माणको क्रममा प्राकृतिक वा अन्य कुनै कारणले पहिलेको डिजाईनमा परिमार्जन गर्नु पर्ने अवस्था श्रृजना भएमा सो परिमार्जन नहुँदासम्म पुरानो डिजाईनमा नै कार्य अगाडि बढाउदा त्यसले अनावश्यक रुपमा सार्वजनिक श्रोत र साधनको दुरुपयोग हुन जाने अवस्थालाई ख्याल नै नगरी सो अनुरुपको निर्देशनलाई काम रोक्न भनि निर्देशन दिएको भन्ने अर्थ गर्न कदापी मिल्दैन । यसरी करारको व्यवस्थाको लगत व्याख्या गरी नियोक्ताबाट करारको उल्लंघन भएको भनी स्थापित गर्ने अधिकार उक्त ट्राइबुनललाई नरहेकाले अधिकार क्षेत्र विहिन उक्त निर्णय प्रथम दृष्टिमा नै वदरभागी रहेको छ । सम्झौताका सामान्य शर्तको बुँदा नं. ६ मा सम्झौता सम्बन्धी कुनै पनि सूचना वा निर्देशन लिखित रुपमा प्रदान गरिएको हुनु पर्छ भन्ने व्यवस्था रहेको छ । विपक्षी निर्माण व्यवसायीले डिजाईन परिमार्जनको लागि प्रोजेक्ट म्यानेजरले दिएको निर्देशन मौखिक रहेको भनी स्वयं स्वीकार गरी रहेको अवस्थामा जवरजस्ती लिखित निर्देशन दिएको भनी करार भंग गरेको कार्यलाईई वैधानिकता प्रदान गरेको मध्यस्थको निर्णय करारको व्यवस्था विपरित रहेको छ । विपक्षीले कार्यस्थल छोडेर हिडेको र यस विभागले पटक पटक काम सम्पन्न गर्नका लागि ताकेता गर्दा समेत नियोक्ताले करारको शर्त उल्लंघन गरेको करार बमोजिमको कार्य सम्पन्न गर्न अनुरोध गर्दा विपक्षीले उल्टो विभिन्न शिर्षकमा करोडौ रकम क्षतिपूर्ती दिनुपर्ने भनी मध्यस्थ ट्राइवुनल समक्ष दावी पेश गरेको र सो दावी पत्रका सम्बन्धमा यस विभागले मध्यस्थ ट्राइवुनल समक्ष पेश गरेको लिखित प्रतिवाद, सुनुवाई एवं वहस नोट साथ पेश भएका तथ्य तथा तर्कहरुलाई अनदेखा गर्दै यस विभाग अन्तर्गतको उक्त आयोजना र विपक्षी निर्माण व्यवसायी बीच सम्पन्न ठेक्का सम्झौता बमोजिमको कार्यसँग सम्बन्धित विपक्षी र निवेदक बीच उठेको विवादमा मध्यस्थको निर्णयका विपक्षी भौतिक पूर्वाधार मन्त्रालयले आधारभूत रुपमा करारको उल्लंघन गरेकाले दावीकर्ता लुम्बिनी विल्डर्स प्रा.लि. ले करारको समाप्त गरेको (Termination of Contract) वैध रहेको, करारको समाप्तीपछि दावीकर्ताले ९,४६,०००/- पाउने, Actual cost वापत रु ५१,५६,९४७.४४ तत्कालै प्राप्त गर्ने र बाँकी रु ५१,५६,९४७.४४ करचुक्ता पछि प्राप्त गर्ने र इन्सुरेन्स वापत रु ८,४७,५००/- पाउने गरी मध्यस्थ ट्राइवुनलबाट १४ फरवरी २०२० मा

भएको निर्णय करारको व्यवस्था तथा सार्वजनिक हित र नीति विपरित रहेको, मध्यस्थले विना आधार र कारण विपक्षीले माग गरे अनुरुपको सम्झौता भंग भएपछिको खर्च, काम रोक्न आदेश दिएका कारणले भएको तथाकथित वास्तविक खर्च, करारको व्यवस्था अनुरुप कुनै पनि विलको भुक्तानी गर्दा प्रोजेक्ट म्यानेजरको सिफारिशमा गर्ने भन्ने व्यवस्था, प्रचलित सार्वजनिक खरिद सम्बन्धी नीति तथा करारको व्यवस्था, सम्झौताको व्यवस्था र सार्वजनिक खरिद ऐन, २०६३ को दफा ५९ मा रहेको व्यवस्था विपरित रहेकोले उक्त मध्यस्थ ट्राइवुनले १४ फरवरी २०२० मा गरेको निर्णय मध्यस्थता सम्बन्धी ऐन, २०५५ को दफा ३० को उपदफा (२) र (३) बमोजिम बदर गरी पाउँ भन्ने बेहोराको निवेदक नेपाल सरकार भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग तर्फबाट अधिकार प्राप्त महानिर्देशक केशव कुमार शर्माको निवेदन पत्र ।

२. मध्यस्थता सम्बन्धी ऐनको दफा ३० को उपदफा (२) र (३) अनुसार मध्यस्थ ट्राइवुनले मिति १४/०२/२०२० मा गरेको देहाय बमोजिमको निर्णय ।

