

**Arbitration Laws and Judicial Response to Settling the Disputes Through
Arbitration in Nepal**

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Abstract

The article aims to analyze the arbitration-related laws in Nepal, the domestication of international arbitration treaties and conventions, settlement procedures of arbitration disputes and the role of the Nepalese judiciary to settle the disputes through arbitration. To settle disputes outside the court through a mutual agreement in a peaceful situation, ADR (Alternative Dispute Resolution) is the best method practiced worldwide since time immemorial; Nepal has also proclaimed various provisions in different statutes and rules. Arbitration Act, 2055 is the current statute that governs arbitration matters and Arbitration (Court procedures) Rule, 2059 governs the court proceedings. The various provisions of Arbitration Laws and Rules have been proclaimed to mitigate the international arbitration laws and rules. Nepalese judiciary especially the supreme court and high court has played a pivotal role to settle the dispute that arose during arbitration, arbitral award, its implementation, the appointment of arbitrator etc. The finding of the study is there have been significant changes in the decision-making process by the court and new trends mitigating the international proceedings have been followed. The analysis is significant as it helps to understand the arbitration laws and procedures and new trends adopted by the courts to settle disputes.

Keywords: arbitration, court, award, dispute, law, implementation, settlement

Introduction

Globalization has rendered international transactions more frequent and has shown the inadequacy of national laws as a regulatory instrument thereof. Innovations in information technology and computer networks, a global shift towards market economies within nation states and regional and multilateral free trade agreements, have all led to an increasingly globalized world economy.

International commercial transactions have significantly increased in both number and complexity as a result of the rise of globalization and the opening up of trading frontiers, leading to an increase in the number of disputes. As a result, resolving such disputes that arise in personal cross-border or international economic transactions has become increasingly important through the use of international commercial arbitration (ICA).

Lawrence (1935) opined that arbitration may be defined as a method of settlement of disputes and differences between two or more parties, whereby such disputes are submitted to the decision of one or more persons specially nominated for the purpose, either listed of having recourse of action at law or by order of the court after such action was commenced.

Laven (1990) argued that in the context of international business transactions, arbitration is frequently used to settle commercial disputes. The arbitration may be required by the terms of employment or business contracts in some countries, like the United States, where it is frequently used in consumer and employment disputes.

Arbitration must be founded on the agreement of the parties. Not only does this mean that they must have consented to arbitrate the dispute that has arisen between them, as Sutton (1997) defined additionally, it means that the arbitral tribunal's power is constrained to what the parties have agreed. As a result, the tribunal's decision must resolve the dispute that was brought to its attention and must not make any rulings regarding unresolved issues or disputes between the parties.

Arbitration is not part of the State system of courts, as Fellas (2010) said it is a consensual procedure based on the agreement of the parties. However, it serves the same purpose as legal action in a state court system. The outcome is an award that can be enforced in court, typically using the same or a similar process as enforcing a court judgment. As a result, the State has a greater interest in the arbitration process than it does in other dispute resolution methods that are also alternatives to litigation. This prompted some nations to impose strict regulation on arbitration in the past.

Therefore, there is no exception for Nepal in as far as arbitration is concerned. Nepal passed the Arbitration Act in 1999 as a result of arbitration's growing international influence. Under Chapter 2 of the Act, disputes may be resolved through arbitration. According to the Act, disputes relating to agreements or matters covered by those agreements must be resolved through arbitration in accordance with any procedures specified in those agreements, if any, or, in the absence of such agreements, in accordance

with the Act. Therefore, the purpose of this thesis is to ascertain or investigate the judicial control over arbitration in Nepal.

Statement of Problems

Globally, arbitration has an international basis. This can be attributed in part to the fact that the United Nations International Trade Law, relating to international arbitration, has been reflected in many national legal systems as a principle for the regulation of both international and domestic arbitration. It is a set of guidelines that are suggested for international commercial law, but because they have found their way into the legal systems of many UN member states, they also constitute a unique vertical legislative monism.

As the United Nations International Trade Law's framework of rules for arbitration, including the national framework is also clear that these rules will not be reflected by the legislature only in the promulgation of the special law (The Arbitration Act of Nepal, 1999), including changes in rules and regulations issued, in particular, by permanent arbitration courts.

