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ARBITRATION LAWS IN NEPAL; LIMITATION

LIMITATION LAWS ON ARBITRATION AND CONTRACTUAL
MATTERS



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ARBITRATION LAWS IN NEPAL; LIMITATION

A. ISSUES

1. This brief is intended to outline:
 - 1.1. What is the statutory time limit to bring a claim in an arbitration under Nepalese law?
 - 1.2. Does the three-month time limit referred to in **Arbitration Act, 2055 (1999)** (the "**Arbitration Act**"), **Section 6(1)** apply to Arbitrations?
 - 1.3. When does a reason to settle a dispute through arbitration arise?

B. TIME LIMITS UNDER NEPALESE LAW

2. Nepal does not have a general Limitation Act, in the way that England and many other jurisdictions do. Instead, statutes dealing with different topics each provide their own specific limitation periods.
3. Thus, **Section 89** of the **Contract Act 2056 (2000)** provided:

(1) In case prevailing law prescribe any specific limitation:

(2) Complaint in respect to the following contracts or matters other than those mentioned in Sub-section (1) shall not be heard unless these are filed within the limitation as mentioned hereunder; (a) In the case of a void contract, to have them declared void at any time; (b) In the case of a voidable contract, within a year from the date when the party that can have the contract declared void learns about the reason for having the contract declared to be void; (c) In the case of contracts mentioned in Chapter 7, within two years after the date of reason to file a lawsuit arises; (d) In the case of any other claim under this Act, within two years after the date of the reason to file a lawsuit arises for such a claim.

This was in similar terms to **Section 18** of the previous **Contract Act 2023 (1966)**.

4. The **Contract Act 2056 (2000)** has now been repealed and replaced by the **National Civil (Code) Act 2017 (2074)** (the "**National Civil Code**"). Chapter 2 of the National Civil Code sets out provisions relating to the performance of contracts. **Section 534**, which appears at the end of Chapter 4 provides:

534. Statute of limitation: A person who is aggrieved from any act done or action taken under this Chapter may make a lawsuit within two years after the date of the reason to file a lawsuit arises.

- Chapter 5 of the National Civil Code sets out provisions relating to breach of contract and remedies. **Section 544**, which appears at the end of chapter 5 provides:

Statute of limitation: A person who is aggrieved from an act done or action taken under this Chapter may make a lawsuit within two years after the date of the reason to file a law suit arises.

- The Arbitration Act specifies a time limit within which arbitrations must be commenced, unless the parties have agreed otherwise. **Section 6(1)** provides:

Appointment of Arbitrator: (1) Unless otherwise stated in the agreement, the process of appointing arbitrators must be started within three months from the date when the reason to settle a dispute through arbitration arises.

- There is some debate as to whether the Contract Act 2056 (2000) and the National Civil Code shall be applied to arbitrations. The contention is that the word “lawsuit” in **Section 89(2)(d)** of the Contract Act 2056 (2000) and in **Sections 534 and 544** of the National Civil Code referred to litigation in court.
- There is also a version which lawyers often contend that the National Civil Code Act and its predecessor statutes applied to all contractual claims, whether brought in court or by arbitration.

Section 6(1) of the Arbitration Act provided an additional time limit applicable to arbitration, except when the arbitration agreement provided otherwise.

9. However as observed below the courts have almost every time held that the National Civil Code and its predecessor statutes applied only to claims brought in court proceedings. In the case of claims brought by arbitration, there was only the limitation period provided by Arbitration Act **Section 6(1)**.

C. DOES THE THREE-MONTH TIME LIMIT REFERRED TO IN ARBITRATION ACT SECTION 6(1) APPLY TO ARBITRATIONS?

10. The wording of Arbitration Act **Section 6** imposes a time limit for starting the process of appointing arbitrators. That time limit applies “unless otherwise stated in the agreement.
11. In ICC case *CCECC-Sharma-Lama JV (Nepal) v. Melamchi Water Supply Development Board (Nepal)* (Tribunal: Professor Jayavadh Bunnag (President), Mr. Gordon L. Jaynes, Mr. Narayan Datt Sharma) there was a preliminary issue as to whether the claimant’s claim was barred because the claimant had issued its Notice of Arbitration (“NOA”) too late. The tribunal considered the application of both **Section 6** of the Arbitration Act and **Section 89(2)(d)** of the Contract Act 2056

