

9. Arbitration

9.1 Meaning and Definition of Arbitration

Simply, the term 'arbitration' is a process of settling disputes. Arbitration means the settlement of disputes by the decision of the person. It is a method of settlement of disputes and differences by referring them to a neutral third party who decides the issues after hearing both sides in a quasi-judicial manner. Thus it is a means of the settlement of disputes between the parties, where a person gives his decision after hearing the disputing parties as neutral as the judge of the general court of law does.

The Nepalese Arbitration Act, 2055, has not defined the term 'arbitration' but defined the term 'agreement'. This term denotes the arbitration agreement. According to section 2(a) of the Act, 'agreement' means a written agreement made between parties for settlement by arbitration of a dispute which has arisen at that time or which may arise in future in respect to a defined legal relationship contractual or not contractual.

According to M.R. Romily, 'arbitration is the reference to the decision of one or more persons, either with or without an umpire of a particular matter on differences between the parties.'

According to M.C. Kuchhal, 'Arbitration is the settlement of disputes and differences relating to civil matters (eg. Money, property, or breach of contract) between one party and another in a judicial manner by the decision of one or more persons called arbitrators, appointed by the contending parties, without having recourse to a court of law.'

From the definitions of arbitration, arbitration agreement and agreement stated above it follows that arbitration is a process of the settlement of dispute.

9.2 Essential of Valid Arbitration Agreement

1.1.1 (a) The agreement must be in written form:

The arbitration agreement or the submission of arbitration must be made in a written form and it may be made before or after the disputes arises.

1.1.2 (b) No need to mention name:

A person who decides dispute referred to him under arbitration is called arbitrator. The parties may name arbitrator in agreement or not. Even after concluding agreement name of the arbitration can be determined.

1.1.3 (c) All the essentials of valid contract:

All the essential elements of the valid contract must be present in the arbitration agreement (i.e., competent parties, free consent, certainty and clarity, legal object, consideration etc.) and it should follow the law of contract and customs of the business.

1.1.4 (d) Binding force of award:

Award made by the arbitrators is binding to the parties. The decision made by the arbitrator (award) concerning the dispute between agreed parties has a fully binding force.

1.1.5 (e) Procedural simplicity:

The procedure for the arbitration is to be brief and simple because the main purpose of arbitration is to avoid the lengthy procedure of the regular courts. There is no complex and more formal process.

9.3 Importance of Arbitration

Today business is being more and more complicated day by day due to increasing number of transactions. The parties have no time to go to the court to settle of the differences arising in the field of business. It is a popular way among the alternative settlement of dispute.

- **Prompt decision:** The decision given under arbitration is prompt because the law relating to arbitration has also specified time limit to provide decision. In the context of Nepal, arbitrator has to decide the case within 120 days after the submission of document.
- **Privacy and close hearing:** The dispute which is referred to arbitration follows the secret research method and close hearing, which do not make the dispute public and is far from unnecessary rumor.
- **Expertise service:** The arbitration may be from the same field as that of a dispute, the expert who has specialized and is experienced in the subject matter is appointed by the concerned parties.
- **Less expensive:** Simple procedure and prompt settlement of the dispute makes the case less costly.
- **Convenient for international business disputes:**

The law of land is limited within the national territory, but the law of arbitration has emanated from the international trade law and business, and disputes can be settled by international institution which is convenient to the business persons and firms of different nations and societies.

9.4 Who is an Arbitrator?

An arbitrator is a person appointed by mutual consent of the concerning parties to settle a controversial issue between them. The arbitrator is a tribunal chosen by the consent of the disputing parties.

9.5 Number of Arbitrator

The number of arbitrator is determined by the agreement between the parties. If the number of arbitrators is fixed in the agreement it is as per agreement. If it is not fixed the number of arbitrator of arbitration shall be three as determined by the Section 5(1) of the Arbitration Act.

