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Revisiting the Core Ideas of Arbitration through Functional and Practical Measures

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Abstract

Arbitration has been vital to dispute resolution in today's commercial society. It has been discussed, presented, and conceived as one of the prominent methods of alternative dispute settlement mechanisms. It has been said to have significant advantages over litigation in court, such as speedy process, lower cost, flexibility, confidentiality, and fair, final, and enforceable awards. However, these advantages or core ideas of arbitration must be revisited to ensure and endure the concept of arbitration itself. This paper tries to oversee the core ideas of arbitration through functional and practical measures, and the author has revisited the fundamental advantages of arbitration, such as its speed, cost, and non-litigious nature, besides debunking whether arbitration is an alternative dispute resolution mechanism.

Keywords*: Arbitration, Core Ideas, Advantages, Revisiting.*

I. Introduction

The Concept of arbitration has its roots in the development of commerce itself. The popular story of King Solomon on the true mother of a baby is considered the first case of arbitration in biblical history.[1] The word arbitration is etymologically derived from the Latin word *arbitari*, which means to judge.[2] This etymological meaning of arbitration is to judge. Arbitration is defined as "arbitration, the act of arbitrating, the putting an end to a difference by the means of arbitration."[3] Arbitration, in other words, is defined as the process by which parties sort the dispute between them to the third person, known as an arbitrator, who is neutral and impartial and lacks any interest in the dispute. In most cases, the person is chosen by themselves. The decision given by the arbitrator is binding to them as they accept the decision of the Arbitrator, which is awarded to be binding and final.[4]

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1 The King James Bible 1 Kings 3:16-28 states in the book Elkouri and Elkouri about How Arbitration Works (1960).

2 Arbitration, Etymology is available at https://www.etymonline.com/word/arbitration and was accessed on September 10, 2022.

3 Vijayakumar Raju v. IndusInd Bank Ltd, 2010 (3) RAJ 11.

4 Martin DomkeE, *Commercial Arbitration*, Englewood Cliffs, N. J.: Prentice-Hall, 1965. pp. xii, 116.

Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions.[5] Arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.[6]

In Nepal, Arbitration can be traced back to the system of *'Panchayat'*, long before the codified judicial system developed. *Panchayat* was an informal tribunal of five men chosen from among the villagers to render an impartial decision in the settlement of disputes between the members of villages. Their decisions were binding upon the parties to the disputes. Similarly, the concept of arbitration in its modern sense was first found in government contracts.[7]

The arbitration Act of Nepal does not define arbitration. However, the central feature of arbitration includes the beginning of the alternative to the national court and private and confidential means of dispute settlement within a speedy and inexpensive process whose whole process is controlled by the parties in dispute.[8] The main advantages of arbitration over national judicial systems are that it is fast, cheap, and confidential.[9] It also makes the award predictability ensures the parties' participation, in a neutral forum with the expert in the dispute-related field.

There has been continuous rhetoric about arbitration aligning with its features and advantages over conventional and formal dispute settlement mechanisms. Meanwhile, arbitration is subject to certain drawbacks.[10] The need to select the panel before anything substantive makes speedy relief challenging or a myth in arbitration. Similarly, execution of arbitral award, and recourse to arbitral award, which may be taken as the exception to arbitration, shall allow parties to plan litigation to make the arbitration process lengthy, litigious, and not cost-effective. Thus, in this paper, the author revisits the fundamental advantages of arbitration, such as its speed, cost, and non-litigious nature, besides debunking whether arbitration is an alternative dispute resolution mechanism.

II. Principles of Arbitration

a) Arbitration is Consensual: Arbitration rests on a firm foundation of party autonomy. The parties own the dispute and should be able to control the details of their disputing process. They may choose to litigate, mediate, or arbitrate. Arbitration is a mutual process that requires the consent of both parties. Arbitration can only be initiated if parties have agreed to create it. Parties can insert any arbitration clause if it is relevant utilizing a submission agreement between parties. The parties are also not allowed to withdraw from the arbita unilaterally. A contract is central to the success of party autonomy in the arbitration procedure. An agreement to arbitrate

5 I.C Sharma, 'Recent Development In Arbitration', Nepal Law Review p. 1, volume 13, 1999, p. 1053

6 Ibid.

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

8 Julian D. M. Lew , Loukas A. Mistelis , Stefan Michael Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2003, p. 12

9 Stefania Bondurant, 'A Practitioner's Guide: An Overview of the Major International view of the Major International Arbitration Tribunals', *South Carolina Journal of International Law and Business*, volume 3: 1, 2006, p. 22

10 Tibor Varady, John J. Barceló (III), Arthur Taylor Von Mehren, *International Commercial Arbitration: A Transnational Perspective*, , West Group, 1999, p. 24..

