Kluwer Arbitration Blog

One Step Forward, Two Steps Backward? Assessing Nepal's New Arbitration Ordinance

Sameep Khanal · Thursday, April 10th, 2025

On 13 January 2025, the government of Nepal promulgated an ordinance ("**Ordinance**") amending the Nepalese Arbitration Act, 1999 ("Arbitration Act"). The Ordinance purports to modernise the arbitration framework, introducing provisions designed to enhance efficiency and align with international standards. While the changes in these provisions represent a positive step forward, the decision to introduce an ordinance appears unusual, as the Nepali Parliament is fully functional and the coalition-majority government that introduced the Ordinance holds a commanding majority within it. Given the practice in Nepal of using ordinances primarily for immediate or short-term changes in laws requiring frequent updates, such as tax or foreign investment legislation, the decision to amend the Arbitration Act—a law that has remained unchanged for 24 years—through an ordinance, and without prior consultation with stakeholders such as industry professionals, practitioners, arbitral institutes, and arbitrators, is both unexpected and concerning.

In addition to the hasty process adopted for the Ordinance, there are areas where the reforms either fall short of or introduce ambiguities that could hinder the arbitration process. This blog critically examines these changes, highlighting their potential impact and suggesting ways to address the identified gaps.

Expedited Arbitration: Is Reference Necessary?

The Ordinance has formally introduced both an expedited arbitration procedure and an expedited enforcement of the arbitral award allowing parties faster resolution timelines, including enforcement within 15 days instead of the earlier 30-day period. While expedited arbitration was already possible under the previous legal framework through party agreements (or by agreeing to the arbitral rules that provided for expedited proceedings) or procedural orders, this explicit recognition and reduced timeline for the enforcement of an arbitral award is expected to provide an added advantage. This reform is particularly relevant in Nepal, where ad-hoc arbitration is widely practiced, and parties frequently rely on domestic law or ad hoc rules like the United Nations Commission on International Trade Law ("UNCITRAL") Rules without the oversight of an arbitral institution. State-owned enterprises and government departments also commonly use ad-hoc arbitration to resolve disputes, making the efficiency of enforcement even more crucial. Unlike institutional arbitration, where enforcement mechanisms are often more structured, ad-hoc arbitration depends heavily on the efficiency of national courts to uphold and execute awards.

Prohibition on Re-Examination of Evidence

The Ordinance has addressed judicial interference by explicitly prohibiting the re-examination of evidence during setting-aside proceedings before the High Court. This restriction confines courts to procedural and jurisdictional grounds for review, rather than permitting *de novo* evaluations of evidence. Previously, courts could reassess witness testimony or expert opinions, leading to delays and undermining the finality of arbitration. The new provision reinforces the autonomy of arbitration and aligns Nepal's practices with global standards.

Finality of Awards and Its Limitations

The Ordinance provides much-needed clarity that a challenge to a domestic arbitral award does not lead to the suspension of enforcement and does not interfere with finality. Previously, when an arbitral award was challenged, the District Court would automatically halt its enforcement. Under the new framework, enforcement is no longer suspended by default; a party seeking suspension must now apply for it. This clarity is crucial in establishing confidence in the arbitration process. However, this progressive change is limited to Section 32 of the Arbitration Act, which governs the enforcement of domestic awards, and does not extend to Section 34 of the Arbitration Act, which deals with the enforcement of foreign awards. This discrepancy in the treatment of domestic and foreign arbitral awards is a missed opportunity, as harmonising the treatment of domestic and foreign arbitral awards would have enhanced Nepal's appeal as a seat of arbitration for international parties.

Suspension of Awards: Effects, Standards and Safeguards

The Ordinance permits the suspension of arbitral awards. A party desiring suspension must file the application before enforcement is granted. Under Section 31 of the Arbitration Act, if the losing party does not voluntarily implement the arbitral award within 45 days, the prevailing party may seek enforcement—after 15 days for expedited arbitration (from day 60) and after 30 days for normal arbitration (from day 75). However, it may so happen that the court does not take the full statutory enforcement period and grants enforcement earlier. In such cases, a party desiring suspension must file the application as soon as the enforcement application is submitted to prevent enforcement from taking effect.

The suspension can be sought in cases where the arbitration agreement or arbitral award is tainted by corruption or fraudulent conduct, or where irreparable loss might result from enforcement. However, this provision raises several concerns regarding its effects on enforcement and the lack of counterbalancing measures.

Suspension applications can significantly delay the enforcement of awards, undermining the efficiency of arbitration. Without clear safeguards, parties might exploit this provision to prolong disputes unnecessarily. The Ordinance does not include provisions requiring deposits or guarantees to counterbalance the adverse effects of suspensions. For instance, Article 46(3) of the Japanese Arbitration Act, 2003 requires the posting of security by the applicant seeking to suspend the

enforcement of an award. A similar provision exists under section 103(5) of the English Arbitration Act, 1999. These measures ensure that parties affected by delays can be compensated if the suspension application is found to lack merit. Nepal's failure to include such safeguards risks incentivising frivolous applications, potentially undermining trust in the arbitration system.

Standard of Proof: Applying the Arbitral Tribunal's reasoning in the Curial Court?

As per the Ordinance, the suspension grounds are corruption and fraudulent conduct tainting the arbitral awards or agreement. This is in accordance with the heightened intolerance for corruption and fraud affecting the arbitral award. However, application of this standard is tricky given the growing controversy globally on how the arbitral tribunal should evaluate the corruption standard. The question of which evidentiary standard to apply when reviewing conduct during the arbitration stage is also likely to affect the interpretation of the Ordinance. While some argue for higher standards such as "beyond reasonable doubt" due to the serious implications of a party's conduct, others suggest that the standard should be of clear and convincing evidence. During the course of arbitration, the arbitral tribunal is not adjudicating the underlying criminal dispute, but rather evaluating how the conduct affects the arbitration agreement and the contract. Yet, the standard should not be too lenient, akin to adjudicating a typical civil dispute. It is also argued that for more serious allegation, the applicable standard of proof should be higher.

However, the above standards are evaluated by arbitral tribunals in their specific context with reference to their appropriate procedural rules. Given that Nepal adheres to the principle that the party asserting a claim bears the burden of proof, it remains to be seen how courts will handle cases with insufficient direct evidence.

Moreover, since the Ordinance rules out the *de novo* examination of evidence, it remains to be seen how courts will evaluate the assertion of corruption since the issue of corruption is likely to be discussed, in most cases, during the arbitral proceedings. Another challenge will be determining whether the curial court needs to be satisfied merely with prima facie allegations of corruption or if it needs to establish a more concrete standard before deciding to issue an order for suspension.

Conclusion and Recommendations

The Ordinance certainly endeavours to modernise procedural aspects of arbitration in Nepal, notably with regard to the expedited enforcement of arbitral awards and limiting judicial review of evidence in setting-aside proceedings. However, the temporary nature of an Ordinance stands in the way of bringing long-term impact. It is imperative that this Ordinance be crystallised into law to provide stability and certainty to arbitration stakeholders. Additionally, addressing the identified gaps—such as extending finality provisions to foreign awards, implementing clear and objective standards for corruption, and introducing safeguards like financial deposits during suspension applications—will further enhance Nepal's position as a competitive and reliable arbitration hub.

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