Except otherwise is agreed in contrary, each concerned party will appoint one arbitrator and appointed arbitrators will appoint a third person as arbitrator.

There are two ways of appointing an arbitrator.

- By the concern parties: Each centered party will appoint one arbitrator and appointed arbitrator will appoint third person as arbitrator.
- By the court: In any of the following circumstances party to the agreement can file application in the appellate court for appointment.
 - (a) In case the arbitrator cannot be appointed in accordance with the provision prescribed in the agreement.
 - (b) in case nothing is prescribed in the agreement as regarded to the appointment of the arbitration.

9.5 Who can Refer Disputes of Arbitration?

As a general rule, capacity to submit disputes to arbitration is co-extensive with capacity to contract. While performing the contract if there arises some disputes or differences between the parties, any of the parties may refer such disputes to the arbitrators. There are certain conditions at which even the parties to the contract can not refer disputes to the arbitrations.

Generally only those persons can refer disputes to arbitrators who are legally competent to contract. One who is incompetent to contract can not refer disputes to the arbitrators either. Hence disputes may be referred only by the person who is competent and upon whom the decision of the arbitrator may be imposed. The following persons may not generally refer disputes to arbitrators:-

1.1.6 (a) Minor or a lunatic person:

A minor or a lunatic (unsound) person is not legally competent to contract, he cannot refer any dispute for arbitration, but his natural or legal guardian can, on his behalf, refer disputes bonafide for his benefit and interest.

1.1.7 (b) Agent:

An agent cannot refer dispute to arbitration unless he is given a special right to do so by his principal.

1.1.8 (c) An attorney or solicitor:

They cannot refer dispute to arbitrator unless the client gives special authority to do so.

1.1.9 (d) Partner:

Generally, a partner in a business has no right to refer disputes but he can do it if he is given this right by the partnership agreement or by usage, by custom of trade, on behalf of his partnership.

1.1.10 (e) Trustee:

The trustee enjoys a right to refer dispute to arbitration for protection and improvement of such property.

9.6 What may be referred to Arbitration?

All matters in dispute which can be decided by a civil court may be referred to arbitration. Disputes relating to matters which are purely criminal in nature can not be referred to arbitration.

It is clear that any dispute mentioned in the agreement must be referred to the arbitration and any dispute of civil or commercial nature which is under consideration of the court can also be referred to the arbitration.

Generally, what types of matter may or may not be referred to the arbitration is discussed below separately:

9.7 Matters may be Referred to the Arbitration

- Matters of civil nature such as disputes concerning property, money or concerning the amount payable for breach of contract etc.
- Matters relating to personal rights between the parties, question of validity of marriage or maintenance payable to wife, terms of separation between husband and wife etc.
- Disputes as to dignity and respects or reputation.
- The matters relating to the operation of a private trust also is referred to arbitration.
- Disputes between insolvent and creditor.
- Other civil cases, which are out of jurisdiction of the court of law, may be referred to arbitration.

9.8 Matters may not be referred to the Arbitration

- Disputes relating to matrimonial relations such as a suit for divorce or for restitution of conjugal rights.
- Testamentary matters such as validity of a will of paper.
- Matters relating to public charities and charitable trust.
- Matters relating to insolvency to declare one as insolvent.
- Matters relating to guardianship of a minor and other disable person.
- Matters of criminal nature and disputes.
- Matters relating to dissolution or winding up of a company.
- Execution proceedings of cases.