can set forth the essentials of the arbitration process, ranging from restrictions on discovery to selecting a more judicialized form of arbitration characterized by adopting procedures associated with conventional litigation. Parties to an arbitration agreement may contract to take a limited number of depositions or to mandate that the arbitrator apply substantive legal principles.[11]

b) Arbitration is Neutral: Arbitration is a neutral process; hence, it provides equal opportunity to the parties, such as the arbitrator, arbitration Panel, applicable law, language, and venue of the arbitration. This also ensures that no parties should enjoy the home-court advantage.[12]

c) Arbitration is a confidential procedure: The arbitration rule specifically protects the confidentiality of the matter. The arbitration process provides privacy and restricts unnecessary controversies regarding the case and parties. Any disclosure made during the procedure may result in decisions and awards. English Courts consider arbitration to be a private means of dispute resolution and consider an obligation of confidentiality to be implied in the arbitration agreement between the parties.[13] In some circumstances, the parties are allowed to restrict the access of trade secrets and other confidential information submitted to the arbitration tribunal.

d) The parties choose the Arbitrator: Party autonomy is the Key principle that aligns with the concept of arbitration. Each party has the right to select the Arbitrator whom they think will be fit to handle their case. If the parties have chosen a three-member arbitration tribunal, then each party appoints one of the arbitrators. Then, the two selected arbitrators shall agree on the presiding arbitrator. The agreement to arbitrate can also suggest the potential Arbitrator with relevant expertise or may directly appoint members of the arbitration tribunal.[14]

e) The decision of the arbitral tribunal is final and easy to enforce: The decision of the arbitral tribunal is final and known as the Award. The arbitration tribunal's decision must be final and binding on both parties. Arbitration awards can be easily enforced in other nations than court proceedings.

III. Features of Arbitration

Many people favour arbitration to resolve disputes over litigation in formal courts. Arbitration offers several advantages, such as party control, lower costs, shorter resolution times, flexibility, privacy, fair, final, and enforceable awards, and decision-makers selected by the parties based on desired characteristics. Arbitration arises from a contract or agreement among the disputing parties, enabling them to design the process according to their respective requirements and modify it as the proceedings progress.

Arbitration is considered a quicker and less time-consuming method of settling cases than litigation. Additionally, attorney's fees and expenses are the most significant litigation costs, which increase directly with the time taken to resolve the case. Arbitration reduces attorney's

[11] Edward Brunet, Richard E. Speidel et. al., *Arbitration Law in America A Critical Assessment*, Cambridge University Press, U.S.A., 2006, p. 34.

[12] Riya Ranjan, 'Important principles of Arbitration Law', ipleaders, 2021 available at https://blog.ipleaders.in/important-principles-arbitration-law/, accessed on 1 March 2021

[13] Dr. P C Markanda, *Law Relating to Arbitration and Conciliation*, LexisNexis, 11th edition, 2022, p.

[14] Ibid.

fees and expenses as it concludes in a much shorter timeframe than court cases. Although there are no arbitrator or institutional charges in court cases, the International Chamber of Commerce reports that those charges represent only 18% of the cost of arbitration[15]. This 18% (and more) can be recovered quickly due to arbitration's increased speed and efficiency and the ability to tailor the process to the parties' needs.

Flexibility in dispute resolution is another highly valued feature of arbitration. In arbitration, parties can schedule hearings and deadlines to meet their objectives at their convenience. This flexibility allows parties to save time and money, such as choosing a location for the hearing that reduces costs, taking witnesses out of order or interrupting a witness to accommodate individual needs, continuing a hearing after regular business hours to complete a witness or finish the hearing, taking testimony of distant witnesses by video conferencing or telephone, or ordering deposition so that all experts on a topic testify directly after one another or even all at the same time. The flexibility of arbitration creates a relatively informal atmosphere and reduces stress on witnesses and what often continue to be business relationships between parties.

Compared to regular court hearings, arbitration is far more confidential. Arbitral hearings are held in private settings and are attended only by those designated by the parties and their lawyers. Unlike court proceedings held at the courthouse, which are open to the public, the parties can agree to maintain the confidentiality of the arbitration proceedings. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards.

Similarly, parties can choose their arbitrators. Under the party-appointed and list systems, they can select arbitrators with qualifications tailored to the needs of the dispute in question. Parties can choose arbitrators based on subject matter expertise, reputation for competence, temperament, years of experience, number of arbitration chairs, availability, commitment, and ability to conduct an efficient, cost-effective arbitration. The power of parties to select arbitrators with the desired expertise and competence contrasts with most court cases, where judges are assigned randomly without regard to whether they possess qualifications particularly suited to the dispute at hand.

