

# Effectiveness of Arbitration in Construction Projects

A. K. Mishra\*, & P. S. Aithal\*\*

\*Post-Doctoral Research Scholar, Srinivas University, India and Associate Professor, Madan Bhandari Memorial Academy Nepal, Urlabari3, Morang, Nepal

OrcidID: 0000-0003-2803-4918; Email: [anjaymishra2000@gmail.com](mailto:anjaymishra2000@gmail.com)

\*\* Professor, College of Management & Commerce, Srinivas University, Mangalore, India

OrcidID: 0000-0002-4691-8736; E-mail: [psaithal@gmail.com](mailto:psaithal@gmail.com)

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\*Post-Doctoral Research Scholar, Srinivas University, India and Associate Professor, Madan Bhandari Memorial Academy Nepal, Urlabari3, Morang, Nepal

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\*\* Professor, College of Management & Commerce, Srinivas University, Mangalore, India

OrcidID: 0000-0002-4691-8736; E-mail: [psaithal@gmail.com](mailto:psaithal@gmail.com)

### ABSTRACT

**Purpose:** *It is impossible to specify remedies against every possible situation that may be encountered in construction projects. Any dispute can be settled timely either by negotiation, mediation, adjudication, arbitration, or litigation. This study was based on the context of Road construction contracts selected from the Dispute Resolution Unit of the Department of Roads (DoR, Nepal). The emphasis of this particular research work was to evaluate the effectiveness of arbitration.*

**Design/Methodology/Approach:** *The sixteen case studies were the major basis as a quantitative study for the assessment of the effectiveness of dispute adjudication by assessing the success rate of arbitration. Also, the familiarities of the parties about the provision and procedure of arbitration and its spirit/strength to resolve the disputes and responses of parties regarding the arbitration award were assessed based on the qualitative study. The content analysis in terms of percentage was the main tool for data analysis.*

**Findings/Result:** *The arbitration award was not accepted in about 78.57% of disputed issues of these sixteen cases and referred to litigation, 42.86% issues were referred by the Employers, 25.00% issues were referred by the Contractors and 3.57% issues were referred by both the Employers and the Contractors. 100% of Employers and 100% of Contractors agreed that they know the procedure and provision of arbitration for the resolution of disputes. The majority of the Employers did not accept the arbitration award and referred to the cases to litigation while mostly were accepted by the Contractors except in a few cases. The majority of the Employers had the perception that the arbitration award was favorable to the contractors while most of the Contractors argued that the decisions were fair to both parties. The majority of the Employers said that it is comfortable to accept the litigation award concerning the arbitration award. It is a prompt, cost-effective, efficient, and easy way of resolving construction disputes. The rejection of the arbitration award has negative consequences for the efficiency of public spending and which is associated with the extensive delay in the project completion and the delay is associated with a cost overrun. While acceptance of arbitration award is associated with timely delivery of the project. The enforcement of arbitration awards is critical to the success of arbitration. In those countries where the arbitration is backed up by statute by acts and enforceable by law, it is found to be more successful and effective.*

**Originality/Value:** *This study helps the DoR, Contractors, and other agencies such as the Public Procurement Monitoring Office (PPMO), Nepal council of Arbitration (NEPCA), and different Auditors and arbitrators of Nepal as it gives the perception of the contracting parties towards the arbitration process to familiarize the spirit of arbitration in the Nepalese construction industry.*

**Paper Type:** *Policy Research*

**Keywords:** Status, Success, Contracts, familiarities, response, Department of Roads (DoR)

### 1. INTRODUCTION :

Disputes and claims always exist in the construction industry, especially for highways and transportation. The original Transportation Research Board (TRB) study in 1979 indicates that the problem of construction disputes and claims is increasing (Bramble & Cipollini, 1995) [1]. Even a study

conducted by Mishra et al, 2018 [2] and Mishra, 2018 [3] illustrates increasing cases of disputes in ADB-funded road construction projects in Nepal also. It is impossible to specify remedies against every possible situation that may be encountered in construction projects. And Disputes can be settled timely either by negotiation, mediation, adjudication, arbitration, or litigation. But the litigation process takes a long time and costs. So, quick and effective methods for dispute resolution are preferred (Mishra, 2020) [4]. The success rate of arbitration is determined based on the percentage of acceptance of arbitration reward. This study is especially focused on dispute resolution by independent arbitration, as a method of Alternative Dispute Resolution (ADR), widely practiced in construction contracts nowadays. Arbitration is defined as the final decision of a dispute by a private tribunal which distinguishes the importance of arbitration from the other alternative dispute resolution techniques (Marshall, 2001) [5].

## **2. PROBLEM STATEMENT :**

The number of road projects has been in continuous increasing trends in recent years in DoR. More road projects mean more road contracts and hence more uncertainty in projects which leads to an increase in claims and disputes. Because of uncertainty and, due to the intention of various parties involved in construction projects the conflict among the contracting parties is inevitable. If this conflict between the parties is not resolved, then a dispute occurs which is risky in terms of cost and time overrun of the project. Hence, the dispute should be settled timely to avoid the extra burden of time and cost (Mishra et al, 2021: Mishra, 2018) [6 & 3].

