

# Role of Arbitration for Settlement of International Commercial Disputes

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## 1. Introduction

Arbitration is one of the alternative dispute settlement mechanisms for disputes settlement or resolving differences in the area of commerce, trade, business, and contract and other investment and development related sectors. It is the process of solving dispute between people by helping them to agree to an acceptable solution. In other way we can say, this is a process in which an independent person makes a decision that ends a legal disagreement without the need for it to be solved in court.

Arbitration is a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputant parties select the arbitrator who has the power to render a binding decision. Arbitration is an agreement for taking and abiding by the judgment of selected person in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation.<sup>1</sup> Arbitration is a dispute resolution process in which the disputant parties present their case to a third party intermediary (or a panel of arbitrators) who examines all the evidence and then make a decision for the parties. This decision is usually binding. Methods of ADR include such processes where, unlike in traditional and formal court process, neutral third parties selected as per the consent of the parties, settle or facilitate to settle

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<sup>1</sup> BLACK'S LAW DICTIONARY (6<sup>th</sup> Ed.) (1991).

the disputes. Now-a-days, this process of dispute settlement is known as easier way to resolve commercial related differences worldwide.

Arbitration has become exceptionally strong and widely accepted as a means of resolving disputes in international trade and commerce.<sup>2</sup> Rapid globalization has meant a corresponding growth in the volume of international contracts with clauses providing for international arbitration. In turn, the availability and effectiveness of international arbitration has been seen by many as a spur to cross border commerce and investment. The potential for enforcing arbitral awards worldwide is much greater than the court judgments. As there is little point in obtaining a court judgment that cannot be enforced against suitable assets, this feature often conclusively determines the choice of arbitration for international contracts.<sup>3</sup>

The most important enforcement convention (although there are others) is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention). Over 150 countries are parties to the New York Convention, each of which broadly agrees to enforce arbitral awards made in other contracting States subject only to limited grounds for objection.

Arbitration is a dispute resolution process in which the disputant parties present their case to a third party intermediary (or a panel of arbitrators) who examines all the evidence and then make a decision for the parties. This decision is usually binding, like court-based adjudication. The role of an arbitrator is similar to that of a judge, though the procedures can be less formal and an arbitrator is usually an expert in his own right.

Arbitration is a non-judicial process for the settlement of disputes where an independent third party - an arbitrator - makes a decision that is binding. Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

The definition of 'Arbitration Agreement' has been included in Section 2(a) of Arbitration Act, 2055 B.S. (1999 A.D.) that, "Agreement" means a written

<sup>2</sup> Maurice Kenton & Peter Hirsth, *Advantages of International Commercial Arbitration*, <https://www.clydeco.com/insight/article/advantages-of-international-commercial-arbitration>, (Accessed: November 25, 2018).

<sup>3</sup> Latham & Watkins, *Guide to international arbitration*, <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>, (Accessed: November 25, 2018).

agreement reached between the concerned parties for a settlement through arbitration of any dispute concerning any specific legal issue that has arisen or may arise in the future under a contract or otherwise. Supreme Court of Nepal mentions in a case that,<sup>4</sup> 'the formal procedure of the court is realized as time consuming by the clients of trade and commerce which has negative impact in the transactions. They felt that the court procedure is burdensome and that will impact upon the goodwill of the trade and traders, that is why arbitration has made its space as an alternative'.

According to justice M.R. Romily-"An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter on differences between the parties".<sup>5</sup>

## 2. International Commercial Arbitration

Long before laws were established, courts were organized or judge formulated principles of law, men had resorted to arbitration for resolving of disputes, adjustment of differences and the settlement of disputes. Arbitration is a private method of dispute resolution. International commercial arbitration is an alternative method of resolving disputes arising out of commercial transactions between private parties across national borders that allows the parties to avoid litigation in national courts.