Commercial disputes must be resolved quickly to avoid lengthy, expensive appeals that increase costs and cause business paralysis. Arbitration provides finality quickly and economically because lengthy, expensive appeals like those encountered in court are unavailable under the Arbitration Act of Nepal. The existing statutes severely limit a court's ability to vacate arbitration awards except on limited grounds such as corruption, fraud, and partial evidence, which are challenging to prove and rarely succeed. Based on the features of arbita discussed above, whether these features are mere rhetoric or persist in the arbita's practical and functional domains. These are categorically done under the following Questions and answers series:

IV. Is Arbitration A Form of Alternative Dispute Resolution (ADR) or an informal mechanism of dispute resolution?

The speech of Professor Frank Sander at the Pound Conference has been identified as the

[15] ICC Commission on Arbitration and ADR, ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, ICC-International Chamber of Commerce, 2018, available at http://www.iccwbo.org, accessed on 8 August 2022.

birth of modern ADR. His speech focused on comparing the pros and cons of litigation with other dispute resolution methods. The professor introduced the concept of Multi-Door Court House during the speech.[16] According to him, arbitration and mediation are two primary forms of ADR. His speech posits that the binding decisions made by the third party outside the court are to be kept together.[17] He proposes two phases of dispute resolution, viz., the mediation and adjudicatory phases.[18] Thus, putting the adjudicatory process of arbita as ADR just by mere division of keeping litigation not as an alternative and all other processes, including arbitration, mediation, negotiation, and a rag-tag of assorted methods and also the decision of tribunal as an alternative, seems to be problematic.[19] The idea of ADR is rooted in the private dispute settlement where the parties have the autonomy to decide. But in the case of binding arbitration, the party's autonomy is at stake. Here, the Arbitration becomes the Act of a non-litigious process and does not have the element of party autonomy.[20]

During the infancy of the ADR movement, dispute settlement was divided into two types: viz. litigation and ADR. All the dispute settlement mechanisms outside the court were grouped as alternative ones. Thus, arbitration was also categorized into mediation, neutral evaluation, negotiation, etc. The movement emphasized the advantages of such non-legal processes over the litigious process. Thus, if ADR is defined as anything other than litigation, binding arbitration qualifies as ADR.[21] However, if such a definition is quashed and the elements of ADR are focused, making them the indicator of Arbitration, then the concept becomes problematic. With the emphasis on informality, interpersonal relationships[22] with low cost, speed, and the ability to foster personal growth and awareness, binding arbitration would disallow arbitration within the domain of Alternative Dispute Resolution.

It is undeniable that arbitration is less formal than litigation; the rules of procedure and evidence are comparatively relaxed. It may share the characteristics of arbitration, but it also shows similar features of litigation, and the amount of the cost and time required for the ligation may be parallel to that of the arbitration process, which ultimately challenges to keep arbitration within the list of ADR[23]. Although the parties themselves choose the arbitrators in most cases, and even if the arbitrators are not the judges, the rights given to them are like those given to judges.[24]

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16 Frank E.A. Sander, Varieties of Dispute Processing, in Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration Of Justice, F.R.D., vol. 70, , 1976, p. 111.

17 Jethro K. Lieberman & James F. Henry, 'Lessons from the Alternative Dispute Resolution Movement', *University of Chicago Law Review*, Vol. 53:2, available at https://chicagounbound.uchicago.edu/uclrev/vol53/iss2/7, accessed on 7 October 2022.

18 Tibor Varady(n 10), p. 24.

19 Charlie Irvine, 'The Thick Line Between Mediation and Arbitration (Or Why ADR is a Weasel Word)', *Kluwer Mediation Blog*, 24 July 2021, available at http://mediationblog.kluwerarbitration.com/2021/07/24/the-thick-line-between-mediation-and-arbitration/, accessed on 9 October 2022.

20 Ibid.

21 Jean R. Sternlight, 'Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness', Scholarly Works, 2000, available at https://scholars.law.unlv.edu/facpub/270, accessed on 7 October 2022.

22 Deborah R. Hensler, 'A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation', *Texas Law Review*, vol. 73, 1995, pp. 1587, 1594.

23 Ian R. Macneil, R.E. Speidel, T.J. Stipanowich, *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act*, Little Brown, volume, 4, 1994.

24 Edna Asper Elkouri & Frank Elkouri,I, *How Arbitration Works*, Committee on ADR in Labour & Employment Law - American Bar Association Section of Labor and Employment Law, Washington D.C., 5th edition, 1997.