(2000). There was a construction contract between the parties dated 25 January 2005, which provided for disputes to be resolved by arbitration in accordance with the International Chamber of Commerce ("ICC") Rules (decision para 1.2). The claimant issued its NOA on 27 July 2014 (decision para 2.1). The 2012 version of the ICC Rules was applicable (decision paras 5.32 and 5.54). There is no difference which is relevant for present purposes between Article 12 of the ICC Rules 2012 and Article 12 of the 2021 version of the ICC Rules. The respondent contended that the reason to settle a dispute through arbitration arose on 10 April 2011 and that the claimant failed to commence the process of appointing arbitrators within three months from that date (decision para 5.2). The tribunal held that the ICC Rules and the conditions of contract were silent about the time for commencing an arbitration (decision paras 5.33 to 5.35). Therefore, the three-month time limit imposed by Arbitration Act **Section 6 F(1)** applied. In paragraph 5.35 of its Partial Award on Jurisdiction the tribunal stated:

*5.35. Therefore, since neither the Contract nor the ICC Rules provides that the process of appointing arbitrators must be started within a certain period from the date when the reason for the settlement of a dispute through arbitration arises then it is the Tribunal's determination that **Section 6(1)** of the Arbitration Act applies.*

Having regard to both **Section 6** of the Arbitration Act and **Section 89(2)(d)** of the Contract Act 2056 (2000), the tribunal held that the claimant had commenced the process of appointing arbitrators too late; therefore, the tribunal had no jurisdiction to hear and enter into the merits of the claim [decision para 6 (a)].

12. Under Nepalese law and practice, a claimant commences an arbitration by serving an NOA in which it nominates its own party-appointed arbitrator. In ICC case 20375/CYK/PTA the tribunal held (rightly in our view) that the 2012 ICC Rules did not specify a time limit for serving the initial NOA in which the claimant nominates its party-appointed arbitrator within 3 months. Although that decision is not binding, it definitely is persuasive.
13. There are numerous case laws where the Supreme Court of Nepal has endorsed the view that **Section 6(1)** of the Arbitration Act applies as the period of limitation for arbitrations. However, all these arbitrations were seated in Nepal.
14. Considering the above, we can say with a degree of certainty that if the seat arbitration is Nepal or if the limitation is a matter of procedure, we hold that the three-month time limit imposed by Arbitration Act, **Section 6(1)** applies in this case.

D. WHEN DOES A REASON TO SETTLE A DISPUTE THROUGH ARBITRATION ARISE?

15. We consider that in order to identify the relevant principles of Nepalese law, we must review the principal authorities.
16. We start with *Pradhan v Korean Development Corporation* (case 111 of 1986). In that case the plaintiff claimed commission at the rate of 2% for working as local representative of the defendant. The court held in paragraph 20 that the mere fact that a commission fell due did not create a reason to file a lawsuit. A reason to file a lawsuit was only created when the defendant refused to pay the commission due. The case neatly illustrates the difference between the Nepalese concept and the accrual of a cause of action under English law. In England, we believe (where limitation periods are longer) time would start to run as soon as the commission fell due. Further, the trigger point presupposes that both a dispute has arisen and that there is a reason to settle that dispute through arbitration. The important point which emerges from this case, is that the date to settle a dispute through arbitration could arise later (and sometimes very much later) than the date on which the claimant has a legal entitlement to a remedy. In context, before a dispute can arise there must be a claim that is made by the contractor and rejected by the employer. What constitutes a rejection

of the claim, and what degree of finality must there be in that rejection before there is reason to refer a dispute to arbitration will be specific to the individual facts of the case.

17. In *Raghubar Shrestha v Syako Construction Pvt Limited* (decision of the Supreme Court, Division Bench, dated 1 September 2008) it was held on the facts of that case that time started to run for limitation purposes on the date when the construction contract was terminated. At paragraph 3 the court stated:

When another party to the contract had stopped carrying out the works as per the contract and the term of the contract was not extended by Plaintiff, the termination of the contract should be considered as the reason to filing the lawsuit with regard to the contract dated 2048/11/23 (March 6, 1992).