In an arbitration parties agree to refer the dispute to impartial consisting of one or more arbitrator. Both the parties to the dispute represented by lawyers, present their arguments in front of the tribunal. After listening to the argument of both parties, the tribunal makes the judgment and it can be enforce anywhere in the world. International arbitration is the process of resolving disputes between or among transnational parties through the use of one or more arbitrators rather than through the courts. It requires the agreement of the parties, which is usually given via an arbitration clause that is inserted into the contract or business agreement. The decision is usually binding.

Arbitration is today most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions (International Commercial Arbitration). It is also used in some countries to resolve other types of disputes, such as labor disputes, consumer disputes,

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<sup>4</sup> *Krishna Chandra Jha V. Dinesh Bhakta Shrestha and others* (2059), Supreme Court of Nepal Bulletin, 2059, Asoj 1, P.1 cited on Satya Narayan Kalika, *THE LAW OF CONTRACT*, 1st Ed., (2013), Pairavi Prakashan, Kathmandu, Nepal, at 259.

<sup>5</sup> *Collins V. Collins* (1958) 28 LJ Ch. 186

and for the resolution of certain disputes between states and between investors and states.

The European Convention on International Commercial Arbitration 1961 was the first international instrument to have the words “International Commercial Arbitration” in its title.<sup>6</sup> Although, no standard definition has been given to the terms, however, there is fairly clear agreement on its constituent elements of the three words; “arbitration” that is “commercial” in nature and has more “international” element to it.

International commercial arbitration between traders of different countries has long been recognized by the business community and the legal profession as a suitable means of settling trade controversies out of court.<sup>7</sup> The procedure in international commercial arbitration is basically the same as in domestic arbitration. In the mid-1960s, in order to establish more uniformity in procedure and to make access to arbitration facilities more easily available, the United Nations economic commissions published new rules applying to international arbitration for Europe and Asia.

The development of international commercial arbitration was furthered by uniform arbitration legislation prepared by the UN Conference on International Commercial Arbitration in 1958 and by the Council of Europe and the Inter-American Juridical Committee of the Organization of American States.

### 3. Approaches of Arbitration

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

There are some approaches on commercial arbitration that will reflect principal characteristics of arbitration as follows:<sup>8</sup>

- **Arbitration is based on consent of the parties**

Arbitration can only take place if both parties have agreed to it. In the case of future disputes arising under a contract, the parties insert an

<sup>6</sup> Dilli Ratna Shrestha, *Rule of International Commercial Arbitration and its Use in Domestic Arbitration*, Business Law Journal, Vol. 11, Commercial Law Society Nepal, Kathmandu, Nepal, at 79 (2007).

<sup>7</sup> Arbitration by Martin Domke available at <https://www.britannica.com/topic/arbitration#ref212248>, (Accessed: November 22, 2018).

<sup>8</sup> Principal Characteristics of Arbitration available at <http://www.wipo.int/amc/en/arbitration/what-is-arb.html>, (Accessed: November 22, 2018).

arbitration clause in the relevant contract. An existing dispute can be referred to arbitration by means of a submission agreement between the parties.

- ***Arbitrator (s) can be chosen by the parties***

In arbitration process the parties can select a sole arbitrator together. If they choose to have a three-member arbitral tribunal, each party appoints one of the arbitrators; those two persons then agree on the presiding arbitrator. Alternatively, the Center can suggest potential arbitrators with relevant expertise or directly appoint members of the arbitral tribunal. The Center maintains an extensive roster of arbitrators ranging from seasoned dispute-resolution generalists to highly specialized practitioners and experts covering the entire legal and technical spectrum of intellectual property.

- ***It is neutral and confidential in process***

In addition to their selection of neutrals of appropriate nationality, parties are able to choose such important elements as the applicable law, language and venue of the arbitration. This allows them to ensure that no party enjoys a home court advantage. The Arbitration rules specifically protect the confidentiality of the existence of the arbitration, any disclosures made during that procedure, and the award. In certain circumstances, the Rules allow a party to restrict access to trade secrets or other confidential information that is submitted to the arbitral tribunal or to a confidentiality advisor to the tribunal.