Thus, the lack of control by the parties, more formality, lack of speed and self-fulfilment, and the binding arbitration being in the power of lawyers who do not get over the hand of the litigation along with the process of conducting discovery, filling for the motion in the court, etc. make it problematic to list arbitration to be ADR in true sense.[25] It is also highlighted that when arbitration is kept within the same category, it fuels the misperception that ADR is distinct from litigation, besides blurring the line between ADR and litigation and making the crossroads of all dispute resolution concepts.[26]

Some authors are reluctant to accept arbitration as an ADR process because of its litigious nature. Until recently, most practitioners would have defined ADR as an alternative to litigation, including arbitration as a form of ADR. However, because arbitration has become as established as litigation and partly because of the increasing tendency to include any consensual process in ADR, most practitioners regard ADR as an alternative to litigation, arbitration, and all adjudication forms. Parties waive their right to resolve the disputes through court by valid agreement, which is compulsory for an arbitration process. So, arbitration is a dispute settlement by private judges, as opposed to justice by the state court established by law. The parties appoint the arbitrators. The state appoints the judges of the state courts. Parties can submit their dispute to arbitration only when they have agreed to do so. It is a legal method of settling disputes between parties outside ordinary court procedures by referring to a mutually agreed third party with the authority to determine a legally binding award. An arbitrator differs from a judge in that s/he is appointed not by the state but by the parties or by an individual or institution chosen by the parties.

In arbitration, the arbitrator chosen by the parties gives an award which is binding. However, this general understanding is not complete and there are multiple times either party are dragged to the court during the arbitral proceedings and after the award is rendered. It is an open fact that arbitration laws of almost all jurisdiction gives supervisory jurisdiction to the courts. The prevailing Arbitration Act, 1999 of Nepal has the following grounds for which the courts to intervene or facilitate the arbitration proceedings, including the supervisory role to be played in some of the matters:

- The Act had given the High Court supervisory jurisdiction over the arbitral process and the Arbitrator's appointment if required.
- The experts claim that the Act commits to adopting international trade usages and new trends in arbitral proceedings.[27]
- The principle of severability is reflected in the Act.[28] The principle in Arbitration states that an arbitration clause or agreement embodied with the original contract can be separated *ipso facto* from the actual subject of the contract, even if an arbitrator or court invalidates the original one.[29]
- The time frame for the enforcement of the Award is only 45 days[30]

25 Tibor Varady(n 18), p. 24.

26 Ibid.

27 Ibid (n 7).

28 Madhyasthata Ain, 2055 (Arbitration Act, 1999), Nepal, s.16.

29 Bryan A. Garner, Black's Law Dictionary, Thomson West, 8th edition, 2005.

30 Arbitration Act (n 28) s. 31.

- The Act also requires the defaulting parties to pay the interest of the amount set by the Award.[31]
- Cost of arbitration proceedings- parties compelled to pay the fees and arbitration expenses[32]
- The provision of the Act is extensive to the devolution of rights and liabilities, even if there is death of any party, insanity, or disappearance of any party.[33]
- The Act prescribes a fee of 0.5% of the total amount to be received by the party to be paid for the execution of the Award.[34]
- Deposition of the case file of arbitration to the district court for the execution of the case[35]
- The Act gives power to the Supreme Court to make rules on arbitration.[36]
- It incorporates and gives effect to several core arbitration principles: *Kompetenz-Kompetenz*.[37], arbitral confidentiality,[38] a pro-enforcement approach to domestic and foreign arbitral awards[39] and limited grounds for setting them aside[40]and review of awards by the High Court on the grounds of public policy.[41]
- The Act requires that the Arbitrator affix his or her signature to the oath and submit it to the High Court.[42]
- The Act has provided the list of rights and duties of the Arbitrator. He or she must maintain the case file chronologically, which will be submitted to the district court later for record. The Act confirms the document's confidentiality and provisions that no copies of any documents may be given to anyone other than the parties without their approval.[43]

V. Are Arbitration Confidential?

The arbitration is a private process. It is chosen by the parties to make it a private affair by holding the entire proceeding in private. It can be attained by the related parties to the disputes

31 Arbitration Act (n 28), s. 32.
32 Arbitration Act (n 28), s. 35.
33 Arbitration Act (n 28), s. 38.
34 Arbitration Act (n 28), s. 41.
35 Arbitration Act (n 28), s. 42.
36 Arbitration Act (n 28), s. 43.
37 Arbitration Act (n 28), s. 16.
38 Arbitration Act (n 28), s. 9.
39 Arbitration Act (n 28), s. 32.
40 Arbitration Act (n 28), s. 34.
41 Arbitration Act (n 28), s. 30.
42 Arbitration Act (n 28), s. 9
43 Arbitration Act (n 28), s. 42.

and their invites.[44] The business world has a reputation for saving. Thus, they are attracted to the arbitration for its privacy and confidential arbitral proceedings. They are unwilling to reveal the details about their do's, don'ts, and transactions to the public.[45] The litigation is generally open to the public; anyone can have information about it. Due to such reasons, many camera hearing cases also fall into the trap of camera hearing. There is a blowing up of the news all the time. However, the parties choose arbitration as an existence to such phenomenon and main the secrecy.[46]