In Nepalese road construction contracts under DoR, there is the provision of ADR methods with the thought of completing the projects promptly, cost-effectively, and efficiently. Therefore it is desired to study the effectiveness of arbitration in Nepalese road construction contracts.

## **3. OBJECTIVES :**

The general objective of the study is to assess the effectiveness of arbitration along with the familiarities and responses of the contracting parties regarding the decisions of arbitrators.

## **4. LITERATURE REVIEW :**

### **4.1 Essential Elements of a Valid Contract:**

In Road Construction Contract under Department of Road, the disputes have been increasing in terms of quantity as well as in terms of amount. Ghimire et al (2012) [7] found that the success rate of adjudication is very low and adjudication has become ineffective and underutilized in road construction contracts. He further recommended studying the effectiveness of arbitration for resolving disputes. According to Mishra (2020) [8], the basic essential elements of valid contracts must have meetings of mind as Agreement: Both parties should do an agreement. Intention to create Legal Relations: Contracting parties must have the intention to make a legal relationship. Lawful Consideration: Parties to a contract must be benefited equally or must exchange something of equal value. Completeness and Certainty or Time and Place: The contract must be complete and clear and capable of being made certain. Contractual Capacity: The parties to the contract must have contractual capacity. Written and Registration: To make the contract evidence in the court of law it should be in written form and there is no specific provision in Nepal to register the contract. But if we wish we could register the contract. Lawful Object: The objective of the contract should be lawful otherwise the contract cannot create a legal relationship. Good Faith: The parties in the contract must be acting in good faith. No Violation of Public Policy: The contract should not violate "Public Policy." Free and Mutual Consent: The parties to the contract must have mutual understanding and must contract with free consent. Enforcement: The possibility of applying law into action strongly assures the success or failure of a contract. In developing countries like Nepal, the construction projects with domestic finances are usually implemented using two parties (Employer-Contractor) system whereas a three-party (Employer- Contractor-Engineer) system is used to execute the projects financed by international lenders [8].

### **4.2 Claims and Disputes in Road construction Contracts:**

A claim is defined as a legal request for additional compensation (cost and/or time) on account of a change in the terms of the contract [9].

As per Fisk (2000) [10], generally, claims may be identified as falling into one of the following classifications:

(I) Owner-caused delays in the work: The delays that are occurred due to failure to meet an obligation stated in the construction contract by the owner lie in this section. These types of delays are considered compensable (time & money) (Fisk, 2000) [10].

(II) Owner-ordered scheduling changes: When the scheduling changes after the order from the owner the contractor may claim (Fisk, 2000) [10].

(III) Constructive changes: If there is any change in a contract (defective plans and specifications, improper inspection and rejection, the impossibility of performance, etc.) by the owner, it increases the contractor's cost and/or time of performance so that the contractor may claim (Fisk, 2000) [10].

(IV) Differing site condition: is sometimes called "changed conditions" or "unforeseen conditions". If the owner fails to provide payment for differing site conditions, the contractor may claim (Fisk, 2000) [10].

(V) Severe weather: It includes severe rain or similar weather that prevents work from being done and delays the project. This type of claim may not always be excusable, and in some cases may be ruled excusable only and not compensable (Fisk, 2000) [10].

(VI) Acceleration of work: There are two types of acceleration i.e., Directed acceleration and Constructive acceleration. Directed acceleration occurs when the owner orders a contractor to speed up the work. According to the U.S. District Court, the necessary elements of a claim for constructive acceleration: "constructive acceleration is present when (1) the contractor encountered an excusable delay entitling it to a time extension; (2) the contractor requested an extension; (3) the request was refused; (4) the contractor was ordered to accelerate its work. that is, to finish the project as scheduled despite the excused delays; and (5) the contractor accelerated the work" (Fisk, 2000) [10]. According to the (Marshall, 2001) [5], the major advantages of Arbitration compared with Court proceedings are Arbitration may save in cost and time, the Arbitration process is more flexible than a court proceeding, and "Arbitral awards are, on account in particular of the New York Convention, recognized and enforceable in many more countries than an English court judgment."

From the literature review, it was found that the arbitration method for dispute settlement saves time and money rather than a court proceeding. And there is no review of merits in court. Moreover, arbitration is taken as the final decision of a dispute by a private tribunal and courts rarely reexamine it, subject only to a request to set aside the award due to procedural irregularities such as an unfair procedure or arbitrator lack of independence. The works of the literature showed that arbitration provision is widely used as a method of ADR in Nepalese road construction contracts. It is a prompt, cost-effective, efficient, and easy way of resolving construction disputes. The rejection arbitrators' decisions have negative consequences for the efficiency of public spending and which is associated with extensive delays in project completion. That prolongs the disputes and the project implementation is hampered by cost overrun, time overrun, and quality degradation with serious cash flow problems and substantial losses to the projects. While acceptance of arbitrators' decisions is associated with on-time project delivery. The percentage of sample cases resolved by adjudication provision was taken as its success rate similarly; it can be taken for Arbitration also.

