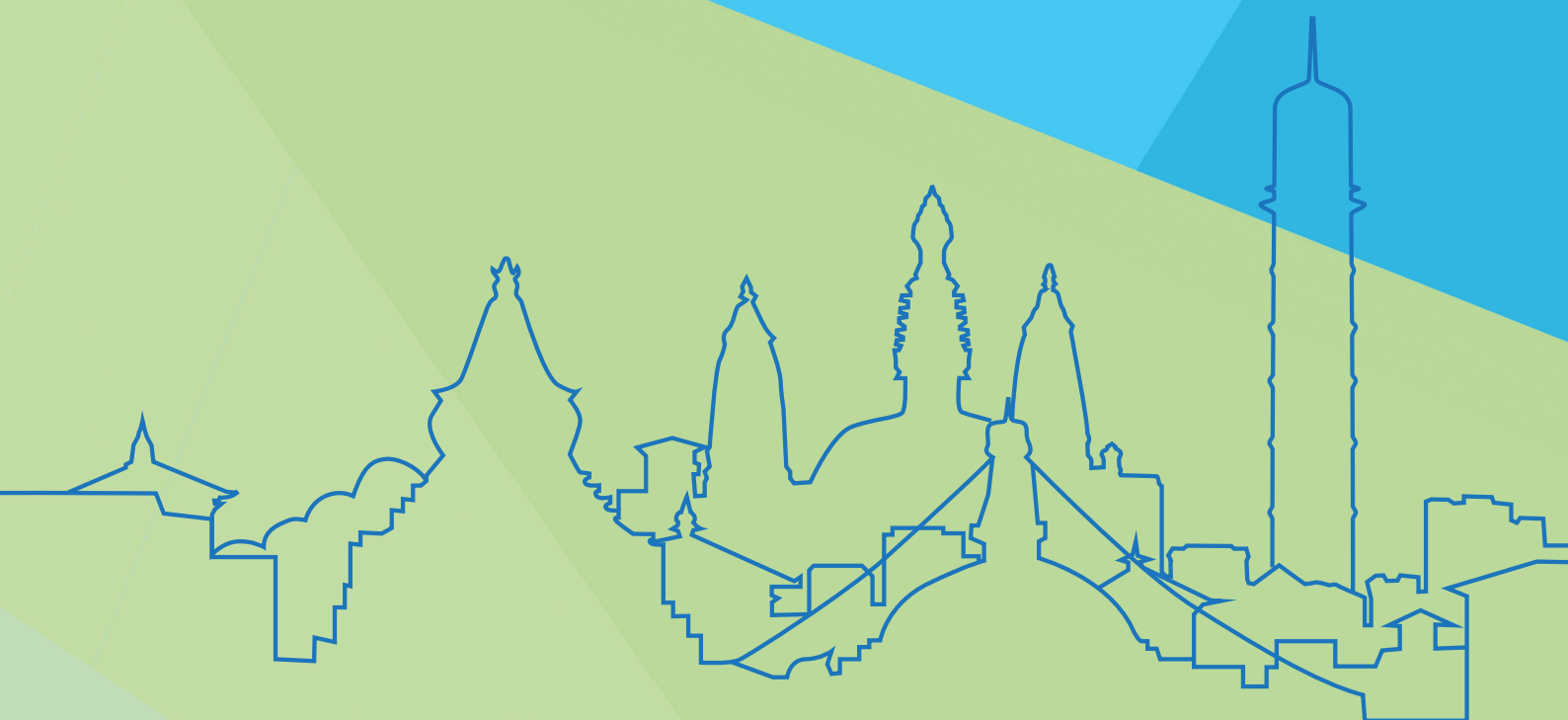


ARBITRATION HANDBOOK: NEPAL





PIONEER

LAW ASSOCIATES

Pioneer Law Associates ("**Pioneer Law**") was founded in 1982 by four lawyers recognized for professional specialization in their respective practice areas, and with a vision to create an institutional set up to provide expert legal services in the areas of commercial, civil and criminal laws. Since the concept of institutional legal practice with specialization in multiple practice areas was a new one at that time, Pioneer Law pioneered a new trend and hence the name "**Pioneer**". Since then, Pioneer Law has evolved as a full-service law firm and is recognized as a leading commercial law firm in Nepal. Pioneer Law continues to be a pioneer as a full-service law firm with highly regarded specialization in commercial laws.

We also strongly believe in knowledge sharing and disseminating our knowledge to the legal fraternity and stakeholders, through academic presentations and publications. We hope that the Arbitration Handbook will be helpful in providing a brief background of the current law and practice in this area.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Arbitration Act.....	the Arbitration Act, 2055 (1999)
Arbitration Rules.....	the Arbitration (Court Procedure) Rules, 2059 (2002)
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
NEPCA	Nepal Council of Arbitration
New York Convention	the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PLA	Pioneer Law Associates
SIAC	Singapore International Arbitration Centre

CHAPTER 1

INTRODUCTION



Disputes or clashing view-points are a reality of life, and business operations of any entity are not immune to these. The traditional method of business/commercial dispute settlement has been adjudication by the courts. However, this can, often times, be a highly time and resource consuming process, with little to no technical support in the decision-making. As such there is a need to defer to Alternative Dispute Resolution (ADR) methods in order to maintain the commercial efficiency of business partnerships and associations.