1. Decides that the Respondent is in of the Contract under sub clause 58.2 (b) of COC and therefore the Claimant's termination is valid and in accordance with Clause 58.1 of COC.
2. Decides that the Claimant is entitled to payment upon termination amounting to NRs 946,000.00
3. Decides that the Claimant is entitled to payment of NRs 2,33,35, 953.74 the actual cost incurred as result of suspension order.
4. Decides that the Claimant is entitled to payment of IPS no 12 after the valuation of the works jointly between the Respondent and Claimant after deduction any due amount previously paid in IPS no 11.
5. Decides that the Claimant is not entitled for price adjustment.
6. Decides that the Claimant is entitled to payment of retention money amounting to NRs 51,56,947.44 immediately and the remaining NRs 51,56,947.44 on demonstration of tax clearance.
7. Decides that the Claimant is entitled to payment of insurance of second instalment amounting to NRs 8,47,500.00

३. निम्न कार्यहरु सम्पन्न गरी पेश गर्नुहोला भनी यस अदालतबाट मिति २०७७/३/१५ मा भएको आदेश ।

(क) मध्यस्थता (अदालती कार्यविधि) नियमावली, २०५९ को नियम ११(२) बमोजिम छलफल निमित्त विपक्षीका नाउँमा ७ (सात) दिने म्याद सूचना जारी गर्नू

(ख) सक्कल मिसिल सम्बन्धित निकायबाट झिकाउनू ।

(ग) मध्यस्थबाट भएको निर्णयको नेपाली अनुवाद निवेदकबाट पेश गर्न लगाउनू ।

४. नियोक्ताले लुम्बिनी विल्डर्स प्रा.लि.लाई बोलपत्र स्वीकृत हुँदा नै उक्त क्षेत्रको Site Clear गर्नुपर्नेमा नगरेको, पुलको क्षेत्र (Alignment) एकिन गर्न विलम्व गरेको, नियोक्ताबाट समयमा प्राविधिक नखटाईएको, निर्माण गर्ने पुलको नक्सा धेरै विलम्व गरी प्रोजेक्ट

म्यानेजरबाट उपलब्ध नगराएको, निर्माण क्षेत्रको पहुँच मार्ग (Access to site) समयमा नदिएको, पुलको डिजाईन परिवर्न भएको, विपक्षी आयोगबाट निर्माण कार्य रोक्न निर्देशन दिएको लगायतका कारणले तोकिएको समयमा कार्य प्रारम्भ हुनै नसकी कार्य सम्पन्न गर्नुपर्ने मिति २०७०/२/३० भित्र पुल निर्माणको कार्य सम्पन्न हुन सक्ने अवस्था रहेन ।नियोक्ताले निर्माण कार्य रोक्न मिति २०७१ वैशाखमा मौखिक आदेश दिएकोमा सोलाई २७ जुन २०१४ मा पत्रद्वारा नै कार्य रोक्न भनी लेखी पठाएको थियो । विपक्षीबाट ३० दिनभन्दा लामो समयसम्म कार्य स्थगत गरेकोमा करार भंग गर्न सक्ने सम्झौताको प्रकरण नं. ५८.२(b) मा प्रावधान भएको र आयोजनालाई लामो समयसम्म कार्य स्थगत गरेकोले लुम्विनी विल्डर्स प्रा.लि.को लागत बढ्दै जाने र कार्य हुन सक्ने सम्भावना न्यून भएकोले मिति २०७१/११/६९ मा सम्झौता भंग गर्ने सूचना विपक्षीलाई दिइएको थियो । सर्वप्रथम सम्झौता अनुसार कार्य गर्नका लागि विपक्षीले सुविधा उपलब्ध गराउनुपर्ने करार सम्बन्धी मान्य सिद्धान्त हो । नियोक्ताले लुम्बिनी विल्डर्स प्रा.लि. लाई पूल निर्माण गर्ने ठाउँसम्म पुग्नको लागि सहायक मार्ग (Approach Road) उपलब्ध नगराएको भन्ने तथ्य हालसम्म पनि पुलसम्म पुग्ने जग्गाको अधिग्रहण गरी क्षतिपूर्ति नदिएको तथ्यले पुष्टि गर्दछ । लुम्बिनी विल्डर्स प्रा.लि.बाट विपक्षीलाई सम्झौता भएको केही समय देखि नै अर्थात मिति २०६७/९/२ देखि पटक पटक अर्थात मिति २०६८/७/१०, मिति २०७१/७/२ र मिति २०७१/७/१० मा समेत पत्राचार गरी सम्झौता अनुसार कार्य गर्न उपलब्ध गराउनुपर्ने सुविधा उपलब्ध गराइ पाउन अनुरोध गरिएको छ । पुल निर्माणको सम्झौता अनुसारको कार्य गर्न आवश्यक रहेको नक्सा र मूल पुलमा जानको लागि चाहिने पहुँच मार्ग (Approach Road) मुख्य व्यवस्था नै विपक्षीबाट समयमा उपलब्ध नभएका कारण सम्झौता अनुरुप कार्य हुन नसकेको र सो कार्य नियोक्ताबाट सम्पन्न भएको भनि जिकिर लिन र प्रमाणित गर्न नसकेको विपक्षीको निवेदन स्वीकार्य हुनै सक्दैन । नदिले आफ्नो वहाव परिर्वतन गरी ५०० मिटर टाढा गएको कारणबाट सम्झौता अनुसार कार्य गर्न ढिला भएको, नदी झण्डै २ कि.मी. चौडा भएको र सो सम्बन्धमा विपक्षीलाई जानकारी गराउँदा विपक्षी आफै र इन्जिनियरिङ अध्ययन संस्थानबाट स्थलगत अवलोकन समेत भई पुलको Super Structure को Free Board उचाई ७२ से.भि, बढाउनु भनी आयोजनाले Site Visit पछि मिति २०७२।२।८ (२२ मे २०१५) मा निर्देशन दिएको, इन्जिनियरिङ अध्ययन संस्थानले दिएको सो निर्देशन २०७५।१।३१ मा मात्र आएर नियोक्ताले हामीलाई जानकारी दियो जबकी त्यस अगाडि नै (मिति २०७१।११।०६) मा हामीहरुले Site Demobilize गरिसकेका थियौ । तसर्थ रनिङ विल वापत समेतको रकम लुम्बिनी विल्डर्स प्रा.लि. ले पाउने होइन भन्नु सरासर वदनियतपूर्ण र सार्वजनिक खरिद नियमावली २०६४ को नियम १२३ र मुलुकी