## 5. METHODOLOGY :

This research tended to follow the study of the effectiveness of arbitration as an alternative dispute resolution method taking cases of disputes in road construction contracts under DoR. The dispute cases of contracts under road projects including the projects financed by World Bank (WB) and Asian Development Bank (ADB) available in DRU of DoR were taken for the research. Dispute Resolution Unit (DRU) is the unit that is under the Asset Management, Contract Management, and Quality Control Project of DoR. All the disputes in contracts of DoR are handled by DRU representing the employer. This research incorporated both qualitative and quantitative data. Literature review, case studies, questionnaire survey, and discussion with the parties/experts were taken. After the collection of data from case studies, it was analyzed to find out the percentage of success of arbitration as a quantitative study. Similarly, the familiarities of the parties about the arbitration were found by questionnaire to contractors and employees of DoR. And the response of the parties towards the decision of arbitration about impartiality, effectiveness was found by questionnaire.

### 5.1 Study Area:

The area of this study is limited to the road contracts under dispute available in DRU of DoR. Construction and maintenance of the strategic roads (National highways & Feeder Roads) fall under the responsibility of the Department of Roads (National Transport Policy, 2001). Nowadays the number of road projects under DoR is increasing year by year and so is a dispute. In total there are 36 dispute cases filed in DRU.

### 5.2 Sample Size and Selection:

All the dispute cases (36 dispute cases) under road and bridge contracts available in DRU of DoR will be collected. The questionnaire will be distributed to 25 members each from contractor and employer. Among 25 members each from contractor and employer, minimum of 6 members each from both parties will be selected such that they have been involved in the sample cases. Among 36 dispute cases available in DRU of DoR, 7 cases are under the process of dispute resolution, 6 cases are related to bridge contracts and 7 cases have incomplete information due to non-availability of complete documents. So, the remaining 16 cases will be taken for this study as a sample. The sample selection was based on non-probability sampling (judgment) from available dispute cases in DRU under road contracts.

### 5.3 Collection of Data:

Questionnaire Survey & meeting with Experts were used to collect primary data.

**Questionnaire survey & Meeting with Experts:** Two sets of questionnaires with the same meanings in each set were designed first, one set for Employer's experts and another for Contractor's experts. The designed questions were first pre-tested by distributing them to four experts having similar expertise for their consultations. The comments, suggestions, and views of the experts were incorporated and the questions were finalized so that the final questions were supposed to be unbiased. Now the Twenty-five experts as Project Managers/Project In-charges from the Employers side and twenty-five experts from the Contractor's side were selected for the questionnaire survey in such a way that they were more or less involved in the dispute resolution process of the cases under this study though there were some limitations. The questionnaires were distributed to all selected experts but they were collected from 20 experts from Employers and 20 experts from Contractors. Some of them may be biased and some may not have sufficient experience. Therefore, the analysis was done with discussion when there were contradictions between the views and opinions of the respondents in two or more questions. Only the related questions regarding the objectives of the study, out of the questionnaire survey, were analyzed to achieve the objectives of the study.

**Discussion with Employers/Contractors/Experts:** During the course of questionnaire collection, a discussion was made with the Employer's and Contractor's representatives and experts. Also, a discussion was made with experts from the arbitrators' side for collecting their views for this study.

**Case study** of road contracts under DoR available in Dispute Resolution Unit (DRU), DoR. the data were collected through questionnaire survey, meetings, and discussion with experts and stakeholders. A set of questionnaires for three stakeholders was designed first and then pre-tested by consulting and distributing to two experts involved with the design and approval of the bridge projects. Then the questionnaire was finalized so that the questions and ranking system choices were supposed to be unbiased and supported by an extensive literature review.

### 5.4 Analysis of Data:

For this study, the dispute cases which have been decided by arbitration method under road contracts available in DRU of DoR were taken. The percentage of acceptance of arbitrators' decisions by contracting parties was found and this percentage value was taken as the index for measuring the success rate and effectiveness of arbitration. Descriptive statistical analysis was done for the questionnaire survey and discussions with the experts from Employer. The data were analyzed with the help of content analysis as a percentage of sampled numbers from the information obtained through case studies, questionnaire surveys, and discussions with the experts from Employer, Contractor, and arbitrator. Now, conclusions were drawn with recommendations by linking the results obtained from cases studies, questionnaire surveys, and discussions with the literature review. Following three things such as % of success rate, % of familiarity spirit of arbitration and knowledge of experts, and % of positive and

negative response above 70% assumed as Effective followed by the range of 40 to 70 % as moderately effective and less than 40% as ineffective.

## 6. RESULTS AND DISCUSSION :

### 6.1 Case Study:

The purpose of the case studies is to identify the issues, claim, and decisions of all selected cases for which the standard practice of the Nepal Council of Arbitration is continuously referred [11].