Simply understood, ADR is a means of resolving disputes out of court through any one of the following methods - arbitration, mediation, expert deliberation, negotiations, conciliation, etc. Businesses are increasingly adopting these methods as they are speedy and effective means of dispute resolution.

Arbitrations in Nepal are governed by the Arbitration Act, 2055 (1999) and are primarily based on the mutual understanding of the concerned parties. The courts are not involved in the dispute settlement, and have jurisdiction only in relation to either invalidating or enforcing a decision arrived at through the arbitration process. Further, invalidation by court is only allowed if certain basic and fundamental requirements of the law have been violated during the arbitration proceedings and/or the arbitral award is against the law.

Pioneer Law Associates, in the spirit of knowledge sharing, proudly presents this Arbitration Handbook: Nepal. Through this Handbook, interested persons can get a quick snap-shot of the concept and process of arbitrations in Nepal.

CHAPTER 2

APPLICABLE LAW



2.1. Historical Development

Nepal does not have a long legislative history of arbitration; however, arbitration can be traced back to the system of Panchayat in Nepal, an informal tribunal consisting of five persons chosen from amongst villagers to decide various disputes. The Development Board Act, 2013 (1956) was the first legislation in Nepal which envisioned dispute settlement through arbitration. The Arbitration Act, 2038 (1981) was enacted as the first legislation specifically in relation to arbitration. Subsequently, Arbitration Act, 2038 (1981) was repealed by Arbitration Act, 2055 (1991) ("Arbitration Act") which is the prevailing legislation governing arbitration in Nepal.

2.2. Arbitration Act

The Arbitration Act basically provides the procedures for arbitration proceedings in the event parties do not specify the same in their agreement. However, there are some mandatory provisions of the Arbitration Act which have effect, notwithstanding any agreement to the contrary. In contrast, the residuary (non-mandatory) provisions of the Arbitration Act apply in the absence of the parties agreeing to their own arrangements in the arbitration agreement. The following provisions can be implied as mandatory owing to their language construction under the Arbitration Act:

S.N.	Mandatory provisions
1.	Number of Arbitrators should be odd in count.
2.	Arbitrators to take written oath regarding impartiality and honesty.
3.	Grounds for disqualification of any person from being appointed as an arbitrator.
4.	Power of the arbitral tribunal to determine its own jurisdiction.
5.	Arbitrator must ensure equal and adequate opportunities to both the parties.
6.	The arbitral tribunal must inform the parties regarding the type of proceedings to be held, the day and time fixed for the purpose of the proceedings and also keep records thereof in a case file.
7.	Arbitrator should not decide the arbitral award on an issue, which is found to be inextricably linked with any other issue which the arbitrator cannot decide.

S.N.	Mandatory provisions
8.	Decision of Arbitrators: Based on majority. In case a majority decision cannot be arrived at, the opinion of presiding arbitrator will be the decision. Arbitral award must be in writing and duly signed.
9.	Decision must be read out to the concerned parties and copy of the award must be given to the parties.
10.	The arbitral award must be in writing and signed by the arbitrators. If any arbitrator fails to affix their signature, the reason for such absence must also be stated.
11.	The arbitral tribunal cannot give a decision regarding the dispute after the final award has been rendered. However, an exception to this rule is in instances where a party has appealed the arbitral award and the arbitral tribunal has been directed to take another look at the matter.
12.	Rights of dissatisfied party to file appeal before the Hon'ble High Court to invalidate the arbitral award, within 35 days from the date of award.
13.	The concerned parties to implement the arbitral award within 45 days from the date of receipt of arbitral award. In case the arbitral award cannot be implemented within the prescribed timeline, the concerned party may file a petition before the District Court within 30 days from the date of expiry of the above time limit. The District Court shall implement the arbitral award ordinarily within 30 days as if it was its own judgment.
14.	Rights to enforce certain foreign arbitral award in Nepal.

2.3. International Instruments

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, also known as the "New York Convention, 1958", is one of the key instruments in international arbitration. Nepal is amongst the contracting states, having acceded to the New York Convention on March 4, 1998, with the following declaration:

"The Kingdom of Nepal will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state. [The Government of Nepal] further declares that the Kingdom of Nepal will apply the Convention only to the differences arising out of legal relationship, whether contractual or not, which are considered as commercial under the law of the Kingdom of Nepal."