In the commercial corporate world, by arbitration, it is assumed that the corporation or parties to the arbitration do not lose professional reputation, whatever the decision would be, as the Arbitrator's conclusion is not made in arbitration. The reputation stake could be more significant than the amount involved, which would even hamper the client's decision to connect to the business. Thus, confidentiality and privacy are the advantages of arbitration that help to maintain the confidence and prestige of the parties to conduct business with others, as the public and other related field members are unaware of disputes related to contract business.[47] This is unlike litigation, where all the decisions are made public.[48] The arbitration is also considered advantageous as there is no public record and a public hearing.[49] But are arbitrations private and confidential? Undoubtedly, the arbitration is a private proceeding and does not publicly publish the judgment. The confidentiality of the information revealed in arbitration is problematic.[50]

Many arbitration-related authors who demonstrate privacy and confidentiality as the positive traits of arbitration use privacy and confidentiality synonymously. These two are different concepts subject to different meanings.[51] Privacy in the arbitral proceedings does not ensure confidentiality as privacy prevents public access to the information; meanwhile, confidentiality is related to the confidentiality of the information.[52] Since arbitration is not a secret event but rather a private process, the arbitration rules do not protect the confidentiality of the information revealed.[53]

For Instance, the rules of well-known arbitration institutions can be taken viz. American arbitration Association (AAA.) Commercial Arbitration Rules do not address the confidentiality of the arbitration proceedings.[54] The rules require parties to draft their confidentiality clause

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44 Sastrowiyono, A. A.-F., 'The Pro's and Cons Of Arbitration: A Study Of International Arbitration With Perspective Of Indonesian And Korean Law', *Lex Renaissance*, vol. 4:2, 2020, pp. 231–247..

45 Ibid.

46 Ibid.

47 Valbon Mulaj, 'The Advantages and Disadvantages of Arbitration about the Regular Courts in Kosovo', *Hungarian Journal of Legal Studies*, volume 59:1, 2018, pp. 118-133.

48 Ibid.

49 Arthur Mazirow, The Advantages And Disadvantages Of Arbitration As Compared To Litigation, Speech delivered at the Counsellors of Real Estate, Chicago, April 13, 2008.

50 Cindy G. Buys, "The Tensions Between Confidentiality and Transparency in International Arbitration," American Review of International Arbitration, volume 14, 2003, pp. 121, 129-31.

51 Orna Rabinovich-Einy, 'Going Public. Diminishing Privacy in Dispute Resolution in the Internet Age', *Virginia Journal of Law and Technology*, volume 7:4, 2002, pp. 8-97.

52 Christopher R. Drahozal, *Commercial arbitration : cases and problems*, LexisNexis, 1st edition, 2002, pp. 417-18.

53 Michael D. Goldhaber, 'Sneak Peek: An Inside Look at More than 100 Major Disputes from the Secret World of Arbitration', *Focus Europe*, Summer, 2005, p. 22.

54 Amy J. Schmitz, 'Untangling the Privacy Paradox in Arbitration', *University of Kansas Law Review*, volume 54, 2006, available at https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1592&context=facpubs, accessed on 6 October 2022.

themselves.[55] Even the arbitration institutions that maintain confidentiality are not absolute. For Instance, the rules of the Asian International Arbitration Center (AIAC) can be followed.[56] The parties' information is subject to disclosure to the necessary limit required for the implementation and execution of the Award. The rules of AIAC also state that if the legal duty requirement is set to reveal the information, such information shall be disclosed or used to challenge the Award before the court or other judicial authority. [57]

When analyzing the provision of Nepal's Arbitration Act, it is evident that it is required arbitration proceedings to be held under camera hearing[58] parallel to the provision of UNCITRAL Model Rules.[59] The rules of Nepali arbitration are unclear on the privacy of the information shared in the proceedings. The camera hearing makes the hearing private. However, it does not entail that there shall be secrecy in the information transmitted during the arbitration. Apart from this, whenever litigation in the court related to any proceeding, i.e., the Arbitrator's appointment, challenging the Arbitrator's jurisdiction or arbitration tribunals, or setting aside with the arbitral award within the arbitration, that matter does not become private. Similarly, the award requires the reasons or the ground for the Arbitrator's decision to be written, which gives the public an idea about the dispute of the parties.[60] Similarly, suppose the losing party did not voluntarily execute the decision. In that case, the winning party will go to the concerned district court for execution again, giving ample room to challenge the matter of confidentiality. The concept of confidentiality is not absolute in arbitration. Although confidentiality is incomplete, no one can deny that arbitration is translucent, if not opaque, in maintaining the confidentiality of the information related to arbitration. Thus, arbitration is less transparent and has less access to public information than litigation.[61]

VI. Is Arbitration Speedy?

Arbitration proceedings, holding of sessions, and decision-making processes are speedier than in regular courts. This gives the parties more trust and a greater interest in arbitration as some or all their disputes are entrusted to arbitration settlement.[62] Speedier resolution; however, there can be exceptions due to multiple parties, arbitrators, lawyers, and litigation strategies.[63]

Even the analysis of several arbitration authors has stipulated that international commercial arbitration lacks the expected speed.[64] According to the survey conducted by the white house,

55 Ibid.

56 Arbitration Rules of the Asian International Arbitration Centre, 9 March 2018, Malaysia, rule 45.

57 Ibid.

58 Arbitration Act (n 28), s. 19.

59 UNCITRAL Arbitration Rules, 9 December 2021, rule 28(3)..

60 Ibid, rule 34(5).

61 Laurie Kratky Dord, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 Notre Dame Law Review, 1999, volume 74, pp. 285-86.