- ***The Final decision of the arbitrator can be enforced easily***

The parties agree to carry out the decision of the arbitral tribunal without delay. International awards are enforced by national courts under the New York Convention 1958, which permits them to be set aside only in very limited circumstances.

#### **4. Appointment of Arbitrators**

There is a universal practice to appoint the arbitrators or tribunal members commonly by one of three means:<sup>9</sup>

1. Arbitrators are appointed by the disputing parties by mutual agreement or understanding between them one arbitrator by each party.
2. After appointing each arbitrator by both parties the third one will be chosen by the existing tribunal members.

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<sup>9</sup> Appointment process of arbitrators from <http://www.mediate.com/articles/grant.cfm>, (Accessed: November 25, 2018).

3. In another way the court or institution will nominate the arbitrator according to the of the parties mentioned in agreement.

Arbitration as an ADR which resolves the business disputes. Most states have provisions in their civil practice rules for arbitration to settle the business disputes. Those rules provide a basic template for the arbitration as well as procedures for confirmation of an arbitrator's award which means the document that gives and explains the decision of an arbitrator. A procedure that gives an award the force and effect of a judgment after a trial in a court. Many states have adopted the Uniform Arbitration rules and procedure, although some states have specific and individual rules for arbitration of their ground reality.

## 5. Arbitration process

After choosing the arbitrator or tribunal of arbitrators the process starts how the dispute to be resolved. Out of the uniformed principle of arbitration the tribunal or arbitrator can make their basic code of conduct of rules forwarding the process. In spite of their internal rules of arbitration it can be differ depending upon nature of cases. There are some essential procedure or steps that can be solved the disputes of international commercial regime, we can spelt out in a following way.

- a) **Starting the process of arbitration** – The parties must have intention to resolve or settle the dispute through a means of arbitration, the both parties must be agreed for this process.
- b) **Appointment of arbitrator** – Arbitrators may be appointed by one of three ways: (1) Directly by the disputing parties, (2) By existing tribunal members (3) By an external party that could be court or institution.
- c) **Preliminary meeting with the parties** – It is a good idea to have a meeting between the arbitrator and the parties, along with their legal council, to look over the dispute in question and discuss an appropriate process and timetable.
- d) **Claim and response of the parties** – The claimant sets out a summary of the matters in dispute and the remedy sought in a statement of claim. This is needed to inform the respondent of what needs to be answered. It summarizes the alleged facts, but does not include the evidence through which facts are to be proved. The statement of response from the respondent is to admit or deny the claims. There may also be a counterclaim by the respondent, which in turn requires a reply from the

claimant. These statements are called the 'pleadings'. Their purpose is to identify the issues and avoid surprises.

- e) **Problem discovery and inspection** – These are legal procedures through which the parties investigate background information. Each party is required to list all relevant documents, which are in their control. This is called 'discovery'. Parties then 'inspect' the discovered documents and an agreed upon selection of documents are prepared for the arbitrator.
- f) **Interchange of evidence** – The written evidence is exchanged and given to the arbitrator for review prior to the hearing.
- g) **Hearing** – The hearing is a meeting in which the arbitrator listens to any oral statements, questioning of witnesses and can ask for clarification of any information. Both parties are entitled to put forward their case and be present while the other side states theirs. A hearing may be avoided however, if the issues can be dealt with entirely from the documents.
- h) **Legal submissions** – The lawyers of both parties provide the arbitrator with a summary of their evidence and applicable laws. These submissions are made either orally at the hearing, or put in writing as soon as the hearing ends.
- i) **Award** – The arbitrator considers all the information and makes a decision. An award is written to summarize the proceedings and give the decisions. The award usually includes the arbitrator's reasons for the decision.
- j) **Enforcement (execution) of award**<sup>10</sup>

Having obtained the award with the enforcement clause appended to it, you are entitled to refer it to enforcement officer, unless the other party agrees to enforce it voluntarily.