This is vital in terms of enforcement of foreign arbitral awards in Nepal. Nepal allows the enforcement of only those international arbitral awards which have been rendered in countries that recognize and enforce the arbitral awards rendered in Nepal. Further, these arbitral awards must only be in relation to the difference arising out of the legal relationships that are considered commercial as per the laws of Nepal.

CHAPTER 3

ARBITRATION AGREEMENTS AND CLAUSES



3.1. Introduction

Arbitration agreements are agreements between parties to resolve particular disputes through arbitration. The decision to resolve certain disputes through arbitration can be either separate agreements or can also be captured within the main contract as a part of the dispute resolution clause. While the arbitration clause forms a part of the contract itself, arbitration agreements are separate agreements and can be entered into before disputes arise.

3.2. Types of Arbitration Agreements and Clauses

The Arbitration Act defines arbitration agreements as a written agreement between parties for settlement of any dispute regarding any specific legal issue through arbitration. Such dispute may have already arisen or may rise in the future under a contract or otherwise. This Act has also defined "written agreement" and states that a written agreement for this purpose will be deemed to exist in any of the following circumstances:

- (i). Parties execute a contract with a provision for arbitration or sign a separate agreement towards this purpose.
- (ii). Any communication between parties deciding to submit dispute to arbitration which can be recorded in written form such as letter, telex, telegram and telefax.
- (iii). Submission of statement of defense in response to a statement of claim submitted to an arbitral tribunal without objecting to the submission of the dispute to such arbitral tribunal.

3.2.1. Single and multi-tiered arbitration clauses

Parties may refer present or future disputes to arbitration through single or multi-tiered dispute resolution clauses. Single tiered dispute resolution

clauses refer disputes directly to arbitration as the first and final stage of dispute resolution. Parties may also agree that attempts must be made to resolve disputes through other ADR mechanisms before going into arbitration. Such provisions are referred to as multi-tiered dispute resolution clauses. If the agreement between parties consists of a multi-tiered dispute resolution clause in the abovementioned manner, all the prescribed dispute resolution mechanisms must be exhausted before disputes can be referred to arbitration.

3.2.2. Ad hoc or institutional arbitrations

The agreement between parties may contemplate either an ad hoc or institutional arbitration mechanism. An ad hoc arbitration is where parties have not nominated an institution to administer the arbitration proceeding. Parties may also opt to nominate a specific institution which would administer the arbitration proceeding, which will then be known as an institutional arbitration. There are many arbitral institutions which provide such services, such as the Nepal Council of Arbitration (NEPCA) in Nepal, Singapore International Arbitration Centre (SIAC) in Singapore, The London Court of International Arbitration (LCIA) in London and the International Chambers of Commerce (ICC) International Court of Arbitration which has numerous offices worldwide.

3.3. Key points to remember

3.3.1. Validity of Arbitration Clause/ Agreement

In order to ensure that the intention to resolve disputes through arbitration is not frustrated, it is essential that the agreement between the parties be valid. A valid arbitration agreement should fall within the above-mentioned definition at paragraph 3.2 above. It should also constitute a valid contract pursuant to the prevalent contract laws. A valid contract should comply with the following conditions:

- (i). There should be an offer and acceptance to do or not do something,
- (ii). Either party, if a natural person, must be above the age of 18,
- (iii). Either party, if a natural person, must be of sound mind at the time of execution of contract, and
- (iv). The contract must be legally enforceable.

3.3.2. Jurisdiction of Arbitral Tribunal

The arbitral tribunal itself has the power to decide whether it has jurisdiction to preside over the dispute presented before it. Therefore, if any questions regarding jurisdiction of the arbitral tribunal arises, then the tribunal itself may decide and settle such issues.

3.3.3. Pathological Arbitration Clauses

Pathological or defective arbitration clauses create confusion regarding the intention of the parties at the time of executing the contract.

Examples of pathological or defective arbitration clauses are - misnamed arbitral institutions, clauses suggesting that parties "may" refer disputes to arbitration instead of conclusively establishing arbitration as the chosen dispute settlement mechanism, and clauses which are inconsistent or contrary to the relevant laws.

It is important to avoid such clauses as they may frustrate the intention of parties to resolve disputes through arbitration.

3.3.4. Severability

As mentioned above, arbitration clauses may be a part of the main contract between the parties. However, the arbitration clause is considered separate and severable from the main body of the contract and remains valid even in cases where the main contract becomes invalid.

3.3.5. Procedure for Appointment of Arbitrators

Primarily, the agreement between the parties is looked at to determine the procedure for appointment of arbitrators. The agreement may itself prescribe the name of the arbitrators or procedure for appointment of arbitrators. The agreement may also defer to arbitration rules of a specific arbitral institution wherein procedure for appointment of arbitrators has been prescribed.

If the agreement between the parties does not have any such provision for appointment of arbitrators either party may appoint one arbitrator and the appointed arbitrators would appoint a third presiding arbitrator.