**Table 1:** Summary of cases with their issues

Cases	No. of Issues	Contractor's Claims (NRs)	Arbitrators' Decisions (NRs.)	Implementation of Decisions	Remarks
Case 1; RSDPAF-W-FYPM-NCB-WR-Pokhara-3A	Payment against rice Adjustment on Issue 1 construction material.	NRs, 066,901.18 (NRs. 407.368, 5, 1 5 as Price Adjustment + NRs. 698, as .6793 an interest	The decision of the Arbitrator is also the same as that of the Adjudicator. The Arbitrator gave his decision on 10th January 2014 (2070-09- 26) against the claim of the Contractor.	Arbitrators' Decision was accepted.	-
Case 2; DTI/065/066	Measurement of the quantity of the item of formation of embankment and Issue 1 fabrication of gabion boxes.	11.665,692.83	5,667,884.76 to be given to the Contractor by the	Arbitrators' Decision was not	The employer referred a case Appellate
	Soil excavated at the site was different Issue 2 then the soil classification mentioned in the BOQ	Without VAT)	Employer	accepted.	Court

Case 3; RNDP/LCB/DG-01	Cost compensation against idle Issue 1 equipment and manpower during banda days	20,473,065.00 plus interest @ 10%	2,113,055.00	Arbitrators' Decision was accepted.	Both employer and Contractor referred case to Appellate Court.
	Additional Cost of general items for Issue 2 extended period	1,950,000.00 plus interest @ 10%	The claim was rejected by Arbitrator	Arbitrators' Decision was not accepted.	The Contractor referred the case to Appellate Court.
Case 4; RNDP/LCB/DG-02	Cost compensation against idle Issue 1 equipment and manpower during banda days.	53,69,676.95	1,213,184.10	Arbitrators' Decision was not accepted.	Employer referred the case Appellate Court
Case 5; RNDP/LCB/DG-04	Cost compensation against idle Issue 1 equipment and manpower during banda days	5,914,490.99	1,525,781.03	Arbitrators' Decision was not accepted.	Employer referred the case Appellate Court
Case 6; RNDP/LCB/DG-03	Issue 1 Cost compensation against idle Equipment and manpower during bandha days	7,745,181.87	5,106,887.00	Arbitrators' Decision was not accepted.	Employer referred the case Appellate Court
Case 7; RNDP/LCB/HB-1 & RNDP/LCB/HB-2	Issue 1	Cost for making the availability of water	3,805,036.00	The claim was rejected by Arbitrator	Contractor referred the case to Appellate Court
	Issue 2	Compensation amount due to Nepal Bandha	13,608,350.00		
	Issue 3	Compensation due to less efficiency of trucks because of the condition of the road	23,386,550.00		
	Issue 4	Cost of idle equipment and manpower during the	1,669,950.00		

		Dhankutta Headquarters Attack			
	Issue 5	Cost for disposal of excavated Material and land used by the Contractor	1,368,850.00		
	Issue 6	Cost of idle plant, equipment and manpower due to Terai Banda	3,688,300.00		
Case 8; RNDP/LCB/PP-4	Issue 1	New Rate for the BOQ Item	2,699,581.50	1,360,731.7	Employer referred the case Appellate Court
Case 9; NRDUC/SMN/NCB 3-1	Issue 1	Additional cost and time compensation against manual rock excavation instead of rock blasting	23,648,775.40 plus interest @ 10%	The area of jurisdiction about Arbitration could not be taken	Employer referred the case Appellate Court
	Issue 1	Compensation of cost due to rise in fuel	2,494,581.36 plus VAT.	Claim was rejected	Arbitrator s' Decision was accepted
Case 10; RMDP/REHAB/ICB/MKS-12	Issue 2	Compensation of idle resources due to Banda/Blockade/Strike	4,198,772.67 plus VAT and interest @ 12.5%	Arbitrators' Decision was not accepted	Employer referred the case Appellate Court
	Issue 3	Compensation for supplying machine and manpower for survey works	4452,000.00 plus VAT and interest @ 12.5%	Claim was rejected	Arbitrator s' Decision was accepted
	Issue 4	Compensation for Quantity of Hard rock cutting	4,989,069.35 plus VAT	Claim was rejected	Arbitrator s' Decision was accepted
Case 11; BJJD-BJ01	Issue 1	Payment of the excess quantity more than the contract quantity	12,737,348.74	Arbitrators' Decision was not accepted	Employer referred the case Appellate Court
Case 12; 21-057/58	Issue 1	Price escalation/compensation mainly due to extension of time occurring due to the Employer's Risk.	1539,460.32	The amicable settlement made with Adjudicator's decision	-