देवानी संहिता, २०७४ को दफा ६६४ प्रतिकूल छ । नियोक्ताले कम्पनीलाई सन् १४ मे, २०१४ देखि १८ फ्रेवुअरी २०१५ सम्म अर्थात २३७ दिनसम्म पर्खदा र डिजाइन (Drawing and Design) नै समयमा उपलब्ध नगराई बाँकी काम रोक्न नियोक्ताबाट नै सन् 19 October 2014 (मिति २०७१।७।२) मा अनुरोध भएपछि विपक्षीकै कारणले मात्रै कार्य गर्न रोकेपछि ३० दिन भन्दा बढी कार्य गर्न रोक लगाएमा सम्झौतापत्रको प्रकरण ५८.२ र ५८.३ बमोजिम करारको आधारभुत उल्लंघन (Fundamental breach of contract) मानी करार भंगको सूचना विपक्षीलाई दिएको र सोही आधारमा मध्यस्थताबाट भएको निर्णय कानूनसम्मत छ। सम्झौताको GCC शर्त नं. ५८.५ मा सम्झौता भंग भएपछि लिखित प्रतिवादवालाले कार्यक्षेत्र छोडि फर्कन बाध्य भएको हो, यस कारणले पनि सम्झौता बमोजिम विपक्षीबाट सम्झौता उल्लंघन भएको तथ्यगत अवस्था प्रमाणित गर्दै सम्झौता भंग गरिएको सम्झौता प्रदत्त र कानूनद्वारा संरक्षित व्यवस्था भएको व्यहोरा न्यायीक जानकारीको विषय हो । विपक्षीले कम्पनीलाई काम गर्न अनुकुल वातावारण नदिई काम गर्न रोक लगाई सन् १४ मे २०१४ देखि १४ मे २०१८ सम्म अर्थात ४ वर्षसम्म काम सुचारु गर्न अनुमती समेत नदिई सम्झौतामा उल्लेख गरेको तथ्यलाई विपक्षीले अन्यथा भन्न नसकेको र भन्न सक्ने अवस्था समेत नभएकोमा विपक्षीबाट दायर भएको निवेदन खारेज गरी मध्यस्थको निर्णय सदर गरी पाउँ भन्ने बेहोराको विपक्षी लुम्बिनी विल्डर्स प्रा.लि.का तर्फबाट अख्तियार प्राप्त संचालक समितिका अध्यक्ष बिष्णुप्रसाद शर्माको लिखित प्रतिवाद ।

आदेश खण्ड

५. नियम बमोजिम साप्ताहिक तथा दैनिक पेशी सुचीमा चढी निर्णयार्थ यस इजलास समक्ष पेश हुन आएको प्रस्तुत मध्यस्थको निर्णय बदर सहितको मिसिल संलग्न कागजातहरुको अध्ययन गरी निवेदकको तर्फबाट उपस्थित हुनुभएका उच्च अदालत पाटनका उपन्यायाधीवक्ता डा. श्री सूर्यप्रसाद पौडेल र विपक्षीको तर्फबाट उपस्थित वरिष्ठ अधिवक्ता श्री सूर्यप्रसाद कोइराला, अधिवक्ताद्वय श्री शरदप्रसाद कोइराला र श्री किरण पौडेलले गर्नु भएको बहस समेत सुनियो ।

६. विपक्षी लुम्बिनी विल्डर्स प्रा.लि. र निवेदक भौतिक पूर्वाधार तथा यातायात मन्त्रालय सडक विभाग बीच हुलाकी राजमार्ग पूल आयोजना सम्बन्धी १४ जुन २०१० वि.सं. २०६७/२/३१ मा ठेक्का नं. ०७-HRBP-०६७ सम्झौता भएको थियो । सम्झौता बमोजिम कार्य गर्ने सम्बन्धमा निवेदक र विपक्षी बीच विवाद उत्पन्न भई मध्यस्थता प्रकृयामा गई मध्यस्थ ट्राइबुनलबाट सन १४/०२/२०२० मा निर्णय आएको थियो । मध्यस्थको निर्णयका विपक्षी भौतिक पूर्वाधार मन्त्रालयले आधारभूत रुपमा करारको