If the parties are not able to appoint arbitrators, either party may approach the relevant high court in Nepal.

3.3.6. Number of Arbitrators

The number of arbitrators is determined by the agreement between the parties, or the arbitration rules mentioned in the agreement between the parties. If there is no reference to number of arbitrators in the agreement, three arbitrators should be appointed as per the prevailing arbitration laws of Nepal.

If even number of arbitrators have been appointed pursuant to the agreement between parties, one additional arbitrator should be appointed by the existing arbitrators.

3.3.7. Disqualification of Arbitrators

The following individuals are disqualified from being appointed as arbitrator:

- (i). An individual who is disqualified to enter into contracts as per the prevailing laws.
- (ii). An individual who has been punished by a court on criminal charges involving moral turpitude.
- (iii). An individual who has become insolvent or has been declared bankrupt.
- (iv). An individual who has a personal interest in the dispute.
- (v). An individual who does not meet any specific qualifications which might be mentioned in the agreement.

3.3.8. Seat and Venue of Arbitration

The terms "seat" and "venue" have very specific connotations in arbitration. The seat of arbitration is the place that determines the curial law or the procedural law governing the arbitration.

It also determines which court would exercise supervisory jurisdiction over the arbitration. For example, issues regarding appointment of arbitrators, challenges to arbitrators and taking of evidence would be addressed by the law of the seat.

The seat of arbitration is especially important in matters involving international parties. Parties can select a seat in the absence of the governing law provision in their agreement and the law of the seat often becomes the law governing the arbitration proceedings.

The seat of arbitration will also determine where the award has been made, which is significant during enforcement of such award.

The venue of arbitration is a reference to the physical location where the arbitral hearings are to be conducted.

3.3.9. Notices and Summons

Notices and summons should be served in the manner prescribed in the agreement between the parties. If the agreement does not make any provision in this regard, notices and summons can be served directly to the concerned person or sent through telex, telefax, telegram or any other manner through which a written record can be created.

If any electronic address has been mentioned in the agreement or if parties have provided such address to each other or to the arbitral tribunal, notices and summons can be sent to such address. If the same is not available, then notices and summons can be served at the place of business or permanent address of the concerned party.

If notices and summons are being served by a postal service, the same should be registered prior to serving.

3.3.10. Language of Arbitration

The language of arbitration would be a specified in the agreement between the parties. If the same has not been specified in the agreement, the language shall be as determined by the parties after discussion.

In the event that the parties cannot reach such a determination, the language of arbitration would be the language used in the initial agreement pursuant to which arbitration is commenced.

3.4. Conclusion

The validity of an arbitration agreement or arbitration clause is vital to ensuring that disputes are resolved through arbitration. The matters regarding arbitration are also primarily determined by the agreement between the parties. Parties must therefore ensure that the agreement is clear and unambiguous. If the agreement between the parties is silent on a particular issue, the same is covered by the law governing arbitration in Nepal.

Where appropriate, the courts also facilitate resolution of disputes through arbitration.

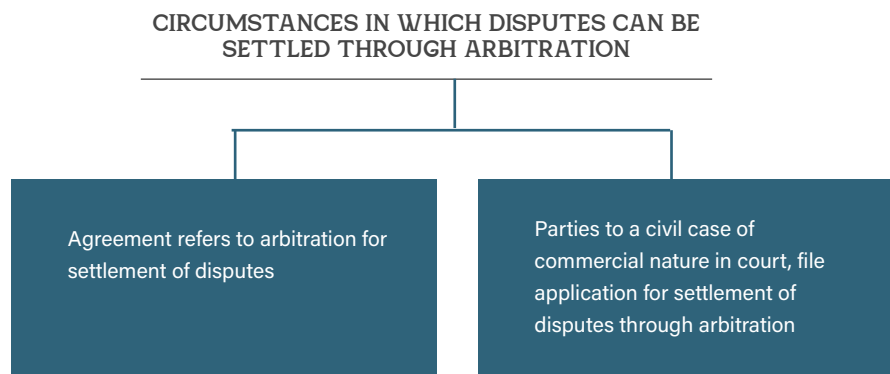
CHAPTER 4

PROCESS OF ARBITRATION PROCEEDINGS



4.1. Dispute

Disputes are any claims or differences or disagreements between any contracting parties, arising in connection with an agreement, which cannot be settled amicably between the parties. The matters that would give rise to criminal liability cannot be subject to arbitration. Only commercial disputes, including but not limited to investment, construction, infrastructure projects, sales of goods, insurance and banking can be resolved through arbitration.



4.2. Resorting to Arbitration

For any disputes to be resolved through arbitration, one must carefully evaluate the dispute settlement clause provided in any agreement. The dispute settlement clause can either be: single tiered arbitration clause or multi-tier arbitration clause, as explained at paragraph 3.2.1 above.