It must be logical that practical application will seek the view of constitutional doctrines of their interpretation of certain issues given that the Model Law enters into constitutional and legal systems through numerous provisions. The fundamental principle of arbitration law has a doctrinal foundation, which is important to note.

Rules of international commercial arbitration are not state-made law; it is an outcome of international commercial practice. No set of rules can or should specify every aspect of the procedure that might arise in international commercial arbitration. It depends on the background of the parties, their representatives and the arbitration. Party autonomy is a prime characteristic of arbitration which expects rules more flexible. Rules of international commercial arbitration have not been developed in a form of a complete package of dispute settlement. It has to be relied upon by national laws and courts. In this regard, the researcher has dug out the domestication of international treaties and conventions of Nepal to the following questions.

- Does the Nepalese judiciary supervise the arbitration laws and rules?
- Is there any change in judicial trend in adjudicating arbitration issues?
- What is the contribution of the Nepalese judiciary to domesticate international arbitration laws?

Research Objectives

The general objective and plan of the study are given below:

- i. To find out the role of the Nepalese judiciary in the settlement of arbitration disputes.
- ii. To find the judicial trend in adjudicating arbitration issued by the supreme court of Nepal.

Literature Review

Arbitration is not part of the State system of courts rather it is a consensual procedure based on the agreement of the parties. Nevertheless, it fulfils the same function as litigation in the State court system. The end result is an award that is enforceable by the courts, usually following the same or similar procedure as the enforcement of a court judgment. Consequently, the State has an interest in the conduct of arbitration beyond the interest it has in the settlement of disputes by other procedures that are also alternatives to litigation.

Sutton et al (1997) viewed that there are recognized and widely used arbitration principles. Both parties, particularly in commercial disputes, desire a quick, inexpensive, amicable, and effective way to resolve civil disputes, which is very difficult to achieve when using traditional justice mechanisms due to their methods of operation, resources, and lack of other technical expertise. Arbitration is the term used to describe a decision made by one or more people regarding a dispute between two parties, either with or without the assistance of an umpire.

Fellas (2010) argued that the terms of the parties' agreement (including, in particular, any adopted arbitration rules) and the national laws that apply in each case determine the tribunal's authority and responsibilities. With a similar view Born (2009) opined that the tribunal must adhere to due process and make sure that each party has an appropriate opportunity to present their case and counter the arguments of their rivals. However, the process can be very flexible in other areas. Gaerner (2009) described that the parties to the dispute may choose the third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party- also termed (redundantly) *binding arbitration*.

According to The New York Convention on Arbitration (1958), the courts are able to assure that the proper procedure has been followed in the arbitration by their power to set aside an award or to refuse to recognize or enforce it.

Subedi (2007) highlights the development of arbitration in Nepal and pointed out the judicial trends with the analysis of the various cases decided by the Supreme Court in relation of various issues of arbitration. The author has also conducted a survey of the court cases that are currently pending. The survey reveals that there is still much to be done to address the current issues and increase the court's ability to handle cases and petitions quickly. His additional recommendations for Nepal to institutionalize arbitration include building capacity and improving the law.

Laven (1990) analyzed the literature on the use of arbitration in the public sector. In this review, the categories emerged: 1) The distinctive nature of the arbitration process in the public sector; 2) Specific groups of public sector employees, primarily police, and teachers; and 3) The effects of various state statutes on the arbitration process.

Weidemaier (2010) claimed that it is a common theme in the arbitration literature that arbitrators do not establish a precedent. However, it is becoming increasingly evident from empirical evidence that in some arbitration systems, arbitrators frequently cite other arbitrators, assert that they are relying on prior awards, and promote adjudicatory consistency as a crucial system norm. Therefore, arbitrators are similar to courts in that they can (but do not always) establish a precedent that directs future behaviour and give parties, counsel, and adjudicators a language to express and resolve grievances. This Article provides a theoretical foundation for understanding the conditions under which such precedent will (or will not) arise. It identifies three considerations that may account for the development of precedent across a range of arbitration systems: (1) whether the arbitration system is structurally conducive to the creation of precedent; (2) whether arbitral precedent functions to fill gaps in (or displace) state-supplied law; and (3) whether arbitrators are likely to be viewed as legitimate producers of law in the relevant context. After explaining the relevance of these considerations, the Article explores how they might apply in different arbitration contexts and sets forth a research agenda capable of shedding light on arbitration not only as a mechanism for resolving disputes but also as a mechanism for generating robust systems of privately made law.