9.9 POWER AND DUTIES OF ARBITRATOR

An arbitrator has some rights or powers and also some duties. The Nepalese Arbitration Act, 2055, Section 21 has made some provision in this regard, they are as follows:

1.1.11 (a) Rights or powers of Arbitrator:

An arbitrator is a person who is appointed for the settlement of disputes between the parties. After getting appointment, he enjoys and exercises some rights and powers along with the obligation of performing duties. So rights or powers of the arbitrator means those rights and powers which the arbitrator is entitled to exercise in the course of settling disputes submitted before him. In general, the arbitrator has the following rights and powers:-

- To administer oath to the parties and witness appointing before him.
- To administer interrogatories a necessary.
- To take counsels from experts or the Appeal Court, in case the majority of arbitrators can not take decision.
- To ask the concerned parties to appear before him and submit documents and give particulars according to need.
- To appoint an expert on any specific issue to examine and get his opinion on it.
- To take a guarantee of property or bank guarantee in case one of the parties is foreign national.
- To order for specific performance of the contract under some special circumstances.
- To enjoy and follow the powers given by the law.
- To inspect the disputed place, product, production process, structure and other things.
- To exercise the special power given by the concerned parties, if any.
- To issue certified copies of document and award.

9.10 Duties of Arbitrator

In the course of arbitration proceedings the arbitrator need to perform some duties along with the exercise of rights or powers. The primary function of the arbitrator is to settle dispute referred to him for the settlement. After getting appointment, the arbitrator or the umpire is in the capacity of the judge of the regular court. To hear both of the parties, to examine documents, to read out the award judicially, etc. are some of the examples of the arbitrator's duties.

- **To act judicially:** Due to holding position of the arbitrator, the primary function of the arbitrator is to render justice to the parties of dispute. He must be fair and impartial and decide the dispute in the quasi-judicial manner. He must follow all the arbitration clauses very strictly.

- **Not to do misconduct:** The arbitrator must act in good faith and must not misconduct through him or by others. Not to perform duties as he was expected to perform duty is his misconduct.
- **Not to act as an advocate or an agent:** He shall not act as an agent or an advocate of any party to the dispute.
- **To perform all the functions personally:** An arbitrator can not delegate his powers to others.
- **To provide equal opportunity to the parties:** An arbitrator has to give equal opportunity for the disputing parties to appoint legal practitioner, and an opportunity to submit their claims.
- **Not to cross jurisdiction:** The arbitrator has to work within the scope of authority. If he crosses the jurisdiction his verdict will be null or void.
- **To make award within the time:** The arbitrator is bound to render his award (decision) within the time prescribed in the agreement. The arbitrator must make award generally within 120 days from the date of submission of the claim.
- **To inform the parties of an award and to provide the copies.**
- **To sign the award and mention its place and date.**
- **The arbitrator should not take gift and charity from the party.**
- **To keep the file safe:** - The arbitrator must safely keep the file of the arbitration proceedings. He must prepare the file mentioning depositions of the parties, documents and evidences received from them, date and time respectively. Lastly, he must refer the file to the district court for safe custody.

9.11 Revocation of Arbitrator's Authority

Revocation of arbitrator's authority means to restrict a person appointed as an arbitrator from initiating arbitral proceedings. It is also termed as revocation of an arbitration agreement. Because of this, right of the arbitrator to arbitrate gets discharged. The parties and the court in the following circumstances may revoke the authority of an arbitrator.

1.1.12 (a) Revocation by the mutual agreement of the parties:

If both parties so like, they may instead of referring disputes to the said arbitrator, settle such dispute by mutual compromise. In this situation, the arbitrator's authority is supposed to be revoked. Furthermore, if the both parties like, even after submission of disputes to the arbitration, they may, by their mutual agreement, and in this way too, the arbitrator's authority may be revoked. It should, however, be noted that they cannot revoke his authority after award being issued by him.

1.1.13 (b) Revocation by permission of the court:

The parties to the arbitration agreement may be revoking the arbitrator's authority also by the permission of the court. But, only on some specific circumstances, the court allows them to revoke the arbitrator's authority.

According to see 11 (2) of the Act the parties may apply to the arbitrator within 15 days from the date of irregular. The court may give permission to the parties to revoke or remove an arbitrator's on the following circumstances:-

- Appointment of the arbitrator without free consent of the party.
- If the arbitrator acts partially in a biased manner.
- If the arbitrator acts against the natural law of justice or judicial principles or the existing law.
- When an unreasonable absence in the meetings.
- If an arbitrator continuously commits irregularity and mistakes.
- If an arbitrator is not qualified or loss his qualifications.