4.3. Appointment of Arbitrators

Nepalese law allows parties to choose the procedure for the appointment of the arbitrator(s). If the parties have not chosen any method, then the arbitrator is appointed as per the process prescribed in the Arbitration Act.

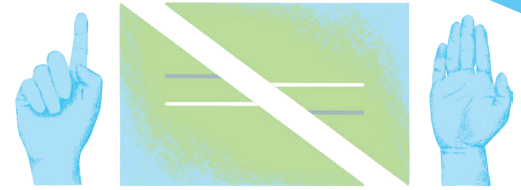
4.4. Process Map

The following table outlines the tentative timeline of arbitration as per the Arbitration Act and the Arbitration Rules.

Procedure	Timeline (Tentative)
Appointment of arbitrator	3 Months from the date when the reason for the settlement of a dispute through arbitration arises
Submission of claim	3 Months from the date when a dispute requiring arbitration has arisen in case only arbitration has been mentioned in the agreement without mentioning any time limit, and from the date of appointment of the arbitrator in case the arbitrator has been appointed after the dispute has arisen
Submission of objection (counter claim if any)	30 days (subject to extension up to 15 days upon occurrence of certain conditions) from the date of receipt of the claim, unless otherwise provided for in the agreement
Rejoinder	15 days (subject to extension up to 15 days upon occurrence of certain conditions)
Award	120 days
Implementation of award	45 days
Submission for implementation of award	30 days
Pendency period	30 days (if the other party fails to implement the award within 30 days)
Implementation by District Court in case of non-implementation by other party	30 days
Total	510 days (17 months approx.)

CHAPTER 5

ENFORCEMENT AND CHALLENGE OF ARBITRAL AWARD OR ORDER



5.1. Introduction

The Arbitration Act considers an arbitral award as final and binding on the parties of arbitration. The final award of the arbitral tribunal is enforceable. The Arbitration Act has provided for the provisions regarding enforcement of arbitration awards. Further, the mechanism for enforcement of an arbitral award may vary in terms of nature of award i.e. whether the award is a domestic award or foreign award.

5.2. Domestic Awards

5.2.1. Challenging a Domestic Award

A domestic award is enforceable upon receipt of copy of the award by the parties. If any party is not satisfied with the arbitral award such party can challenge such award before the concerned high court.

While challenging the arbitral award, the challenging party must prove at least one of the circumstances mentioned below:

S.N.	Grounds
1.	Incompetency of the party to enter into the contract
2.	Award rendered based on an invalid/unenforceable contract
3.	Where governing law is not clear, the agreement is not valid under the laws of Nepal
4.	Failure to render timely notice of appointment of arbitrator or about the arbitration proceedings
5.	Award is beyond jurisdiction of the arbitrator
6.	The procedure of designation of arbitrators or their functions and actions do not confirm with the agreement
7.	If no agreement, the process of appointment of arbitrators and their powers and functions does not comply the Arbitration Act