Mattli (2001) seeks to shed light on the striking institutional differences among the various methods of international commercial dispute resolution for private parties.

This method includes recourse to public courts and more frequently to private international courts, such as the international court of arbitration of the International Chamber of Commerce or the London Courts of arbitration, as well as recourse to so-called ad hoc arbitration and alternative dispute resolution techniques, such as conciliation

and mediation. The key institutional dimensions along which these methods of international dispute resolution vary are (1) procedural and adaptive flexibility, and (2) centralization to procedural safeguards and information collection. He further explains the different methods of international commercial dispute resolution that are selected.

Karki (2005) in 'A Comparative Analysis of Some of the Important Rules of Commercial Arbitration in Existence' has analyzed numerous rules of arbitration such as International Chamber of Commerce Rules, United Nations Commission on Trade Law, International Centre for Settlement of Investment Disputes Rules, Arbitration Act, 1999 and Nepal Council of Arbitration Rules. In the article United Nations Commission on Trade Law on International Commercial Arbitration (1985) and Nepalese Arbitration Law, Prof. Karki said that the Arbitration Act, of 1999 was based on the United Nations Commission on Trade Law.

Methods and Materials

The doctrinal research method is the foundation of the study. Analytical and comparative research methods are also used. Through primary and secondary sources of information, data have been gathered. The primary sources of information are international treaties, conventions, covenants, agreements, and international and national laws. Secondary sources of information include books, literature, articles, news, and expert opinions. For this, primarily library research techniques were used.

Results and Discussion

Judicial Response in Arbitration of Nepal

Settlement of disputes was a common practice in society which was not developed as we see today. According to Rao (2002), Dharma was a major pillar of trade. Additionally, because of the adherence to the religious path, fair play in trade was generally the norm, and disputes were resolved amicably when they arose. The formal court and arbitration systems that exist today were not developed.

In our country, the introduction of the modern concept of arbitration is not very old. The foundation on the subject was laid down by the enactment of the Development Board Act, 1956. The Act gave recognition to the concept of arbitration in the judicial system and authorized its use in disputes involving the Government on the one hand and the donor or construction companies on the other. As the international contractors or donors believed in their own way rather than our needs, generally the arbitration was

modelled after the ICC, Paris. It was very costly and inconvenient for developing countries like ours. The UNCITRAL Rules were only occasionally applied after persistent persuasions. This paved a new path and introduced an innovative element to the swift resolution of disputes. Both to reduce the number of arbitral cases registered in regular courts at all levels and to increase donor confidence in the legal system in place, steps were taken. The expansion of trade, commerce, and investment along with the improvement of international relations all contributed to the evolution of a new legal system on the subject, which ultimately resulted in the enactment of the Arbitration Act in 1981.

Development of Arbitration Law in Nepal

The modern concept of arbitration was only recently introduced. According to Sharma (2009), the Development Board Act, 1956 recognized the idea of arbitration in the legal system and permitted its use in disputes involving the government and donors or construction firms. In general, the arbitration was modelled after the ICC, Paris, as the international contractors or donors believed in their own ways rather than our needs. It was very costly and inconvenient for developing countries like ours. The UNCITRAL Rules were only occasionally applied after persistent persuasions. This paved a new path and introduced an innovative element to the swift resolution of disputes. Both to reduce the number of arbitral cases registered in regular courts at all levels and to increase donor confidence in the legal system in place, steps were taken. Arbitration clauses started to appear in various state transactions, though they served different functions and had different meanings.

The development of international relations, involvement of foreign construction companies in development activities in Nepal, and the expansion in trade, commerce and investment cumulatively ushered in the evolution of a new legal regime on the subject finally leading to the enactment of the Arbitration Act in 1981.