उल्लंघन गरेकाले दावीकर्ता लुम्बिनी विल्डर्स प्रा.लि. ले करारको समाप्त गरेको (Termination of Contract) वैध रहेको, करारको समाप्तीपछि दावीकर्ताले ९,४६,०००/- पाउने, Actual cost वापत रु ५१,५६,९४७.४४ तत्काले प्राप्त गर्ने र बाँकी रु ५१,५६,९४७.४४ करचुक्ता पछि प्राप्त गर्ने र इन्सुरेन्स वापत रु ८,४७,५००/- पाउने गरी मध्यस्थको निर्णय आएको छ । बाढीको कारण एबुटमेण्ट सम्बन्धी कार्य डिजाइन परिमार्जन गर्नुपर्ने भएकोले केही समय काम रोक्न मौखिक निर्देशन दिएकोलाई निवेदकले करारको आधारभूत उल्लंघन गरेको भन्न नमिल्नेमा करारको भंग गरेको भनी आएको मध्यस्थ निर्णय क्षेत्राधिकार बाहिर गएकोले मध्यस्थ निर्णय बदरभागी छ । उक्त निर्णय सार्वजिनक खरिद सम्बन्धी नीति तथा करारको व्यवस्था विपरित छ । विपक्षीले करार भंग गरेको कार्य अवैध रहेकोमा सो कार्यलाई वैधानिकता दिएको र करार भंग भएपछि खर्च भएको र विपक्षीलाई करारबाट सिर्जित दायित्वबाट बचाउने गरी आएको मध्यस्थ निर्णय करारको व्यवस्था विपरित तथा सार्वजनिक नीति विपरित रहेकोले मध्यस्थ सम्बन्धी ऐन, २०५५ को दफा ३० को उपदफा २ र ३ बमोजिम बदर गरी पाउँ भनी निवेदकको निवेदन दावी रहेको पाईन्छ । विपक्षी लुम्बिनी विल्डर्स प्रा.लि. ले लिखित जवाफमा सम्झौता बमोजिम पूल निर्माणको कार्य गर्न आवश्यक रहेको नक्शा र मूल पूलमा जानका लागि चाहिने पहुँच मार्ग (Approach road) उपलब्ध नगराई करारको मुख्य व्यवस्था नै विपक्षीबाट पालना नभएको अवस्था छ । नियोक्ताले कम्पनीलाई सन १४ मे २०१४ देखि १८ फेब्रुअरी २०१५ सम्म २३७ दिनसम्म ड्रइङ्ग र डिजाइन उपलब्ध नगराई एबुटमेण्टको कार्य हुन नसकेको हो । काम रोक्न नियोक्ताबाट नै २०७१/७/२ मा निर्देशन दिएपछि सम्झौता बमोजिमको कार्य स्थगित गरिएकोमा सो निर्देशन ३० दिनभित्र फिर्ता पनि नभएको अवस्था हुँदा निवेदकले सम्झौताको प्र.नं. ५८.२ (बी) को सम्झौताको आधारभूत उल्लंघन (Fundamental breach of contract) गरेकोले सोही करारको प्रकरण नं. ५८.१ बमोजिम मिति २०७१/११/६ मा विधिवत रुपमा एकतर्फि रुपमा सम्झौता रद्द गरिएको र सम्झौताको शर्त नं. ५८.५ बमोजिम कार्यक्षेत्र छोडि फर्कन बाध्य भएको हो, सम्झौता विपरित कार्यस्थल छोडि हिडेको होइन । त्यसपछि मिति २०७५/१/३१ मा इन्जिनियरिङ अध्ययन संस्थानको राय बमोजिम मिति २०७५/१/३१ मा मात्र निर्माण कार्य गर्न पत्राचार गरेको थियो । निर्माण व्यवसायीले सम्पन्न गरेको कामको उचित मूल्य प्राप्त गर्ने अधिकार मुलुकी देवानी संहिताको दफा ५३२ र ६६० अन्तर्गत सुरक्षित रहेको अवस्थामा मध्यस्थ ट्राइबुनलबाट मध्यस्थता ऐन, २०५५ को दफा १७ र १८ र मध्यस्थ सम्बन्धी नियमावलीमा तोकिएको कार्यविधि परिपालना गरी भएको निर्णय क्षेत्राधिकार विपरित रहेको भन्न मिल्दैन । निवेदकले मध्यस्थता ऐन, २०५५ को दफा ३० (३) (ख) अन्तर्गत सार्वजनिक नीति

वा हित प्रतिकूल रहेको भनी पुष्टि गर्ने सकेको छैन । सम्झौतापत्रको आधारभूत शर्त उल्लंघन गरेको कारणले मध्यस्थताबाट सम्झौतापत्रको प्रावधानको आधारमा रकम र मु.अ. कर समेत दिलाउने गरी भएको निर्णय क्षेत्राधिकार बाहिर रहेको नदेखिएको र सार्वजनिक नीति र हित विपरित समेत नरहेकोले मध्यस्थताको निर्णय बदर हुनुपर्ने होइन भनी विपक्षीले लिखित जवाफ फिराएको देखिन्छ ।

७. प्रस्तुत मुद्दामा निवेदन माग बमोजिम मध्यस्थ ट्राइबुनलबाट सन १४/०२/२०२० मा भएको निर्णय बदर हुनुपर्ने हो, होइन? भनी निर्णय दिनुपर्ने देखिन्छ । यसमा मूलत: मध्यस्थताको निर्णय क्षेत्राधिकार विपरित रहे वा नरहेको, सार्वजनिक नीति वा हित विपरित रहे नरहेको, सम्झौता भंग भइसकेको अवस्थामा सम्झौता बमोजिम क्षतिपूर्ति समेत भराउने गरी मध्यस्थ निर्णय गर्न मिल्ने हो वा होइन, करारका पक्षले करार भंग गरेको कार्य वैध वा अवैध रहेको भनी मध्यस्थले निर्णय गर्न मिल्ने हो वा होइन? भन्ने प्रश्नहरु विचारणीय रहेको देखिन्छ ।