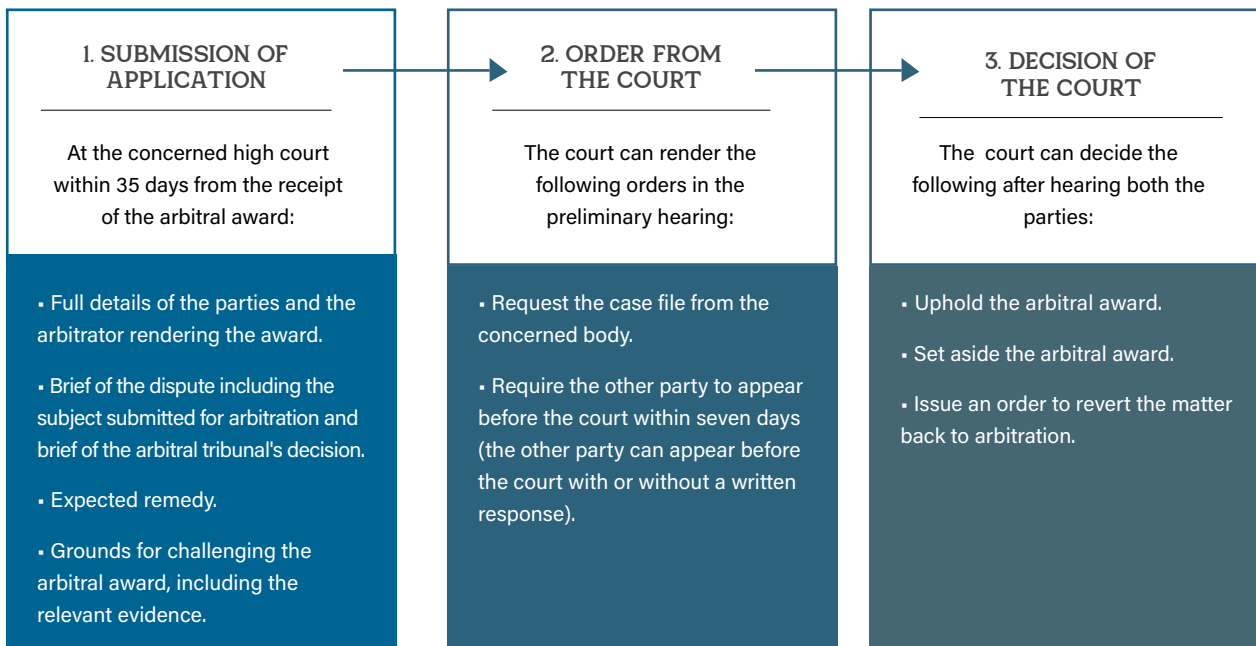
5.2.2. Invalidation of Domestic Award

A domestic award can be declared invalid by the court, if -

- (a) the dispute which is settled by the arbitrator cannot be settled through arbitration under the laws of Nepal.
- (b) the enforcement of the award is detrimental to the public interest or policies.

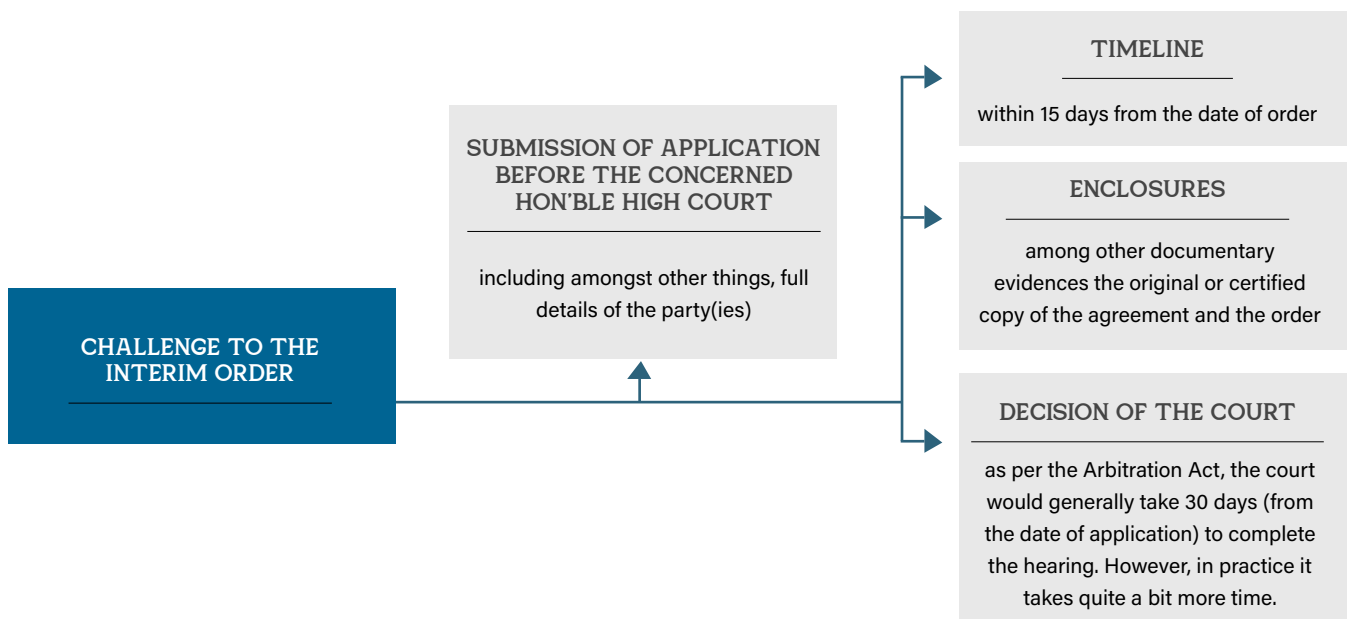
5.2.3. Procedure for challenging an Arbitral Award

The procedure and timeline for challenging an arbitral award and expected remedy from the court has been outlined below.