## 6. Models of International Commercial Arbitration for Dispute Resolution

International arbitration is not like litigation in the courts of law. There is no volume containing the rules of court, no code of civil procedure to govern the conduct of an international arbitration and litigators who produce their own country's rule book or code of civil procedure as a helpful guideline to the

<sup>10</sup> <http://www.sadarbitrazowy.org.pl/en/podstrony/-7-steps-of-arbitration.html>, (Accessed: November 24, 2018).

conduct of an international arbitration will be told politely but firmly to put it away. The rules that govern an international arbitration are, first mandatory provisions of the *lex arbitri*, the law of the place of arbitration which are generally cast in broad terms. Secondly, there are the rules that the parties may have chosen to govern the proceedings such as those of the ICC or of UNCITRAL, Article 15 of the UNCITRAL Rules. In an international arbitration, the tribunal and the parties have the maximum flexibility to design a procedure suitable for the particular dispute with which they are concerned. This is one of the major attractions of international arbitration; it is flexible method of dispute resolution in which the procedure to be followed can be tailored by the parties and the arbitral tribunal to meet the law and fact of the dispute.<sup>11</sup>

We can find out the different way to settle the dispute in different states, but the governing principle and fundamental aspect of dispute resolution process through the arbitration is more or less uniform in international practice. In commercial area the International Commercial Arbitration (ICA) plays an important role in the resolution of cross-border commercial disputes. Rather than submitting their disputes to the foreign courts that may carry significant business risks. Businessmen often include an arbitration clause in their contracts.<sup>12</sup> The international institutions are working in settlement of international business disputes making ADR procedure rules, appointing the neutral third party as arbitrators and preparing model law for national legislation. So we can find some basic models for international commercial dispute resolution as some of them are as follows:

### **I) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”)**<sup>13</sup>

This convention entered into force on 7<sup>th</sup> June 1959 and it has some objectives in the said convention on Article XII as follows:

- a) Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of

<sup>11</sup> Dr. D. N. Parajuli, *Recognition and Enforcement of Foreign Arbitral Award under National and International Laws*, NEPAL BAR COUNCIL LAW JOURNAL, 126, (2017).

<sup>12</sup> The conflict of laws and international commercial arbitration BY BENJAMIN HAYWARD published in February 16, 2017 available at <https://blog.oup.com/2017/02/conflict-laws-commercial-arbitration/> (Accessed: November 24, 2018).

<sup>13</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html), (Accessed: November 24, 2018).



arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term “non-domestic” appears to embrace awards which, although made in the state of enforcement, are treated as “foreign” under its law because of some foreign element in the proceedings, e.g. another State’s procedural laws are applied.

- b) The Convention’s principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

### **States can be a Party of the Convention**

The Convention is open to accession by any Member State of the United Nations, any other State which is a member of any specialized agency of the United Nations, or is a Party to the Statute of the International Court of Justice (articles VIII and IX).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the “New York Arbitration Convention” or the “New York Convention”, is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.<sup>14</sup> Nepal became the accession of party on 4 March 1998 and entry into force on 2 June 1998.<sup>15</sup>

### **II) United Nations Commission on International Trade Law (UNCITRAL)**

The United Nations Commission on International Trade Law (UNCITRAL), established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966 plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.<sup>16</sup> Those areas include dispute resolution,

<sup>14</sup> <http://www.newyorkconvention.org>, (Accessed: November 22, 2018).

<sup>15</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html), (Accessed: November 24, 2018).