Case 13; 22-057/58	Issue 1	Price escalation/compensation mainly due to the extension of time occurred due to the Employer's Risk.	1749,511.52	The amicable settlement made with Adjudicator's decision	-
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Case 14 ; RNDP/LCB/PP-3	New Rate for increased quantity 1. The issue beyond 25% of BOQ quantity	756.469, 9,000	457, 3,28323 3.1	Arbitrators' The decision was not accepted	Employer referred the case Appellate Court
Case 15; RCSP/ICB/GTS/02	Compensation for the loss due to 1 Issue I, Bandhas, and strikes	8 065,022.85	1,866,020.00	Arbitrators' Decision was not accepted	Employer referred the case Appellate Court
	Additional Costs for indirect items like supervision, utilities for the period of Issue 2 prolongation of the contract beyond. The originally intended date of completion	8,671,503.15	5,080,789.85	Arbitrators' The decision was not accepted	Employer referred the case Appellate Court
	Additional Cost of extension of Insurance Policy and Performance Issue 3 Security for the period of prolongation of the contract beyond the originally intended date of completion	415,264.12	415164.12	Arbitrators' The decision was not accepted	Employer referred the case Appellate Court
	Additional Cost for loss of Issue 4 productivity caused by design change	10,504,662.82	rejected	Arbitrators' Decision was accepted	
Case 16; STFP/ICB/BM	Additional Cost of idle Resource due 1 The issue I, to Bandhs, Blockades, and Strikes	1,11,26,736.91	5,672,235.65 +interest amount of 1,125,122.80	Arbitrators' Decision was not accepted	Employer referred the case Appellate Court
	The disruption caused due to stoppage in	9,042,824.95	rejected	Arbitrators' Decision was accepted	-

	Issue 2 idle resource caused by non availability of Diesel				
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[12, 13, 14, 15 &16]

The description of the project and identity of the projects have been not explained to avoid consequences of social responsibility of the stakeholders through contract number is given to validate on demand for verification (Table 1). No. of disputed issues in each case is at least 1 issue to maximum 6 issues altogether it comes to be 30 issues in 16 cases. All the contracts were interpreted based on the practice of the Department using PPMO regulations and standard textbooks and Nepal law commission [17, 18 & 19].

**6.1.2 Proportion of issues settled by arbitration**

**Table 2:** Proportion of issues settled by arbitration

S. No.	Description	No. of issues	The proportion of issues (in Percentage)	Remarks
1.	Total issues	30		
2.	Issues settled by arbitration	6	21.43%	The issues of cases 12 & 13 were settled amicably after Adjudicator's decision.
3.	Issues referred to Appellate Court after arbitration award i.e., not settled by arbitration	22	78.57%	-
4.	Issues referred to Appellate Court by Employers	12	42.86%	-
5.	Issues referred to Appellate Court by Contractors	7	25.00%	Issue 1 of case no. 3 was referred by both the Employer and the Contractor. While the issue 1 to 7 of case no. 7 were referred by the Contractor.
6.	Issues referred to Appellate Court by both the parties	1	3.57%	Issue 1 of case no. 3 was referred by both the Employer and the Contractor.

The results from the case studies are shown in Table 2 illustrates only 21.43% of the issues were settled by arbitration. That means most of the issues (i.e., 78.57% issues) were not resolved by arbitration and the issues were referred to Appellate Court. This implies that the success rate of arbitration for resolving disputes in road contracts in Nepal is only 21.43%. Out of 78.57% of issues referred to Appellate Court. 42.86% of issues were referred by the Employers, 25.00% issues were referred by the Contractors and 3.57% issues were referred by both the parties. This implies that most of the issues are referred to Appellate Court by Employers. That means most Employers are not accepting the arbitration award. Whereas mostly the contractors are accepting the arbitration award.

This sub-section mainly deals with the success rate of arbitration practiced in Nepalese road construction contracts under DoR. The arbitration couldn't settle 78.57% of the issues and they were referred to Appellate Court. Only 21.43% of issues were settled by arbitration. That means the success rate of arbitration was only 21.43% which is very low in the Nepalese road contracts. Mostly the

Employers were not accepting the arbitrators' award and the issues were referred to Appellate Court by them. That means either Employers do not trust the arbitrators' award or they have a lack of confidence to accept the arbitrators' award due to problems accepting their decisions. During the discussions with the experts from Employer's side, it was found that though the arbitration is binding and enforceable by law, the Employers always want to avoid risks of being investigated by oversight agencies. Employers' minds are guided by the thoughts that the oversight agencies such as CIAA, NVC, Auditors, etc. Therefore, they usually try to go for further steps if the decisions are against the Employer. From the case studies, it was found that only a few issues i.e., 25.00% were referred to Appellate Court by the Contractors after the arbitration award. That means, we can say that Contractors mostly accept the arbitration award except in a few exceptional cases.

The literature on practices of arbitration in other countries showed that in the World Bank's study (2008), 79% of the DRB'S decisions were rejected in road construction projects in India. 44% were rejected by the Employers and 35% by the Contractors. While in Nepal 78.57% of the arbitration award was rejected. 42.86% were rejected by the Employers, 25.00% by the Contractors, and 3.57% by both parties. During the discussions with experts from the arbitrators' side, it was obtained information that the success rate of arbitration in advanced countries like in the USA is around 99% whereas in Nepal its success rate is hardly 1%. To increase the success rate of arbitration in the Nepalese road construction industry like in other countries, a culture should be developed and the spirit of arbitration should be familiarized/adopted by conducting various training and awareness programs in upper implementing agencies including other stockholders, oversight agencies, etc. But from case studies, it was found that its success rate in road contracts is 21.43% which is very low as compared to other countries. Its success rate is again lower than Indian Road Contracts. However, its success rate is high in developed countries like the UK, New Zealand, Singapore, etc., and found effective there.