9.12 The Award

Judgment or final decision of an arbitrator or arbitrators on all matters referred to arbitration is called the arbitral award or award. The document containing the decision of the arbitrators is also called award. The general rule is that, the award will be enforceable on all the disputed parties. The award made by the arbitrator or the arbitration tribunal is regarded as the final decision as of the verdict of the court of law.

In Krishna Chandra Jha Vs. Dinesh Bhakta Shrestha court held that Arbitrator can not go beyond the terms of the contract while delivering the award.¹

9.12.1 Essentials of Valid Award

1.1.14 (a) The award must be made in written form (Sec. 27)

The award must be made in written form. Although there is not a particular format of award but it should contain the following things under it:

- Brief statement of the matters referred.
- Decision of the arbitrator and its basis and ground.
- Existence of jurisdiction, if it is questioned by the party.
- Matters as regards to the amount to be realized or compensated.
- Signature of the arbitrators.
- Place and date of award etc.

¹ Krishna Chandra Jha Vs. Dinesh Bhakta Shrestha

1.1.15 (b) Time limitation for making award

The award must have been made within 120 days from the date of reference. Unless otherwise mentioned in the agreement, the arbitrator should pronounce his award ordinarily within that prescribed time period and the award must be issued within 30 days after completion of oral hearing of the dispute.

1.1.16 (c) The award must be certain and final

The award must not be vague and unclear. It must be certain and final because a repetition of award is not accepted in accordance with the Sec. 29, except correction of a normal error. In case of any difference in opinion of members of arbitration may put a note of decent.

1.1.17 (d) Binding force

The award has a fully binding force to the disputing parties.

1.1.18 (e) The award should not be repeated

Generally award should not be repeated, otherwise it becomes void. But if a party dissatisfied with the award made, he may, according to the Sec. 30 (1), apply appeal in the appellate court within 35 days from the date of hearing or receiving a copy of award, for allowing permission to revoke it and the court may ask the arbitrator to make the award void or to repeat the decision so made.

9.12.2 Execution of Award

The award has a fully binding force. The concerning parties must perform or follow the award in time. Execution of award is enforced in the following modes:

1.1.19 (a) Execution by the parties (Sec. 31):

The award is obeyed by the disputing parties morally and legally. The parties have to execute the award within 45 days from the date of receipt of a copy of the award.

1.1.20 (b) Execution of award by the court (Sec. 32) :

In case of failure of the parties to execute the award within 45 days, either party can file an application to the District Court within 30 days from the date of expiry of time limit prescribed for the purpose for having the award executed. And on receipt of such application filed in this way, the District Court has to execute or enforce the award ordinarily within 30 days as its own judgment.

9.12.3 Execution of Foreign Award (Sec. 34)

Any party which wishes to have an award made in a foreign county enforced in Nepal shall submit a petition to the Appellate Court, along with the following documents:

- The original copy of the arbitrator's award or a certified copy.
- The original copy of the agreement or a certified copy.
- In case the arbitrator's decision is not in the Nepali Language, an official translation thereof in the Nepali language.

9.13 The Provisions Relating to Madhyasthata Ain in Nepal (Arbitration Act, 2055)

Nepal Madhyasthata Ain, 2055 is the law relating to Arbitration, 2055 in Nepal. It has been applied since the date of promulgation. It has six chapters and 44 sections. The Act has the following provisions:

1.1.21 (a) Definitions:

The Act has defined a number of technical terms under section 2 used in the Act and can be used while handling case of arbitration. Accordingly, the terminologies such as district and appellate court, dispute, counter claim, rejoinders arbitrator etc. have been defined for the arbitration context.