<sup>16</sup> A Guide to UNCITRAL Basic facts about the United Nations Commission on International Trade Law, at 1 available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>, (Accessed: November 22, 2018).

international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods. These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, nonmember States, and invited intergovernmental and non-governmental organizations.<sup>17</sup>

It has developed some rules, beside others, applicable to arbitration and conciliation. Important ones related to ADR are UNCITRAL Arbitration Rules 1976 and UNCITRAL Conciliation Rules 1980. Parties to a contract can select these rules in their contract as dispute settlement clause. Moreover, parties are free to make modification on the respective rules as per their need.

### **III) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006<sup>18</sup>**

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernize the form requirement of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.

The ADR laws mainly made after 1996 in different countries are based on these model laws. Arbitration Act 1999 of Nepal is an example of it.

<sup>17</sup> Ibid.

<sup>18</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html), (Accessed: November 22, 2018).

#### IV) International Chamber of Commerce (ICC)

International Chamber of Commerce (ICC)<sup>19</sup> was established in 1919 by a group of business person. It has established International Court of Arbitration in 1923. ICC publishes first rules for the Uniform Customs and Practice for Documentary Credit (UCP) in 1933. ICC granted observer status at United Nations (UN) General Assembly in 2016.

It has been providing service to the parties who want to settle international commercial disputes. It has passed Rules of Arbitration of the International Chamber of Commerce in 1998, which is applicable to the parties who choose arbitration process. Also, it manages and facilitates amicable measures like Mediation, Early neutral Evaluation, mini trials applying ADR Rules 2001.

Currently the Arbitration Rules 2012, as amended in 2017. They are effective as of 1 March 2017. The Mediation Rules, in force from 2014, reflect modern practice and set clear parameters for the conduct of proceedings.<sup>20</sup>

Since it provides professional ADR service, it takes fee for facilitating and managing the process. Any parties to a contract can choose these rules as rule of procedure for resolving dispute between them; ICC has established chapters in different countries, including Nepal. Nepal Chamber of Commerce is working as a Nepal Chapter of ICC since 2004.

#### V) The London Court of International Arbitration (LCIA)

The LCIA arbitration rules are universally applicable, being suitable for all types of arbitral disputes. They offer a combination of the best features of the civil and common law systems, including in particular:<sup>21</sup>

- Maximum flexibility for parties and tribunals to agree on procedural matters
- Speed and efficiency in the appointment of arbitrators, including expedited procedures
- Means of reducing delays and counteracting delaying tactics
- Emergency arbitrator provisions
- Tribunals' power to decide on their own jurisdiction
- A range of interim and conservatory measures

<sup>19</sup> Information about International Chamber of Commerce available at its web page <https://iccwbo.org/about-us/who-we-are/history>, (Accessed: November 26, 2018).

<sup>20</sup> <https://iccwbo.org/publication/2017-arbitration-rules-and-2014-mediation-rules-arabic-version>, (Accessed: November 27, 2018).

<sup>21</sup> [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx), (Accessed: November 27, 2018).

- Tribunals' power to order security for claims and for costs
- Special powers for joinder of third parties and consolidation
- Waiver of right of appeal
- Costs computed without regard to the amounts in dispute
- Staged deposits - parties are not required to pay for the whole arbitration in advance.

On 5 April 1883, the Court of Common Council of the City of London set up a committee to draw up proposals for the establishment of a tribunal for the arbitration of domestic and, in particular, of trans-national commercial disputes arising within the ambit of the City. In April 1891, the scheme was finally adopted and the new tribunal was named "The City of London Chamber of Arbitration". It was to sit at the Guildhall in the City, under the administrative charge of an arbitration committee made up of members of the London Chamber and of the City Corporation.<sup>22</sup>

The Chamber was formally inaugurated on 23 November 1892, in the presence of a large and distinguished gathering, which included the then President of the Board of Trade. Considerable interest was also shown both by the press and in legal commercial circles.

In April 1903, the tribunal was re-named the "London Court of Arbitration" and, two years later, the Court moved from the Guildhall to the nearby premises of the London Chamber of Commerce. The Court's administrative structure remained largely unchanged for the next seventy years. In 1981, the name of the Court was changed to "The London Court of International Arbitration", to reflect the nature of its work, which was, by that time, predominantly international. New and innovative rules were also adopted that year.