The next section discusses the understanding of contracting parties regarding the arbitration and the realization of its spirit by them.

## **6.2 Understanding of Parties about Arbitration and its Spirit:**

**6.2.1 Submission of Claims by Contractors:** Contractors have the right to claim for the compensation events as per the conditions of the contract. It was found that 85% of Employers agreed that the Contractors often submit the claims and 60% of Contractors. It implies that today's contractors are conscious and serious about the claims. They know their rights to claim for the additional cost incurred or extra cost incurred during execution of the works due to compensation events as per contractual provisions.

### **6.2.2 Acceptance of Project Manager's decisions by Contractors on their Claims**

When a contractor submits the claims to the Project Manager (PM), the PM decides the contractor's claim. It was found that the majority of Employers and Contractors agreed that the Contractors rarely agree with the decision of the Project Manager on their claims. During the discussion with the contractors, they had opinions that the PM mostly refused/denied the approval of the claims, especially cost compensation which did not contain in-priced BOQ, though the claims were genuine. "The client always wants to achieve the maximum quality at low cost." Questions were asked to the Employers whether they denied approving the contractor's claims or not. They had opinions that mostly the Contractors submitted the cost compensation claims far more than the realistic. "Also there were limited budgets and it was not easy to approve without reliable evidence. Today's contractors always intend to submit the claims more and they always try to maximize the profit by any means". It implies that Contractors generally do not accept or agree with PM's decisions on their claims. There is a lack of trust between the contracting parties regarding the claims. Both the parties are serious and sincere about the claims.

### **6.2.3 Knowledge of Arbitration Provisions for Resolution of Disputes**

The contracting parties in construction contracts are the Employer and the Contractor. The parties were asked the question through a questionnaire survey whether they understood the arbitration provision for resolving disputes in the contract. It was found that 100% of Employers and 100% of Contractors agreed that they understood about arbitration provision for the resolution of disputes in contracts. During the discussion with contractors and employers regarding their knowledge about arbitration, most of the contractors and employers had the opinion that arbitrators are appointed as a provision contract

document. It implies that the contracting parties in road construction contracts have good knowledge about the provision of arbitration.

#### **6.2.4 Contractor's Claims to arbitration**

The literature review, review of contract agreement shows the provision of dispute settlement in various Nepalese road construction contracts. As per the literature review, if the contractor believes that a decision taken by the adjudicator was either outside the authority given to him by the contract or the decision was wrongly taken, the decision shall be referred to the Arbitration within certain days of notification of the arbitrators' decisions. Hence the contractors have the right to accept or reject the arbitration award.

It was found that the majority of Employers and Contractors agreed that Contractors often referred the claims to arbitration. During the discussion with the contractors, they had opinions that the Employers denied to approve the genuine claims/compensations and it was needed to refer the claims to the arbitration.

This implies that the adjudicator's decisions regarding the claims of compensation are generally not acceptable to the Contractors and they intend to refer the claims to the arbitration as per the provision of conditions of the contract. That means the contractors know the procedure for referring the claims to arbitration and hence try to settle the disputes quickly.

#### **6.2.5 Acceptance of Arbitrators' Decisions:**

The literature review shows that arbitrators are a third impartial party, appointed upon the agreement of both the contracting parties. The question "Do you accept the arbitrators' decisions in general?" was asked to the Contractors and the question "Do the contractors accept the arbitrators' decisions in general?" was asked to the Employers. It was found that most contractors said that they generally accept the arbitrators' decisions while most Employers said that generally, they do not accept their decisions. During the discussion with the Employers, the following were the opinions of Employers for not accepting the arbitrators' decisions:

"To escape from to be investigated by the oversight agencies like Commission for the Investigation of Abuse of Authority (CIAA), National Vigilance Center (NVC), Auditors, etc."

"The oversight agencies frequently ask the questions if the approval is given to the arbitrators' decisions which are against the government."

"An arbitrator's decisions were mostly favorable to contractors."

"Arbitrators went beyond the contract provisions."

"Misinterpretation of relevant clauses or conditions of contract (CoC)."

"Arbitrators did not realize the real situation. In many occasions, decisions made were favorable to the Contractors."