62 Edna Asper Elkouri & Frank Elkouri (n 24).

63 Tibor Varady(n 10), p. 24.

64 White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration', Queen Marry University of London, 2018, is available at https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf, accessed on September 29, 2022.

speed is not among the reasons for arbitration by the parties to the disputes. The report of the International Arbitration Survey, 2018 shows the enforceability of the Award, avoiding any national jurisdiction and flexibility as reasons for opting for arbitration.[65] The lack of speed has been set as one of the worst drawbacks of arbitration in the report.[66] Only 12 percent of the respondents have given speed as a valuable arbitration characteristic, as confirmed in the 2015 survey.[67]

The problem associated with the practice of a speedy act of arbitration is that, in Nepal, the arbitration proceeding usually takes a long time to conclude. The arbitration act of Nepal states that arbitral proceedings shall be completed within one hundred twenty days from the time of completion of submissions of the documents. Further, the parties willing to settle the dispute through arbitration need to have a separate arbitration agreement or the arbitration clause within the contract. The dispute shall be resolved through arbitration if the agreement between the parties says so.[68] Suppose the dispute is of a civil, commercial nature. In that case, it can be settled through arbitration despite filing the petition if the parties to the conflict agree and file the petition for the dispute settlement. The court can be ordered to cancel the record of the petition.[69] Since the court is already involved in this process, from filling out the petition to sending the summon notice to the parties, all the functions involved have taken up more than two months minimum. Thus, the parties cannot benefit from costly arbitration when the contract does not have a dispute settlement mechanism written within the agreement.

The table below shows the Supreme Court's time to hear the arbitration-related writ.[70] Although the Arbitration Act of Nepal requires settling the arbitration within 120 days of submitting documents related to arbitration to the Arbitrator, the list below shows that the writ filled in by the Apex court was running for ten years as well. Even though, arbitral awards is final and binding on the parties, either party more often goes to the Supreme Court to invalidate the awards invoking the extraordinary jurisdiction and the Supreme Court even seems reluctant to dispense these cases. Thus, the concept of arbitration as a speedy process is problematic.

Writ Number and Filed Year	Date of Decision	Time Taken
3100 of 2058 (2001-2002)	2061/8/15 (Nov 30, 2004)	Three years
8692 of 2060 (2003-2004)	2063/1/4 (April 17, 2006)	Three years
3028 of 2059 (2002-2003)	2065/11/19 (March 02, 2009)	Six years
2805 of 2059 (2002-2003)	2065/10/6 (Jan 19, 2009)	Six years
2806 of 2055 (1998-1999)	2065/10/6 (Jan 19, 2009)	Ten years

65 Ibid.

66 Ibid.

67 White & Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', Queen Marry University of London, 2015, , p. 7, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, accessed on 10 October 2022.

68 Arbitration Act (n 28), s. 3.

69 Arbitration Act (n 28), s. 4

70 Bharat Raj Upreti, *Karar Kanoon (Contract Law)*, Legal Research and Development Forum (FREEDHAL), Nepal, 3rd edition, 2010, p. 439.

Writ Number and Filed Year	Date of Decision	Time Taken
2989 of 2059 (2002-2003)	2065/7/5 (October 21, 2009)	Six years
2901 of 2059 (2002-2003)	2066/9/25 (Jan 09, 2009)	Seven years
3028 of 2059 (2002-2003)	2065/11/19 (March 02, 2009)	Six years
3543 of 2063 (2006-2007)	2064/9/1 (December 16, 2007)	One year
3221 of 2059 (2002-2003)	2066/9/13 (December 28, 2009)	Seven years

Table 1: The Table demonstrates the time the Supreme Court consumes on the arbitration writs.

Generally, while watching the trend of the district court, it is found that the execution of arbitral awards - domestic and international- is not satisfactory.[71] It is found that whenever the respondent is the Government, payment is delayed or rarely made.[72] The author of a popular arbitration Act-related article on Nepal has cited the Damodar Ropeways case, which the arbitration tribunal decided on September 03, 1997, registered in Kathmandu District Court. Since the party to the dispute was the Government, it opted for extraordinary jurisdiction, and the case was decided only in 2010 against the Government.[73] The enforcement of the Award is challenging, tedious work for the court itself, which becomes extra hard when the enforcement or execution of the judgment is to be done against the Government. This violates the international obligation of our country created by being party to the concerned instruments.[74] Along with it, the concept of speedy dispute resolution comes at stake in the case of arbitration.