LCIA provides a comprehensive commercial arbitration and conciliation service under a combination of the best features of the civil and common law systems and also under UNCITRAL Rules.<sup>23</sup>

To maintain its worldwide service to the world business, LCIA has formal user's Council's covering the major trade areas of the world.

<sup>22</sup> Historical information of LCIA from its web page available at <http://www.lcia.org/LCIA/history.aspx>, (Accessed: November 27, 2018).

<sup>23</sup> Prof. Dr. Bharat Bahadur Karki, *Models of International Commercial Arbitration and the Courts*, BUSINESS LAW JOURNAL, Vol. 12, Commercial Law Society Nepal, Kathmandu, Nepal, at 3. (2008).

The court has procedural rule LCIA Arbitration Rules (2014) effective from October 1, 2014. Earlier LCIA Arbitration Rules (1998) was applicable.<sup>24</sup>

#### **VI) International Center for the Settlement of Investment Disputes (ICSID)**

ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry.

ICSID provides for settlement of disputes by conciliation, arbitration or fact-finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a careful balance between the interests of investors and host States. Each case is considered by an independent Conciliation Commission or Arbitral Tribunal, after hearing evidence and legal arguments from the parties. A dedicated ICSID case team is assigned to each case and provides expert assistance throughout the process. More than 600 such cases have been administered by ICSID to date.

ICSID offers rules designed specifically for the resolution of international investment disputes between investors and States. The two main instruments are the ICSID Convention and the ICSID Additional Facility, which provide the procedural framework for arbitration, conciliation and fact-finding proceedings. This framework is supplemented by detailed Regulations and Rules.<sup>25</sup>

<sup>24</sup> [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx), (Accessed: November 24, 2018).

<sup>25</sup> Process overview of ICSID available at <https://icsid.worldbank.org/en/Pages/Process/Overview.aspx>, (Accessed: November 27, 2018).

In addition to administering proceedings under the ICSID rules, the Centre handles arbitration cases under other rules, such as the UNCITRAL Arbitration Rules, and *ad hoc* investor-State and State-State cases. The Centre's services are also available for mediation of investment disputes and other alternative dispute resolution mechanisms. While ICSID provides a wide range of services during the course of a proceeding, it does not itself make procedural rulings or decide the dispute. Independent conciliation commissions and arbitral tribunals constituted in each case are vested with the power to rule on procedural issues and resolve the parties' dispute.

The numbers of signatory and contracting member states of ICSID are 162.<sup>26</sup> Nepal has made signatures on September 28, 1965, ratifications on January 7, 1968 and entry into force on February 6, 1969 of the ICSID Convention; designations and notifications made by ICSID to Member States to implement and apply the Convention; and designations made to the ICSID Panels of Arbitrators and of Conciliators.

### **VII) Legal Framework for Enforcement of Foreign Arbitral Award**

Upon arbitral tribunal's clarification of the case to the extent being sufficient for material resolution, the arbitral tribunal issues an award. The award is not appealable. Although it is possible to request a common court to set the award aside, in practice, it is very difficult since the legal bases to be referred to be few. After receiving the award, winner has to request a common court to recognize it or to ascertain its enforceability. It is not a complicated procedure and usually it does not take long. Additionally, the arbitral award can be enforced in almost every state in the world. The numbers of States are 159 which are signatories' parties of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) allowing recognition and enforcement of foreign arbitral awards.

The arbitration act 1999 of Nepal provides for the implementation of an award made in a foreign country. According to section 34 if any party wants to implement the award made in a foreign country enforced then he/she can file an application in the High Court and if the court is satisfied that the award made in a foreign country falls within the criteria of award recognized as enforceable in Nepal than the high court forwards such foreign awards to the district court for its implementation.<sup>27</sup>

<sup>26</sup> <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (Accessed: November 27, 2018).