1.1.22 (b) Arbitral dispute:

The act has categorized civil matters of commercial nature in arbitral dispute and can be taken out from the court for settlement through arbitration. It has restricted to refer non- arbitral disputes to arbitration.

1.1.23 (c) Number of appointment:

As provided in Sections 5-8 under the Arbitration Act, the number of arbitrator should be odd and normally, 3 but 1 is also allowed where the parties determine so. The Act has clearly recognized the provisions under section 11 upon which an arbitrator's authority can be revoked, and his position could be made vacant.

1.1.24 (d) Provision as to oath and qualification:

The act has made some provisions under Sections 9 and 10 in this regard. The arbitrator has to take oath and has to hold essential qualification under law and agreement. The qualification of law is to have contractual capacity, not to be punished under law on criminal charges, not to be insolvent etc.

1.1.25 (e) Rights or powers and duties of arbitrator:

The Act has fixed a number of rights or powers and duties of arbitrator. Some of the powers of the arbitrator are to have submission, to determine the jurisdiction and procedure, to fix the venue, to seek the assistance of the court, to issue different kinds of award and the like. Similarly, some of the duties are to be fair, impartial to respect the principles of natural justice, to take oath etc.

1.1.26 (f) Working procedures:

The Act has dealt with some provisions in this respect. The arbitrator has to work in line of procedures that have been fixed by the agreement or by the Act in the silence of the agreement. He must hold the office immediately after his appointment or submission of dispute in case where he is named in the agreement.

1.1.27 (g) Provision as to award:

As stated in Section 24, award must be made within one hundred and twenty days from the date of submitting rejoinder. Furthermore, the majority decision is regarded as award and the decision of the umpire is recognize as valid in case where different opinion arise between the parties.

1.1.28 (h) Invalidity of award:

As dealt with under different section of the Act, the party dissatisfied with the award of arbitrator can file petition in the Appellate Court for invalidating it within 35 days from the date of receipt of award, by supplying a copy of application to the arbitrator and other party. The Court can uphold or nullify the decision by ordering to settle it again by a fresh decision to the arbitrators. The grounds upon which it can be invalidated are incompetence of

parties to sign an agreements, it is unlawful, or unclear, excess exercise of jurisdiction, against agreement, non-arbitrary, against public policy or morality etc.

1.1.29 (i) Miscellaneous provisions:

The Act provides other more provisions under this chapter 6. The Arbitration must refund payment where no proceeding is held or his position falls vacant for any reason. The liability of the parties falls into the heirs in case of death or insanity.

In conclusion, the present Arbitration Act, 2055, has help business community by stipulating proper legal provisions. However, the Act is silent on definition of arbitration. The timely reform of such shortcoming will prove the Act successful.

Law of Carriage

1. Why is it important to study the law relating to carriage? What are the rights commonly possessed by a common carrier? [4+6]
2055
2. What is a carter party? What matters are dealt with by the clauses of charter party? [4+6]
2056
3. Who are common carriers? What are their liabilities? [4+6]
2057
4. What is bill of lading? What are its character? [4+6]
2058
5. Define the term common carrier and point out the duties of a common carrier. [4+6]
2058
6. State and explain the rights and duties of a common carrier. [5+5]
2059
7. Write a note on charter party. [10]
2060
8. Give the classification of carriers and explain the importance of law of carriage. [4+6]
2061
9. State and explain the rights and duties of a common carrier. [5+5]
2062
10. Define common carrier. Distinguish between common carriers and private carriers. [4+6]
2064
11. What is contract of affreightment? Explain the implied conditions in contract for carriage of goods by sea. [3+7]
2065
12. Define the term common carrier. How do you distinguish between common carriers and private carriers? [3+7]
2066
13. Who is a common carrier? Describe the rights and duties of a common carrier. [3+7]
2067
14. Define contract of affreightment and provide a classification of carriers. [3+7]
[2068]