The above was only the Employer's opinions gathered during the questionnaire survey and discussions with them. During the discussion with the Contractors, they had the opinion that they generally accept the arbitrators' decisions except in exceptional cases. They agreed that, in some exceptional cases, they refer the case to Appellate Court, otherwise, they accept the decisions whether the decisions are favorable to them or not. Mostly the arbitrators' decisions are acceptable to the Contractors except in exceptional few cases while mostly the decisions are not acceptable to the Employers. That means from the Contractor's side, the arbitration is sufficient to resolve the contractual disputes. Employers may have difficulties accepting the decisions due to various reasons. Employers have a fear of the oversight agencies like CIAA, NVC, Auditors etc. that the agencies may ask questions while accepting the arbitrators' decisions that are against the government. Hence Employer tends to avoid the risks. Their mind is guided by the thoughts that the oversight agencies investigate while the approval is given to the arbitrators' decisions. Therefore they intend to reject the decisions and further go for litigation. That may affect the project implementation by cost overrun, time overrun, and quality degradation. Ultimately the project may suffer from all the risks and may fail. The literature reveals that the spirit of arbitration is for the real-time solution of the disputes by prompt, cost-effective, efficient, and conclusive resolution of disputes whereas its spirit has not been realized by the Employers.

#### **6.2.6 Referral of Disputes to Litigation after Arbitration Award**

The literature, provision of dispute resolution in Nepalese road construction contracts, shows that either party may refer an award of the arbitration to court within certain days (generally 30 days), as stated in the contract, of the arbitrators' written decision. It was found that most of the Employers agreed that they refer the disputes to the litigation after the arbitrators' decision whereas most of the Contractors

agreed that they do not refer the disputes to the litigation after the arbitrators' decision. As per the contractor's opinions, in some cases, while Employers refer the cases to arbitration, the Contractors also tend to refer the same case to arbitration so that the arbitrator will also see the case from the viewpoint of the contractor's initial claims. During the discussion with the Employers, they agreed that when they did not accept the arbitrators' decision, which was against the government, for the reasons mentioned in above paragraph 6.2.5, ultimately they referred the cases to litigation.

The above result implies that mostly the arbitration award is acceptable to Contractors except in a few exceptional cases and hence they do not refer the case to litigation. On the other hand, mostly the arbitration award is not acceptable to Employers and hence they refer the cases to litigation. Though the Contractors accept the decisions they may refer the cases to litigation, to some extent, when the Employers referred the cases to litigation, to express their initial claims to the litigation so that the court would see from the viewpoint of the contractor's initial claim. The Employer proposed the arbitration in the contract document and contractors accepted it while submitting the bid. But when disputes were raised and referred to the arbitrators, the arbitrators' decision was not accepted by the Employer. What does it mean? It means the real spirit of the arbitration has not been realized by the Employers. Also, the spirit of the arbitration has not been familiarized in the Nepalese construction industry.

This sub-section mainly deals with the familiarities of the parties about arbitration and its spirit. The literature review shows that there are two contracting parties in construction contracts. They are the Employers and the Contractors. Also, claims are inevitable in construction contracts i.e. the construction workplaces are common for claims. Through the questionnaire survey and discussion with the contractors and employers, it was found that contractors often submit the claims. Hence today's contractors are seen as conscious and serious about the claims and familiar with their rights to claim for the additional cost incurred or extra cost incurred during execution of the works by the compensation events.

The study revealed that Contractors generally did not agree with PM's decisions on their claims. Employers always tried to achieve maximum work at a low cost whereas contractors tried to make maximum profit. For this, the parties tried to minimize the conflicts that may create claims. Hence both the parties are serious and sincere about the claims. The contracting parties are well familiarized with the provision and procedure of arbitration while its spirit has not been familiarized in the construction industry including the Employer.

### **6.3 Response of Contracting Parties about Arbitration Award:**

**6.3.1 Impartiality of Arbitration award:** The question was asked to both the parties whether the arbitration award was favorable to Employers, Contractors or fair to both parties to assess the parties' responses about the impartiality of arbitrators decisions. It was found that the majority of Employers argued that the decision of arbitrators was favorable to the Contractors whereas, most of the Contractors agreed that the decisions were fair to both the parties. During the discussion with the arbitrators, as the Employers are proposing an arbitration in the contract document and the contractors are accepting it in most of the cases, they could have confidence and trust to accept the decisions. There are different perceptions of Employers and Contractors regarding the impartialities of arbitration. Impartiality of arbitrators is questionable from Employer's side and while there is good trust from the Contractor's side. That means Contractors believe in the decisions of arbitrators, while Employers do not believe the arbitrators' decisions.

### **6.3.2 Timely Decisions by Arbitrators:**

Literature of contract agreement in road construction contracts shows that when a claim is submitted to the arbitrator, then arbitrators shall make decisions in writing within a certain period, usually 120 days period, of timely receipt of notification of such request. It was found that 90% of Employers and 95% of Contractors agreed that the arbitrators gave the decisions. During the discussion with the Employers and Contractors, most of them said that arbitrators gave the decisions on time except in a few cases of large projects where the period was extended upon the agreement of both the parties. The above result and discussion imply that both the parties have views that the arbitrators involved in road construction contracts under DoR are efficient and make the decisions timely except in exceptional cases. Hence both the parties are satisfied with the time taken by the arbitration for making decisions

### **6.3.3 Acceptance of Award of Arbitration:**

It was found that the majority of Employers and most Contractors said that they generally accept the award of arbitration. During the discussion with the Employers, the majority of the Employers said that it is comfortable to accept the arbitrator's awards in comparison to the adjudicator's decisions as the provision of arbitration is legal standing and enforceable by law. They said that the role of adjudication is only advisory, not binding by the law. As arbitration is legal standing and their awards are final and binding, therefore, arbitrator's awards are comfortable to accept by the Employers if they have choices between the adjudicator's decisions and arbitrator's awards.