८. निवेदकले विपक्षी लुम्बिनी विल्डर्स प्रा.लि. ले करार रद्द गरेको कार्य वैध रहेको भनी मध्यस्थ ट्रिबुनलबाट आएको निर्णय क्षेत्राधिकार बाहिर रहेको निवेदन दावी छ । विपक्षीले मध्यस्थको निर्णय क्षेत्राधिकार बाहिर नरहेको जिकिर लिएको देखिन्छ । सो सम्बन्धमा विचार गर्दा, करारका पक्षहरु बीच उठेको विवाद सहमतिमा वा एडजुडिकेटरबाट समाधान हुन नसकेकोमा मध्यस्थता प्रकृयामा गएको देखिन्छ । मध्यस्थताबाट करारका पक्षहरु बीच उठेका विवादमा निर्णय दिइने भएकोले सम्बन्धित सबै विवादमा निर्णय दिनुपर्नेछ । विवादमा निर्णय दिनु मध्यस्थको जिम्मेवारी पनि हो र अधिकार पनि हो । मध्यस्थता ऐन, २०५५ मा मध्यस्थताबाट कुनै खास विवाद हेर्न नमिल्ने गरी कुनै कार्यगत सीमा वा निषेध तोकेको पाइदैन । निवेदकले सो को दावी लिन सकेको पनि देखिएन । मध्यस्थता सम्बन्धी ऐनको दफा १६ अनुसार मध्यस्थ समक्ष पेश भएको विवादको निरोपण गर्ने क्षेत्राधिकार नरहेको दावी कुनै पक्षले पेश गर्न सक्ने र मध्यस्थले अफूलाई सुम्पिएको काम कारवाहीको प्रारम्भ गर्नु अघि क्षेत्राधिकार सम्बन्धमा निर्णय गर्नुपर्नेछ । मध्यस्थलाई विवादको निरोपण गर्ने क्षेत्राधिकार नरहेको भनी निवेदकले मध्यस्थ समक्ष दावी पेश गरेको देखिदैन । मध्यस्थले अपनाउने सारवान कानून नेपाल कानून हुने र मध्यस्थले सम्बन्धित करारका शर्तहरु बमोजिम विवादको निरुपण गर्न सक्षम छ । मध्यस्थता ऐन, २०५५ को दफा १८ अनुसार करारका शर्तहरु बाहिर गई निर्णय भएको अवस्थामा बाहेक मध्यस्थको सक्षमता वा क्षेत्राधिकार (competence) नरहेको भन्न मिल्ने देखिँदैन ।

९. निवेदक र विपक्षी बीच मिति २०६७/२/३१ मा भएको सम्झौताको General condition of contract (GCC) को शर्त नं. ५८ मा करार भंग गर्न सकिने प्रावधानहरु राखेको

पाइन्छ । सो को शर्त नं. ५८.२ (बी) मा करारको एउटा पक्षले करारको आधारभूत उल्लंघन गरेमा अर्को पक्षले शर्त नं. ५८.१ बमोजिम करार भंग गर्न सक्ने गरी शर्त राखेको पाइन्छ । बाढीको कारण एबुटमेण्ट सम्बन्धी कार्य डिजाइन परिमार्जन गर्नुपर्ने भएकोले केही समय काम रोक्न मौखिक निर्देशन दिएको कुरा निवेदकले स्वीकार गरेको पाइन्छ । काम रोक्न लिखित निर्देशन नदिएकोले सम्झौताको प्रावधान बमोजिम सम्झौताको आधारभूत उल्लंघन गरेको भन्न नमिल्ने निवेदन जिकिर गरी परोक्ष रुपमा आफूले करारको आधारभूत उल्लंघन गरेको कुरा स्वीकार गरेको पाइन्छ । यसरी विपक्षीले लिखित जवाफमा नियोक्ताले मिति २०७१/७/२ मा काम रोक्न लिखित निर्देशन दिएको तथ्य पुष्टि हुन आउँछ । नियोक्ताले ३० दिन भित्र सो निर्देशन फिर्ता पनि नलिएको अवस्था हुँदा सम्झौताको बुँदा नं. ५८.२ (बी) बमोजिम सम्झौताको आधारभूत उल्लंघन (Fundamental breach of contract) गरेको अवस्था उत्पन्न भएको र सोही आधार देखाई Employee ले सम्झौताको दफा ५८.१ बमोजिम एकतर्फी रुपमा सम्झौता रद्द गरी सो को जानकारी Employer लाई दिएको पाइन्छ । यसरी Employee लुम्बिनी विल्डर्स प्रा.लि.ले सम्झौता रद्द गरेको कार्य करारको शर्त अनुरुप नै रहेको देखिएको अवस्थामा विपक्षीले करार भंग गरेको कार्यलाई वैधता प्रदान गरेको मध्यस्थ निर्णय क्षेत्राधिकार बाहिर रहेको भन्न मिलेन । यसका साथै मध्यस्थको निर्णय बदर गरिपाउँ भन्ने निवेदनबाट अदालतले पुनरावेदकीय क्षेत्राधिकार ग्रहण गरी सो निर्णय जाँच गर्न मिल्दैन । मध्यस्थको निर्णय अन्तिम हुने भएकोले सो निर्णयमा पुनरावेदन सुन्न मिल्दैन । Employee ले सम्झौता भंग गरेको कार्य (Termination of contract) वैध छ भनी आएको मध्यस्थ निर्णय मिलेको छ वा छैन भनी अदालतले फैसला गर्नु मध्यस्थता ऐन, २०५५ को मर्म विपरित हुन जाने देखिन्छ । विपक्षीले करार बमोजिमको काम नगरी कार्यस्थल छोडी भागेको भन्ने निवेदन जिकिर सम्बन्धमा विचार गर्दा, विपक्षी (Employer) ले मिति २०७१/११/९ मा नै करार भंग गरेको सूचना निवेदकलाई पठाएको देखिन्छ । विपक्षीले सम्झौता बमोजिम कार्य सम्पादन नगरी बीचैमा छोडेको भएमा वा सम्झौता बमोजिम कामको प्रगति नगरेमा सार्वजनिक खरिद ऐन, २०६३ को दफा ५९ को उपदफा ७ बमोजिम सम्झौता अन्त्य गरी ऐ. उपदफा (८) बमोजिम निजलाई कारवाही गर्नुपर्ने हो । निवेदकले सो तर्फ कारवाही चलाएको पनि देखिएन । मध्यस्थताको निर्णय आइसकेपछि मात्र निवेदकले सो विषय उठान गरी निवेदन गरेको देखिन्छ । यसर्थ, विपक्षी लुम्बिनी विल्डर्स प्रा.लि. ले सम्झौताको शर्त नं. ५८.१ बमोजिम करार भंग गरेको कार्य वैध रहेको भनी आएको निर्णय मध्यस्थताको क्षेत्राधिकार बाहिर रहेको देखिएन ।