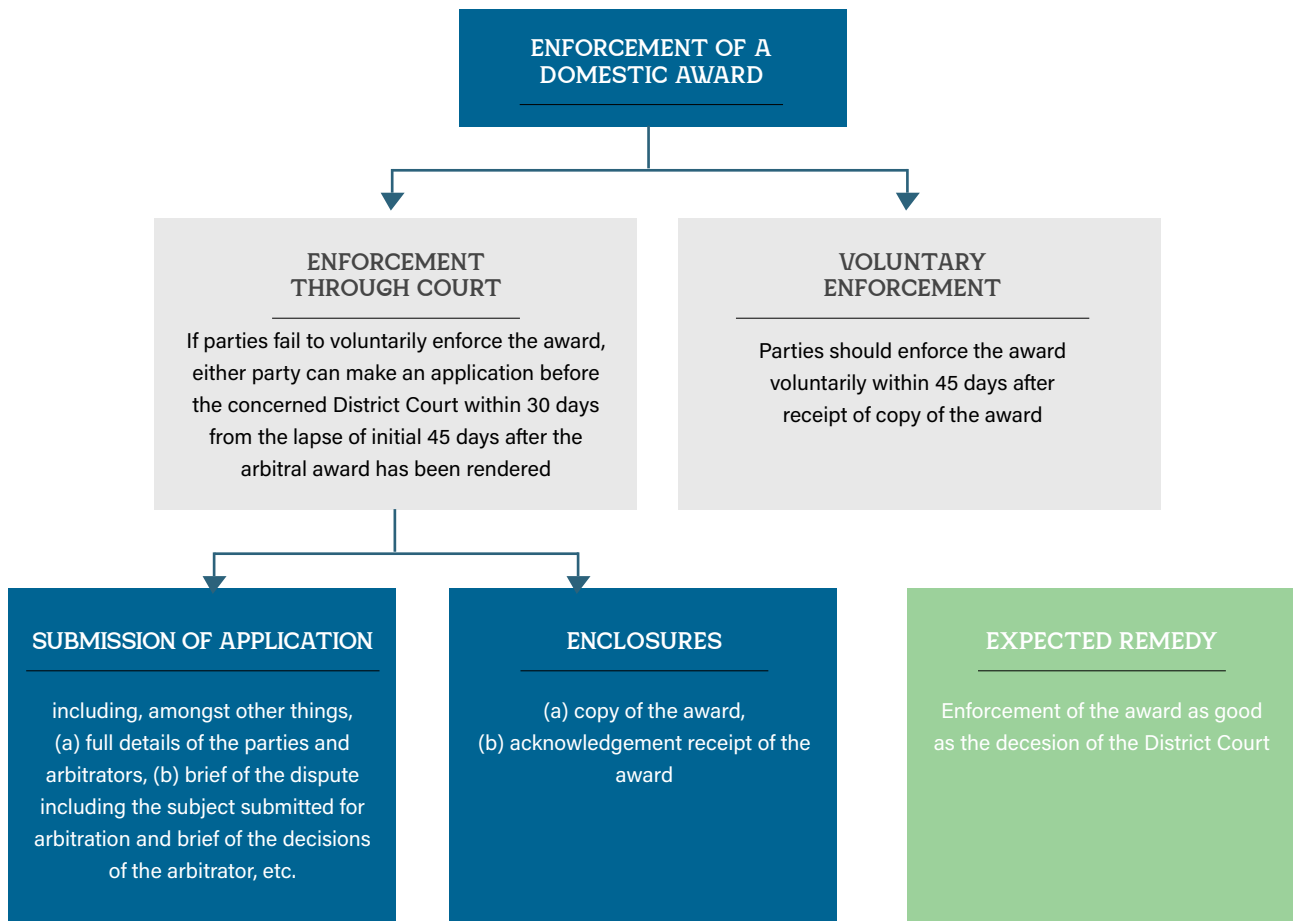


5.2.4. Procedure for challenging an interim order

The procedural chart for challenging an interim order has been illustrated below:



5.2.5. Procedure for Enforcement of a Domestic Award



5.3. Foreign Awards

5.3.1. Foreign Awards

A foreign award, should also fulfil the criteria outlined in the table below:

S.N.	Grounds
1.	The award should be in relation to differences arising out of a legal relationship, whether contractual or not, which are considered as commercial under the laws of Nepal.
2.	Compliance with procedure and laws stated in the agreement while appointing the arbitrators and rendering award.
3.	Due notice to the parties regarding arbitration proceedings in a timely manner.
4.	The award should have been within the jurisdiction of the arbitrators.
5.	The award should be final and binding on the parties according to the laws of the country where the award was rendered.
6.	The award should be enforceable as per the laws of the country where arbitration proceedings have been conducted.
7.	The enforcement application should be filed within 90 days from the date of award.