The Emergence of New Legal Regime: Arbitration Act, 1999

The lacunae and the inadequacies mentioned above which were felt during the exercise of the 1981 Act for nearly 18 years led to the enactment of the Arbitration Act, 1999. This law was by and large a local adaptation of the Model UNCITRAL Law (1995). The following are some of the salient features of the new Act:

- Conferment of party autonomy
- Rejection of some inappropriate principles laid down by the apex court

- Quicker completion of arbitral proceedings
- Disqualifying persons having bad records from being an arbitrator
- Lessening of judicial intervention in the arbitral process;
- Granting of supervisory jurisdiction to the Court of Appeal over the arbitral process
- Clear and express procedures of arbitral proceedings
- Fixation of time limitation for the appointment of arbitrators and submission of claim and counter claims
- Determination of own jurisdiction by the arbitration tribunal itself; Oath taking by arbitrators
- Emphasizing on expedient and inexpensive arbitral proceeding and
- Committing to adopt international trade usages and new trends in the arbitral proceeding etc.

The Act also includes mechanisms for reducing delays, the selection of qualified arbitrators, reduced court involvement, swift and minimally time-consuming procedures, mechanisms for award enforcement, and everything else that is thought to make arbitration less time-consuming than litigation.

Arbitration (Court Procedure) Rules, 2002

The courts are supposed to intervene in different stages of arbitral proceedings only when it is required by law. The new Rule that governs court proceedings is the first of its kind. The Supreme Court drafted it, and it is anticipated that it will be used in the enforcement of commercial law as well as other areas of the law where arbitration processes are relevant. It displays the time frame that the relevant work must be completed by the designated authority within in accordance with the Rule. It also tries to clarify the time reduction, types of documents to be screened by the courts, authorities responsible for a particular work, steps of procedures to follow, fees and other ancillary matters.

Judicial Trend up to 1999

After the inception of arbitration provisions in the Development Board Act, 1956 the application and use of the arbitration process came into practice. However, no specific case law is found until the enactment of the Arbitration Act, 1981. Slowly and gradually, it began to change. From early 1993 we encounter cases relating to arbitration under cases heading as Certiorari, Transactions, Compensation, Mandamus plus Certiorari, or claims for reimbursements, etc.

In the case of *Naresh Vikram Subedi v. Chief District Officer Rolpa and Others* (2044) concerning the court's non-intervention aspect of arbitration law, the Supreme Court rendered the first significant decision. The case was founded on the court's extraordinary jurisdictional rule of not interfering until and unless the conditions outlined in the relevant contract documents were met. The Supreme Court ruled that the proper venue for seeking redress of a complaint was a lower court's regular jurisdiction.

Another case setting a precedent was concerning the rights created by the contractual relationship between the parties in the case of *Karisma Impex v. National Trading Ltd. and Others* (2048). The apex court interpreted that contractual rights are not at par with Legal and Constitutional Rights. So, the subject cannot be entertained through the extraordinary jurisdiction as provided in the Constitution.

Supreme Court in the case of *Poshnath Nepal v. Bhandari Builders and Others* (2052) set a milestone principle regarding the appointment of the arbitrator. It was concerned with the appointment of the arbitrator(s) whereby the district court had appointed the chief arbitrator according to Section 5(2) of the Arbitration Act 1981. In this case, the court had interfered and made an appointment of the chief arbitrator in the place made vacant by the refusal to act by the former chief arbitrator who had refused to work. The Supreme Court upheld the decision.

A case where the court declined to intervene in the merit of arbitral award was *Nepal Rastra Bank v. Rajendra Man Sherchan* (2048) where a division bench of the Supreme Court did not intervene in the merit of the award. The court held that so long as legal questions are interpreted correctly by the tribunal, the court has no business to quash the award. The court should not go to examine the correctness of the arbitral award with regard to interpretation of fact and evaluation of evidence.

By these decisions, the court ruled in consonance with the provision of Section 21(3) of the Arbitration Act 1981 which didn't allow courts to interfere as they do in the exercise of appellate jurisdictions over the decisions of the lower court or quasi-judicial.

Judicial Trend After 1999

The Supreme Court has made a landmark decision in *Bridge Line Corporation v. Agricultural Inputs Corporation* (2062). The court has interpreted the existing arbitration law and set a good precedent. It has taken the view that courts should not make unwanted interference. While rejecting the writ petition the court held that so long as there is an alternative provided for in the law, writ jurisdiction should not be invoked as a usual

course of action; the available alternative should be followed. The apex court held that it can entertain application or appeal only against the Appellate Court order or decisions. Thus, the leading cases show a gradual shift of the courts to non- intervention while interpreting the legal provisions in the Arbitration Act.