**6.3.4 Sufficiency of Award of Arbitration:** The perceptions of the parties about the sufficiency of arbitration provision were assessed through the questionnaire survey with the parties and discussion with them. It was found that most Employers had the perceptions that arbitration was not sufficient for the resolution of disputes in contracts whereas the majority of Contractors had perceptions that only arbitration provision was sufficient. During the discussion with the Contractors, it was asked to 40% of contractors who chose the option that it needed arbitration after adjudication, though they accept the adjudicator's decisions. Most of them said that although they accepted the arbitrators' decisions, there should be a mechanism or provision of litigation after arbitration, otherwise, the arbitrators use their monopoly powers, and therefore, there should be a provision of litigation. It implies that from the Employer's side arbitration alone is not sufficient whereas from the Contractor's side it is sufficient. This sub-section mainly deals with the responses of the parties about arbitration awards. Although the Employers appreciate the efficiency of the arbitrators, they have a negative response in the arbitration award. There is a lack of trust in the arbitration award from the Employer's side. While Contractors have a positive response towards it. Contractors intend to settle the disputes by it while the Employers intend to settle the disputes from the next higher steps.

## 7. CONCLUSION :

In Nepalese road construction contracts under DoR, the success rate of arbitration (i.e., 21.43%) for resolving contractual disputes is very low. The majority of problems that have been arisen in the success of arbitration as an ADR are as a result of Employers not accepting the decision of arbitrators. As the Employer is a government-owned entity and because of many oversight agencies such as Commission for the Investigation of the Abuse of Authority (CIAA), National Vigilance Center (NVC), different Auditors, etc, operating behind the contractual hemisphere and their interference without any reasons whatsoever, the Employers generally prefer not to be answerable to such circumstances and prefer to approach a more legal backing for their safety, even though the cost of resolving the disputes could be higher than at the time of resolution through arbitration. Such tendencies have weakened the arbitration process even though the process may fair, impartial, logical, and judicious. Therefore most of the issues are referred to litigation by the Employers. If the Employers adhere to accept the arbitration award, its success rate would be increased.

Today's contractors are conscious and serious about the claims. They know their rights to claim for the additional cost incurred or extra cost incurred during execution of the works due to compensation events as per contractual provisions. The level of knowledge of the contractors regarding claims is increasing. There is a lack of trust between the contracting parties regarding the claims. Both the parties are serious and sincere about the claims. The contracting parties, the Employer and the Contractor, in road construction contracts have good knowledge about the provision of arbitration for the resolution of disputes. Hence the contracting parties are well familiarized with the provision and procedure of arbitration. But the spirit of arbitration for resolving disputes has not been adopted in the Nepalese road construction industry as the arbitration award are not accepted in most of the cases. As the Employers are not accepting the arbitration award although the decisions are acceptable to the Contractors, the spirit/strength and value of the arbitration provision in decisions are acceptable to the Contractors, the spirit/strength and value of the arbitration provision in resolving construction disputes have not been utilized in Nepalese road construction industry.

From the responses of the Employers, the decisions of arbitrators are favorable to the Contractors while their decisions are fair to both the parties from the responses of the Contractors. The contractors responded that the arbitration awards are sufficient while the Employer respond to the insufficiency of their decisions. Therefore, there is a lack of trust in the arbitration award from the Employer's side. Being very low success rate of arbitration, not the adoption of the spirit of arbitration in the Nepalese

road construction industry, and poor responses of the Employers in the arbitration award, arbitration has become ineffective and underutilized in road construction contracts.

### 8. RECOMMENDATION :

The adoption of the real-time solution of disputes given by the arbitration should be encouraged. For this, various programs and training may be conducted and culture should be developed to implement the arbitration award so that the spirit, value, and strength of arbitration will be adopted in the construction industry. The arbitration will only be effective if the Employers adhere to accept it and have the will to implement it. For this, as the Employers have a lack of confidence to accept their decisions due to fear of the oversight agencies being questioned, it should be directed towards the legal framework. There should be various interaction programs between the employers and arbitrators so that there the gap between them is shortened and that also increases the trust between them.

The selection of arbitrators should be in such a way that the contracting parties should have confidence in their decisions. The ethics and morals of the arbitrators should be appreciable.

### 9. LIMITATIONS OF STUDY :

The study will be limited to the road construction projects under DoR having the provision of arbitration as a dispute resolution method. The cases available in the Dispute Resolution Unit (DRU) of DoR will be selected for case studies. Besides, the cost and time overrun due to delays in dispute resolution will not be studied.

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