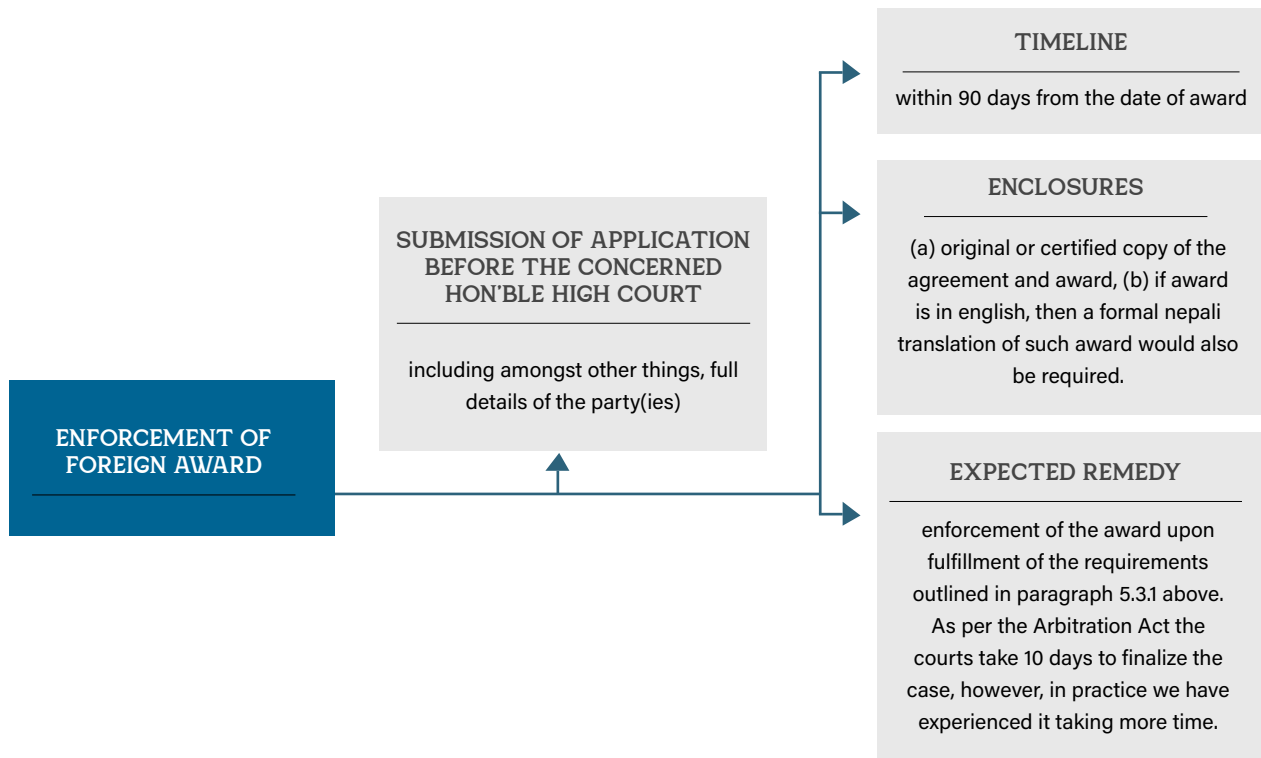
5.3.2. Unenforceability of Foreign Awards

A foreign award cannot be enforced in Nepal, if-

- (a) The dispute which is settled by the arbitrator cannot be settled through arbitration under the laws of Nepal.
- (b) The enforcement of the award is detrimental to the public policy.
- (c) Nepal does not have reciprocity with the country where the award was rendered.
- (d) The award is not in relation to differences arising out of a legal relationship, whether contractual or not, which are considered as commercial under the laws of Nepal.

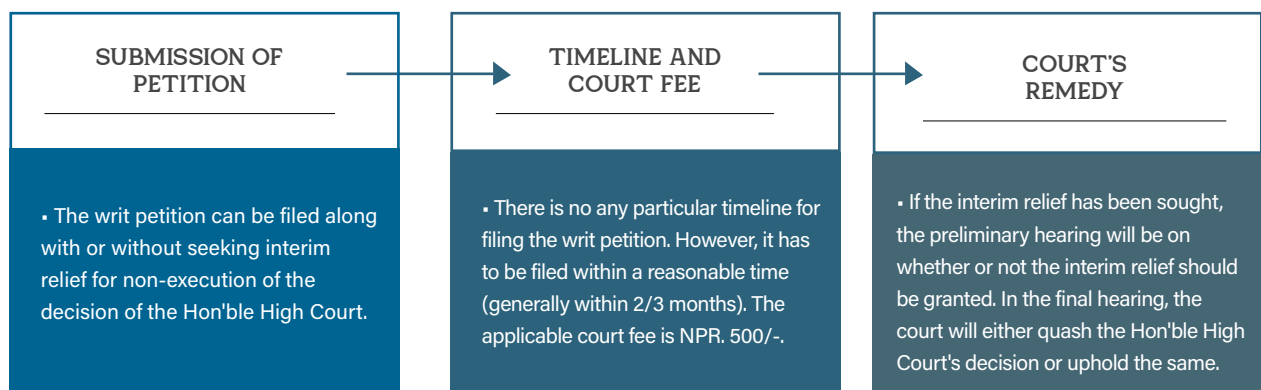
5.3.3. Procedure for Enforcement of a Foreign Award

The procedure for enforcement of a foreign award has been given below:



5.4. Challenge of an Order/Judgment of Hon'ble High Court in Arbitration Law Related Matters

The decision of the Hon'ble High Court can be challenged before the Hon'ble Supreme Court in the form of writ petition. The below given flow chart explains this process:





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