१०. मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) को देहाय (ग) अनुसार "मध्यस्थलाई नसुम्पिएको विवादसँग सम्बन्धित विषयमा वा मध्यस्थलाई सुम्पिएको शर्त विपरित वा मध्यस्थलाई सुम्पिएको क्षेत्र बाहिर गई निर्णय भएको" अवस्थामा क्षेत्राधिकार बाहिर गई निर्णय गरेको मानिने हो मध्यस्थलाई सुम्पिएको विवादसँग सम्बन्धित विषयमा वा मध्यस्थलाई सुम्पिएको शर्त विपरित वा मध्यस्थलाई सुम्पिएको क्षेत्र बाहिर गई निर्णय गरेको भन्ने निवेदन दावी नै नरहेको अवस्थामा उक्त प्रावधान आकर्षित हुने देखिएन । निवेदकले मध्यस्थताको कानूनी क्षेत्राधिकार (competence) मा सम्म प्रश्न उठाएको देखिन्छ । सो सम्बन्धमा माथि विभिन्न प्रकरणमा विवेचना भइसकेको नै देखिन्छ ।

११. विपक्षीले करार रद्द गरेको घोषणा गरिसकेपछि सो करारको शर्त बमोजिम निवेदकसँग दायित्व पूरा गराउन नमिल्ने भन्ने निवेदन दावी गरेको देखिन्छ । करार भंग भइसकेको अवस्थामा सोही करार बमोजिम क्षतिपूर्ति भराउन गरेको मध्यस्थ निर्णय कानून विपरित रहेकोले बदर हुनुपर्ने निवेदन दावी छ । करार गर्ने कुनै पक्षले अर्को पक्षबाट करार बमोजिम केही सेवाका अन्य लाभ लिइसकेपछि वा करारको दायित्व आंशिक रुपमा पूरा गरिसकेपछि करार रद्द भएमा त्यसरी लिएको सेवा वहाल रहेको दिनसम्म हिसाव मिलान गरी सेवा फिर्ता गर्नुपर्नेछ ।1 कुनै पक्षले करार उल्लंघन गरेको वा अन्य कुनै कारणबाट करार अन्त्य भएकोमा मर्का पर्ने पक्षले आफूले गरेको काम वा परिपालना गरेको अनुपातमा अर्को पक्षसँग करार बमोजिमको रकम दावी गर्न सक्नेछ।2 करार भंग भइसकेको अवस्थामा करार बमोजिम गरेको कामको शोधभर्ना गर्न मिल्ने कानूनी प्रावधान रहेको नै अवस्था छ । यसैगरी सार्वजनिक खरिद ऐन, २०६३ को दफा ५९ को उपदफा (३) मा खरिद सम्झौता अन्त्य भएमा वित्तिय फरफारक गर्ने र क्षतिपूर्ति दिने सम्बन्धी अवधारणाको व्यवस्था राखेको नै देखिन्छ । यसरी करार भंग गरिसकेको अवस्थामा सोही करार बमोजिम क्षतिपूर्ति दावी गर्न नमिल्ने भन्ने निवेदन जिकिर कानूनसंगत देखिन आएन । मध्यस्थको निर्णय करारको शर्त र कानून विपरित रहेको देखिएन ।

१२. निवेदकले मध्यस्थको निर्णय सार्वजनिक नीति वा हित विपरित रहेकोले मध्यस्थ ऐन, 2055 को दफा 30 को उपदफा 3 को देहाय (ख) बमोजिम बदर हुनुपर्ने निवेदन दावी लिएको देखिन्छ । मध्यस्थको निर्णय सार्वजनिक नीति विपरित रहेको कुरा निवेदकले नै पुष्टि गर्नुपर्नेमा सो पुष्टि गर्न नसकेको भनी विपक्षीले जिकिर लिएको देखिन्छ । सो सम्बन्धमा विचार गर्दा, मध्यस्थको निर्णय सार्वजनिक नीति विपरित रहेको सम्मको जिकिरबाट वादी दावी स्पष्ट हुन सक्दैन किनभने