The apex court in *Amodananda Mishra v. Appellate Court Patan and Others* (2062) held that section 7 of the arbitration Act does not bar from appointing an arbitrator if the adjudicator is not appointed in time. It was also held that the Arbitration, Act 1999 is not silent on the issue of non-appointment of the adjudicator and the intervention of the Appellate Court in appointment of the arbitrator(s) is valid for the reason that there must be some way out which helps in the settlement of the disputes that arises or might arise from the contract or agreement. It was a clear-cut mandate for the courts to go on with the process of deciding on the issue of appointment of an arbitrator even if the parties fail on the issue of appointing the adjudicator.

Flora Nepal Pvt. Ltd v. Appellate Court Patan (2062) is a unique example of unnecessary intervention by the Appellate court. It is regarding the appointment of an arbitrator by invoking Sec.7 of the Act. In this case the appellate court, by entering into the merit of the case, had declined to appoint the arbitrator as, according to it, the transaction between the parties itself had been frustrated. On the writ petition filed by the applicant, the apex court cautioned the lower courts that it should not cross the limit imposed by the Legislature, and so should remain confined within the limit of the ambit of Section 7 of the Act which should be the guiding principle, and not other matters. It observed, the court has no authority to go into the merit of the case and see whether the parties have done one way or the other. The decision of the Supreme Court is a lesson to the lower courts to see the arbitration cases with self-restraint.

Nara International Himalayan Spring Water Co. Ltd v. Hulas Steel Industries Pvt. Ltd and Others (2006 A.D.) is also pertained to the appointment of arbitrators under Section 7 of the new Act. The case in question had a provision whereby the dispute was to be settled by an arbitration tribunal comprising three arbitrators, one from each party and the third as mutually agreed upon. The respondent party didn't appoint its arbitrator, and later on, when the award was made by the single arbitrator appointed by the court, the petitioner raised the question of the number of arbitrators to be three not the single one appointed by the court. It was ruled by the Supreme Court that the question should have been raised while the appointment of the arbitrator was being made and that failure to perform an obligation by one of the parties should not adversely affect the other party. The

court observed that the petitioner had no legal standing to challenge the award so made. It was also ruled that there is no number of arbitrators specified when the court has to appoint under Section 7.5 of the Act.

Supreme Court in the case of Department of Road et al. V. Waiba Construction Co. Pvt. Ltd., Samakhusi, Kathmandu et al., 2067 (Decision No.8479) held that where the dispute is to be resolved through arbitration, the court cannot enter into factual questions, consider the evidence and provide a decision in a manner similar to a normal case. Further, the Hon'ble Supreme Court also held that where there has not been any grave error in law, the court cannot invalidate an arbitral award.

The landmark decision of the Supreme Court in the case of *Yashasvi Shamsher JBR v. Vaiwers Developers Pvt. Ltd., 2074 (Decision No. 9847)* stated that an Arbitration Agreement is deemed to be constituted in the following situations:

- i. Agreement between the parties to resolve the dispute through arbitration as per Section 3(a) of the Arbitration Act, 2055 within the contract, or;
- ii. Through a separate agreement, or;
- iii. When parties exchange written communications deciding to submit the dispute to arbitration, or;
- iv. When Respondent submits its Statement of Defense in response to Statement of Claim submitted by Claimant without protesting arbitration as the dispute settlement mechanism. The Hon'ble Supreme Court also held that in the absence of the above-mentioned conditions, an agreement between parties to resolve any dispute themselves cannot be construed to mean that the parties had an intention to resolve the dispute through arbitration.

The latest case regarding arbitration dispute is regarded as a case of Department of Roads, Babarmahal v. Arbitral Tribunal comprising of Mr. Sureshman Shrestha, Ms. Kamala Upreti and Mr. Narendra Kumar Shrestha & ors., 2077 (Decision No. 10586) in which Supreme Court held Appellate Court has the authority to invalidate an arbitral award and revert the matter back to arbitration only under the circumstances given under Section 30(2) of the Arbitration Act, 2055.