<sup>27</sup> YADAV KUMAR K.C., *CONTRACT LAW A COMPARATIVE STUDY* (1st ed.), Pairavi Prakashan, Kathmandu, Nepal, at 372 (2016).

Enforcement of a foreign award may be a more complex matter, frequently governed by treaty obligations. There is no universal law available to regulate international commercial arbitration. There are many different national systems of law, which may need to be consulted depending upon where arbitration takes place and what issues are involved. Question of the capacity of the parties to agreement, the validity of the arbitration agreement, the arbitrability of the subject matter of dispute and the recognition and enforcement of the award of arbitral tribunal all fall to be determined by national system of law. Even where arbitration is governed by international system of law, reference to national law is unavoidable if it becomes necessary to seek recognition or enforcement of award. There are various aspects, where role of the court is inevitable. It is because of limitation of the side of arbitral tribunal of private arbitration institution. Among other roles, the national court has major role to ensure recognition and enforcement of award. It means that an application for recognition and enforcement of award as to be made in the place or places in which recognition or enforcement is sought. Once it has given its award, the task of an arbitral tribunal is usually concluded. Neither the arbitral tribunal nor any arbitral institution under whose auspices it may be operating is directly concerned to ensure recognition and enforcement of its award. The recognition and enforcement of award is a matter for the courts, which clothed with the authority of the state, possess considerable powers. Country may adopt own procedures for recognition and enforcement of award. However because of the effect of international convention there is considerable uniformity of national laws governing the recognition and enforcement of international awards, indeed considerably national laws, which govern the challenges of such awards.

## 8. Conclusion

International commercial arbitration and its method and principles, that we came to know are easier to resolve the international commercial disputes in the amicable way that disputed parties can get justice within the limited time frame rather the lengthy court process. The entrepreneurs or business persons may not have extensive time for the case in court. Though, this method has both strengths and shortcomings in many aspects. The neutrality of arbitrators or international arbitration institutions, the enforceability of arbitral awards in foreign countries, the flexibility in arbitration process and confidentiality of arbitration proceedings are often considered as the most advantageous features of international commercial arbitration, with some

criticisms on these aspects, while generally the cost and the slowness of this method makes it disadvantageous.

Multinational or international commercial contracts consist of parties who are almost from different countries. This characteristic of international commercial contracts makes arbitration preferable as a dispute resolution method rather than submitting the dispute to another parties' national court. Parties may either appoint an arbitrator from another country or request an international arbitral institution to make an appointment for the proceeding of arbitration.

In this way, they acquire neutrality in the choice of law, venue, procedure and tribunal. UNCITRAL framework posing a universal approach shows a comparatively liberal attitude towards court interference to International Commercial Arbitration process to enhancing all country situations. Most of the international commercial contracts are set in standard forms. To promote arbitral mechanism in any country, they should have uniform standard of their domestic law with the guideline of international standard of arbitration rules and principles. Now the world is becoming world village due to the development science and technology. We can get the world's activities and information in our computer through the internet, in this way we have to think, how we make this dispute solution mechanism more practical, easier and economic, because the members of the world are not equal footing on development and economy and we should promote this commercial dispute resolve mechanism in an easy accessible way in spite of some challenges in this area.

A fundamental aspect in arbitration is the consent of the parties, both the parties have to agree to settle the dispute through arbitration. This is usually done including a dispute resolution clause in the contract. It is mentioned before, that the arbitration is a private dispute settlement procedure and it is based on party's autonomy. The party agree to choose the way in which they want to arbitrate the dispute. They can select the place, the arbitrator, the rule of arbitration and also substantive and procedure laws governing for arbitration. The parties in a dispute can mutually agree selecting a person as an arbitrator. An arbitration procedure can be design as time saving and economical as well. Arbitration can be conducted privately without disclosing sensitive business information to the public and the government.

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