But the question to be analyzed next is whether arbitration has become slower than litigation. The answer to this shall be definitely no. However, the main problem lies in the speed at which arbitration is taken not as an alternative to litigation but as an exception. The planning of the parties to delay the implementation of the Award by getting involved in the extraordinary jurisdiction seems problematic, which requires a specific solution to uphold the benefit of speedy arbitration. Thus, the delay in the execution of the Award, which is considered final and binding, should be avoided as much as possible, and the court also needs to show special attention and priority to arbitration-related cases. Only genuine claims should be entertained through the Supreme Court's extraordinary jurisdiction.[75] Giving the role to specific agencies, like a commercialized bench in the High Court, would help mitigate the general speed issue.

Similarly, the other issue for the delays in arbitration proceedings is the arbitrators' lack of scheduled hearings and other priorities.[76] Specialized professionalism development, a code of conduct, and a particular regulating body would solve the problem of not allowing the Arbitrator to post the date of hearing except in extraordinary situations. This can also solve this problem

71 Om Subedi, 'Nepali Experience and Experiment with Arbitration on Commercial Disputes', *N.J.A. Law Journal* , volume 1:1, 2007, pp. 91-108.

72 Ibid

73 N.K.P. 2067, Decision No. 8368.

74 Valbon Mulaj(n 47).

75 Bed Prasad Upreti, 'Evolution of Commercial Arbitration in Nepal: Issues and Challenges', *N.J.A. Law Journal*, volume 2:1, pp. 208-220.

76 Ibid.

and make arbitration speedier comparatively.

But while making such an analysis, we cannot ignore that arbitration is still faster than litigation if litigation planning is not done. Different concepts, such as expedited/fast-track arbitration, are generated to resolve the problems of non-speedy arbitration tribunals.

VII. Is Arbitration Non-Litigious?

The Arbitration Act of Nepal has multiple areas where the parties resorting to arbitration can knock on the door or resort to the court. Parties willing to settle the underlying dispute can file a petition at the High Court to resolve the dispute through arbitration.[77] Apart from this, the arbitration can get litigious for the appointment of an Arbitrator,[78] when other parties rejoin the Arbitrator.[79] Similarly, the High Court's registrar is involved in maintaining the panel of arbitrators in the High Court, which is done every year.[80] Again, the high court can be involved in the arbitration process to remove arbitrators for the reasons prescribed in the Act.[81] It shall also be involved in determining the contract's validity for hearing against the interim order issued by the arbitration.[82] The high court shall also be involved in revoking the arbitral Award.[83] Similarly, when there is no voluntary enforcement of the Award, it is to be enforced by the concerned or respective district court. The parties petition the district court to enforce the Award, and the district court is obliged to have the Award implemented parallel to its own.[84]

Thus, if we analyze the provisions of arbitration, there can be involvement of the court in every matter, from choosing the arbitration of the Award to picking the Arbitrator, removal of the Arbitrator, challenging the interim order to challenging the Award, or the enforcement of the Award. Litigation is everywhere in each step of the arbitral proceeding. The term "judicialization" refers to the phenomenon by which international arbitration procedure increasingly resembles domestic litigation because of increased procedural formality/sophistication and litigiousness.[85] In a general context, the problem of judicialization is of two types: internal and external.[86] The internal problem arises when the arbitrators are retired judges who bring their experience of the court to the arbitration.[87] And even the lawyers fall within this paradigm and cannot escape their litigation mode.[88] The increase in formality and sophistication makes the semi-informal arbitration procedure towards the formal side the other problem, which makes arbitration more

77 Arbitration Act (n 28), s. 3.

78 Arbitration Act (n 28), s. 7.

79 Arbitration Act (n 28), s. 21.

80 Arbitration (Court Procedure) Rules, 2002, rule 6.

81 Arbitration Act (n 28), s. 11.

82 Arbitration Act (n 28), s. 21(2).

83 Arbitration Act (n 28), s. 30.

84 Arbitration Act (n 28), s. 32.

85 Remy Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration', *The American Review of International Arbitration*, 25.2, 2014, p. 223.

86 Bruno Zeller, 'Judicialization of the Arbitral Process', *Perth International Law Journal,* volume 4, 2019, pp. 111-117.