In a nutshell, the Supreme Court of Nepal has made some landmark decisions and has set guiding principles, given correct interpretations of arbitration-related cases. It has taken great care in guiding lower courts so as to make the arbitration cases faster, smoother, less costly, less formal and development friendly.

Findings

- Nepal's latest statute on arbitration 'Arbitration Act, 1999' is based on international conventions and laws which were made and declare to settle trade-related disputes in a peaceful manner. United Nations Commission on International Trade Law, 1995 is the foundation of all laws around the world which has paved the way to make trade-friendly laws and dispute settlement mechanisms. At the same time, the arbitration laws of Nepal have got shaped and groomed with the various directions and decisions of the Supreme Court and High Court of Nepal.
- After the inception of arbitration provisions in the Development Board Act, 1956 the application and use of the arbitration process came into practice. However, no specific case law is found until the enactment of the Arbitration Act, 1981. Slowly and gradually, it began to change.
- There could have been more, but the first significant case was *Naresh Vikram Subedi v. Chief District Officer Rolpa and Others* (2044) concerning the court's non-intervention aspect of arbitration law. The court's extraordinary jurisdictional role of deferring intervention until and unless the conditions outlined in the pertinent contract documents were satisfied served as the case's foundation. Until the case was filed, there was confusion about whether the high court had the jurisdiction or not to hear the complaint regarding the arbitration disputes. The Supreme Court settled the issue and established the principle that the high court has the regular jurisdiction for the redress of the complaint.
- Appointment of the arbitrator is always the disputant fact in many cases. Though it was the legal provision, still if the arbitrator refused to work then who has the authority to appoint the next arbitrator was not enshrined in the statute. Supreme Court set a milestone principle and interfered and made an appointment of the chief arbitrator in the place made vacant by the refusal to act by the former chief arbitrator who had refused to work. The Supreme Court upheld the decision. The decision settled the issue of the appointment of an arbitrator forever.
- After the promulgation of the new statute on arbitration law in 1999, a fundamental shift in the judicial trend has been observed throughout the various cases. In 2062 BS, the Supreme Court of Nepal set a milestone precedent in the case of *Bridge Line Corporation v. Agricultural Inputs Corporation* (2062). Court held that so long as there is an alternative provided for in the law, writ jurisdiction should not be invoked as a usual course of action; the available alternative should be followed. The apex court held

that it can entertain applications or appeal only against the Appellate Court order or decisions. Thus, the leading cases show a gradual shift of the courts to non-intervention while interpreting the legal provisions in the Arbitration Act.

- Supreme Court held Appellate Court has the authority to invalidate an arbitral award and revert the matter back to arbitration only under the circumstances given under Section 30(2) of the Arbitration Act, 2055 in one of the notable cases which is regarded as the huge paradigm shift in an arbitration dispute.

Conclusion

The analysis of the case law shows mainly two areas where parties come to court. The first is the appointment of the arbitrator(s), and the second is the quashing of the award given by the tribunal. The survey of cases shows that the appointment is still taking time more than required.

Parties also enter the court to set aside the award. The cases studied show no positive trend in this area also. Any award given by the tribunal is challenged and the disposal of the claim takes a long time. The general trend is to treat the case like other general cases registered in the courts. The procedures in the service of process, asking for the concerned documents and other necessary procedures take a long time.

Yet another area that requires serious review is the execution of the arbitral awards which frustrates the very notion of arbitration which is quickness. Whenever the government is a party, it does not abide by the award(s). Rather it wants to take excuses to make the execution of the award time-consuming. The review of case law shows that we have not been able to grasp the spirit of the arbitration and arbitral procedures are not followed by the courts, parties, lawyers, governments and also by the concerned parties. It is found to be a general norm prevailing among the practitioners to seek court intervention just to make the other party suffer. Since Nepal has become party to ICSID and also to the New York Convention on the execution of foreign arbitral awards, our responsibility has also been increased. We must make our legal regime and human resources as well as the court system competent to settle arbitration disputes is also equally important to execute decisions of the court. The human resource associated with the judiciary needs sensitization, education and facilities to expedite and keep abreast of the subject matter. Judges also need in-depth training in the area of their work.

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