[1] मुलुकी देवानी संहिता दफा 538

[2] मुलुकी देवानी संहिता दफा 539

सार्वजनिक नीति एक बहुआयामिक (multidimensional) अवधारणा हो। अठारौ शताब्दीअघि सामाजिक मूल्य र मान्यता तथा सामाजिक हितको पर्यायवाचीका रुपमा चिनिएको (Principle of encounter commone lay - Deyer's Case,3) सार्वजनिक नीति तत्पश्चात व्यापार व्यवसायको हितसँग जोडिएको देखिन्छ भने तत्पश्चात सामाजिक हित भन्दा पनि सार्वजनिक हितको रुपमा (res publica) चिनिएको देखिन्छ । सार्वजनिक नीति बहुआयामिक अवधारणा हो, सार्वजनिक हित (Public interest), सार्वजनिक नैतिकता (Public morality) र सार्वजनिक सुरक्षा (Public security) यसका मूलभूत आधारशीला हुन् । न्यायिक दृष्टिकोणमा पनि एकरुपता छैनन र कतिपय अवस्थामा सारभूत रुपमा भिन्न रहेको पनि देखिन्छ ।

१३. वेलायतमा हाउस अफ लर्डसले Holman v Johnson4 को मुद्दामा सार्वजनिक नीतिको प्रादुर्भाव गरेको पाइन्छ। यसका लागि ३ वटा सिद्धान्तहरूको विकास गरेको पाइन्छः-

- Ex turpi causa non oritur actio ("from a dishonorable cause an action does not arise")
- Ex dolomalo non oritur actio ("no action arises from deceit")
- In pari delicto potio rest condition defendentis (where the parties are equally at fault, the defendant holds the stronger position.)

Mansfield LCJ set out the principle of ***ex turpi causa non oritur actio***: 'The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; ***ex dolomalo non oritur actio***. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpicausa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes: not for the sake of the Defendant, but because they will not lend their aid to such a Plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, "***in pari delicto potio rest conditio defendentis***"5

१४. सार्वजनिक नीतिको अर्थ न्याय र नैतिकता (Justice and Morality) सँग अन्योन्याश्रित रहेको पाइन्छ । राज्यको आधारभूत नैतिकता र न्याय उल्लंघन हुने देखिएमा मध्यस्थ निर्णय इन्कार गर्नुपर्छ

- The Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only

[3] Deyer's Case, Y.B. 2 Hen. 5, fol. 5, pl. 26 (1414).

[4] Holman v Johnson; 5 Jul 1775 - swarb.co.uk.

[5] *Id.*

where enforcement would violate the forum state's most basic notions of morality and justice.6

- "सार्वजनिक नीति स्पष्ट, परिभाषित र प्रभावकारी हुनुपर्छ तथा सार्वजनिक हितको अर्थ जनधारणाका आधारमा नभई कानून र नजिरबाट सुनिश्चित हुनुपर्छ ।"
    - "Public policy must be explicit, well defined, and dominant, and must be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interest."7

१५. भारतमा कानून र नजीर एवं न्याय र नैतिकताको अवधारणा संश्लेषण गरी सार्वजनिक नीतिको अर्थ गरेको पाइन्छ । मध्यस्थको निर्णय मूलतः (१) भारतको कानूनको आधारभुत नीति विपरित (२) भारतको हित विपरित (३) न्याय र नैतिकता विपरित र (४) गैर कानूनी रहेमा सार्वजनिक नीति विपरित हुने भनि निचोडमा पुगेको पाइन्छ।

- 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.8
- "Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."9
- "The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:- (a) fundamental policy of Indian law; (b) the interest of India; or (c) justice or morality, or (d) if it is patently illegal."10

१६. सार्वजनिक नीति कुनै एक परिभाषा भित्र समेटिन सक्दैन । सार्वजनिक नीति कानूनका ति सिद्धान्तहरु हुन जसले सर्वसाधारणको अहित हुने कार्य गर्न रोक लगाउँछ, यसलाई कानूनमा अन्तरनिहित नीति वा कानूनी प्रशासनमा नीतिको रुपमा बुझ्नुपर्छ ।

- Public policy is "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed . . . the policy of law or public policy in relation to the administration of the law."11

- सार्वजनिक नीति कुनै खास कानून र नियम होइनन् बरु ती संस्थागत अभ्यास हुन जुन नियम कानूनमा उल्लेख गरिएका छैनन् । सार्वजनिक नीति कुनै एक नीति वा सिद्धान्त

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[6] PARSONS & Whittemore Overseas Co. v. Societe Generale d L'Industrie du Papier (RAKTA), 508 F.2d 969 (1974)

[7] E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 62 (2002)

[8] Renusagar Power Co. Ltd vs General Electric Co 1994 AIR 860, 1994 SCC Supl. (1) 644.

[9] Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd (2003) 5 SCC 705

[10] *Id.*

[11] Egerton v. Brownlow [1853] 10 Eng. Rep. 359, 437 (H.L.).