87 Gerald Phillips, 'Is Creeping Legalism Infection Arbitration?', *Dispute Resolution Journal*, volume58:1, 2003 .

88 Ibid.

litigious.[89] It appears that it is not the arbitral 'system' that gives rise to excessive formalism but the participants in the process, namely, clients, arbitrators, and lawyers. Ultimately, the Arbitrator must "take charge and not live in fear of an appeal to overrule their Award.[90] What is needed is a critical and contextual analysis of the normative attributes of arbitration globally beyond the narrow critique of undue legal formalism.[91]

VIII. Is the Arbitration cheaper?

Experts and commentators on arbitration have divided the cost of arbitration proceedings into two types: the cost of the arbitration and the cost of the parties.[92] The former covers the cost of the arbitration administration as well as the cost of the Arbitrator. Meanwhile, the latter covers the cost of the parties for their legal counsel, field experts, travel expenses for the arbitration, printing, witness appearance, accommodation, etc.[93] Along with the cost mentioned above, the cost of the arbitration also covers the expenses related to arbitration that are common to the parties.[94]

If the illustration of the study done by the International Chambers of Commerce (ICC) in 2012 related to the cost of the parties to arbitration in ICC, it has been found that the parties covered 83 percent, arbitration proceeding cost only 15 percent, and administrative cost only 2 percent.[95] Although, the lack of *ad valorem* cost in arbitral Awards suggests that the arbitration process is inexpensive.[96] However, the court that would be saved on court fees is again used in the abovementioned cases. The private process with all the luxury provided accommodation and the expense of the corporate world, along with the lengthy procedure of arbitration these days, the delays caused by the arbitrators, and the litigious nature of the Arbitration where the parties are involved in litigation planning make Arbitration more expensive than the litigation as the parties to the Arbitration have to pay the charge of Arbitration as well as the Arbitration which adds the extra cost on the parties.

In Nepal, the parties to the dispute in the arbitration pay twice during the Arbitration the name of the Arbitrator's fees and administration of the Arbitration, apart from the costs of the attorneys and counsel. While the Award is received, the winning party shall additionally pay a fee of 0.5 percent of the amount received through the implementation of the arbitral Award to the concerned court in the form of payment for having the Award implemented if not voluntarily

89 Ibid.

90 Ibid.

91 Ibid.

92 Mika Savola, 'Awarding Costs in International Commercial Arbitration', *Scandinavian studies in law*, volume 63, 2017, pp. 275–318..

93 Ibid.

94 Cavalieros, Philippe, 'In-House Counsel Costs and Other Internal Party Costs in International Commercial Arbitration', *The Journal of the London Court of International Arbitration*, volumel 30, 2014, p. 146.

95 ICC Commission Report, 'Decisions on Costs in International Arbitration', ICC Dispute Resolution Bulletin, issue 2, 2015, available at https://www.iccwbo.be/wp-content/uploads/2012/03/20151201-Decisions-on-Costs-in-International-Arbitration.pdf. accessed on 14 October 2022.

96 Sondhi, Aditya, 'Arbitration in India — Some Myths Dispelled', *Student Bar Review,* volume 19:.2, 2007, pp. 48–54.

implemented by the parties.[97] Thus, mandatory Arbitration that is not appropriately regulated shall undermine the cost-effectiveness advantage of Arbitration.

IX. Analysis and Conclusion

Arbitration is the preferred method of dispute resolution in the commercial world. The parties are hyped up with the advantages, which is not always the case. The concept, process, and perception of Arbitration, the informal, speedy, non-litigious process, is problematic and is to be revisited. Although Arbitration is still a more popular and preferable method in the corporate world, litigation does not make Arbitration advantageous, as claimed from the time of the Alternative Dispute Resolution Movement in the Pound Conference. The court's involvement in the Arbitration should be only as the facilitator, not the one attached to it. The Arbitration is subject to specific reforms and restructuring to benefit from this extra-judicial process, solving the parties' dispute and protecting their reputation else the arbitration seems to add an extra burden of arbitration to litigation as the parties opting for litigation would have to bear the time and money of litigation meanwhile the party opting the arbitration should bear the cost and time of litigation as well as the arbitration. Thus, reformation and restructuring of arbitration are to be done.

There are some major problems with arbitration as well. While it is said to be cost-effective and less time-consuming, the practicality and the theory are different. It is essential that commercial disputes be resolved quickly and finally become drawn-out in decisions, significantly increasing costs, and causing business paralysis. Arbitration provides finality and does so quickly and economically because lengthy, expensive appeals like those encountered in court are unavailable under the Arbitration Act of Nepal. The existing statutes severely limit a court's ability to vacate arbitration awards except on limited grounds such as corruption, fraud, and partial evidence, which are challenging to prove and rarely succeed.

Principally, the beauty and advantage of arbitration lie in the speedy, informal, expert judging panel and effective dispute resolution. The above-mentioned drawbacks should be addressed to bring a holistic approach to Arbitration. Only then does arbitration become 'fruitful and brings appropriate dispute resolution mechanisms.' The unnecessary intervention of the court, and functional and practical lacunas in the process of arbitration have destroyed the unique attribute of arbitration. The functional and practical limitations and measures are diluting the core notions of the Arbitration which shall be properly checked to maintain the sanctity of the process itself.

[97] Arbitration Act (n 28) s. 34.