होइन बरु एउटा छत्र अवधारणा हो जसले न्यायका लागि उठेका विविध अवधारणा समेटछ ।

- "Public policy does not denote any one rule or principle, but is, rather an umbrella covering a variety of considerations which may have a bearing on the issue before the court."12

१७. निष्कर्षमा, सार्वजनिक नीतिको आधारशिला कानून र नजीर नै हुन् । सार्वजनिक नीति कानूनमा अन्तरनिहित कानूनका आधारभुत सिद्धान्तहरु हुन र नजीरले सार्वजनिक नीतिलाई अझ स्पष्ट गरि दिएको हुन्छ । तथापि सार्वजनिक नीति कानून र नजिर भन्दा व्यापक हुन्छ जुन न्यायको रोहमा अन्वेषण हुन सक्ने हो । सार्वजनिक नीतिका अन्य श्रोतहरु न्याय र सार्वजनिक नैतिकता हुन । मध्यस्थको निर्णय तबसम्म बदर गर्न मिल्दैन जबसम्म सो निर्णयले सार्वजनिक नीति उल्लंघन गर्दैन अर्थात न्यायका मान्य सिद्धान्तहरु, नैतिकताका मान्य अवधारणाहरु, सर्वजन हितायका चीरस्थापित परम्पराहरुको उल्लंघन हुने नदेखिएमा मध्यस्थ निर्णय बदर नगर्नु नै न्यायपूर्ण हुने देखिन्छ ।

१८. कानून र सार्वजनिक नीति न त परस्परमा पर्यायवाची हुन न त विपरितार्थक हुन, बल्की समपुरक अवधारणा हुन । यहि विधिशास्त्रीय मान्यतामा मध्यस्थता ऐन, २०५५ को दफा ३० मा अलग अलग प्रावधानहरु उपदफा (२) र (३) राखिएको हो । सार्वजनिक नीति (Public Policy) र गैर कानूनी कार्य (Illegality) कुनै सन्दर्भमा समान रुपले आकर्षित हुन नसक्ने होइन तर सबै सन्दर्भमा सँगसँगै लागू हुन सक्दैन । सो ऐनको उपदफा (२) को प्रावधान (illegality) आकर्षित हुन नसक्ने भएमा सो को उपदफा (३) को प्रावधान (Public policy limitation) आकर्षित हुने अवस्था तर्फ बिचार हुने हो, यी दुई प्रावधानको विधायिकी मनसाय परस्परमा भिन्न रहेकोले सामान्यत: मध्यस्थ निर्णय कानून विपरित रहेको नदेखिएमा सोही उपदफा (३)(ख) को दावी लिनुपर्ने हो । उपदफा (२) र (३) को दावी एकसाथ लिएमा त्यसको अलग अलग आधार र कारण खुलाउन सकेमा मात्र वादी दावी स्पष्ट हुन सक्छ ।

१९. वादीले Arbitral award सार्वजनिक नीति विपरित छ भनी दावी लिँदा कुन सार्वजनिक नीति विपरित छ भनी खुलाउनुपर्छ । सार्वजनिक नीति व्यापक छः संविधानमा आधारित राज्यका नीतिहरु सार्वजनिक नीति हुन। प्रस्तुत मुद्दा सार्वजनिक खरिद ऐन, २०६३ अन्तर्गतको विवाद रहेकोले सोही ऐन बमोजिमका सार्वजनिक नीति आकर्षित हुने हो । सार्वजनिक खरिद ऐन, २०६३ मा अन्तरनीहित सार्वजनिक नीतिहरु मध्ये सार्वजनिक खरिद प्रकृयामा स्वच्छ र पारदर्शी प्रतिस्पर्धा, स्वच्छ र सन्तुलित रुपमा करारीय दायित्वको परिपालना, सार्वजनिक निकाय र सेवा प्रदायकको जवाफदेहिता, मध्यस्थद्वारा

[12] Janson v. Driefontein Consol. Mines, Ltd. [1902] 27 A.C. 484

विवादको समाधान, सुशासन जस्ता नीतिहरुलाई उदाहरण स्वरुप उल्लेख गर्न सकिन्छ । यस मुद्दामा वादीले मध्यस्थ निर्णय कुन सार्वजनिक नीति, के कुन आधारमा, कसरी उल्लंघन हुन गएको हो दावी लिन नसकेको समेतका आधारमा वादी दावी पुग्न सक्ने देखिन आएन ।

२०. तसर्थः यसमा मध्यस्थ ट्राइबुनलबाट मिति १४/०२/२०२० मा भएको मध्यस्थ निर्णय (Arbitral award) मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) र (३) विपरित रहेको नदेखिँदा निवेदन माग बमोजिम सो निर्णय बदर गर्न मिल्ने देखिएन। वादी दावी पुग्न नसक्ने ठहर्छ । अरुमा तपसिल बमोजिम गर्नू ।

<u>तपसिल खण्ड</u>

- आदेशको प्रतिलिपिसहितको जानकारी उच्च सरकारी वकिल कार्यालय पाटन मार्फत विपक्षीलाई दिनू १
- सरोकारवालाले आदेशको नक्कल माग्न आएमा नियमानुसार लाग्ने दस्तुर लिई दिनू २
- प्रस्तुत आदेशको विद्युतीयप्रति अपलोड गरी पीठमा जनाउनू ३
- दायरीको लगत कट्टा गरी मिसिल नियमानुसार गरी अभिलेख शाखामा बुझाईदिनू ४

(खुशीप्रसाद थारु)
न्यायाधीश

उक्त रायमा सहमत छु।

(नरिश्वर भण्डारी)
न्यायाधीश

<u>फैसला तयार गर्न सहयोग पुऱ्याउने</u>

इजलास अधिकृतः गोकर्ण प्रसाद अर्याल
कम्प्युटर अपरेटरः बसन्त दर्शनधारी
ईति सम्वत् २०७७ साल फागुन २ गते रोज १ शुभम् .....।

प्रमाणीकरण मितिः न्यायाधीश अदालतको छाप

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