18. In *Bijaya Construction Pvt Ltd v Appellate Court Patan* (decision 7823 of the Supreme Court, dated 29 May 2007) the facts are somewhat complicated. It appears that the reason to settle a dispute through arbitration arose on 19 June 1996 when a board meeting rejected the plaintiff's claims as unjustified. The plaintiff started the process of appointing an arbitrator much more than three months after that date. The plaintiff was therefore barred from pursuing the arbitration. We note

that it was the forthright rejection of the plaintiff's claims, not the coming into existence of those claims, which started time running for the purpose of Arbitration Act **Section 6(1)**.

19. In *Gurung v Thapa* (judgement of the Supreme Court, Division Bench, dated 1 March 2009) at paragraph 4, the court held that time started to run for limitation purposes not when a party was required to fulfil an obligation, but when that party refused to fulfil that obligation.
20. In *Shreeram Sugar Mills v Agrotech* (decision of Supreme Court, Division Bench, dated 2 July 2009) the court reviewed two of the decisions discussed above and other authorities. In a valuable passage at paragraphs 5 to 7, the court distilled the relevant principles as follows:

5. Owing to the above reasons and bases, the principle that the limitation period begins from the date of the end of a contract or the date of receipt of notice of termination of contract cannot be considered as a universally accepted principle. In situations where the aggrieved party approaches the court with a petition requesting an order for the specific performance following a breach or termination; the limitation period may begin from the date of expiry of the term of a contract, the date of termination of the contract, or the date of the breach of contract.

6. *However, in claims involving compensation or payments based on quantum meruit, the date of the refusal of its obligation by a party may be considered as the date of the reason to file a suit.*
7. *In the event of a claim for compensation or payment of the amount as stated above, various principles have been formulated by this court as to when the cause of filing the suit should be started in case the claim for payment of such compensation or other claim for payment of the amount is demanded. The cause of filing a suit arises only after the party who is required to fulfill the obligation refuses to fulfill the obligation after the time has elapsed and the legal statute of limitation to enter the court also arises only after the party refuses to fulfill the obligation and it seems that this court has already formulated the principles in various cases that the reason for filing a case does not start without denying obligation and the statute of limitation will also not arise. In NKP 1987, Issue 2, Page 153, in the case of Jyan Bahadur Pradhan v. Korean Development Corporation, a clear principle has been stated in this regard. In the case of Parasmani Bharati v. Homraj Bam published in NKP 2008, Issue 11, Page 1421 and Ganga Bahadur Gurung v. Bhagwati Thapa, in the Civil Appeal No. 459 of Year 2007, even when the decision was taken by the division bench on 1 March 2009,*

the principle was upheld that the time limit starts from the date when the defendant denies the obligation and the statute of limitation also starts from the same date.

21. In *Namaste Travels Pvt Ltd v A.C. Garment* (decision of the Supreme Court, Full Bench, December 8, 2011) the defendant failed to make a payment due to the plaintiff. The plaintiff's lawyer wrote to the defendant, threatening to invoke a legal remedy if the defendant did not pay. The court held that the reason to file the lawsuit arose on the date of that letter.
22. *Damodar Ropeways v Hazama Corporation* (decision of the Supreme Court, Joint Bench, (dated 13 February 2012) was another case concerning non-payment. The court held that the reason to file a lawsuit arose not when payment was due, but when there was a refusal to make payment. (Paragraph 4).
23. In *Nepal Industrial Bank v Arbitral Tribunal* (decision of the Supreme Court, Division Bench, dated 17 September 2012) the bank agreed to underwrite some shares. The bank subsequently sent a letter to the respondent saying that it would not perform that obligation. On a later date the petitioner demanded payment for the shares that the bank had agreed to underwrite. The bank refused to pay. The court held that time started to run under Arbitration Act **Section 6** on the earlier date, namely when the bank notified the respondent that it would not underwrite the shares.

24. *Milan Gurung v Mohan Salani* (Supreme Court, Division Bench, decision dated 16 March 2015) concerned a contract for payment by instalments. The court held that the limitation period started when the last instalment was not paid. A similar conclusion was reached in *Bal Bahadur Pun v Himalayan Helicopter Pvt Ltd* (judgment of the Supreme Court, Division Bench, dated 8 September 2016).
25. What emerges from this review of the authorities is that the determination of when time starts to run under the National Civil Code and under Arbitration Act **Section 6(1)** is heavily dependent on the facts. The authorities show that the limitation clock starts to tick when two conditions are met. First, the claimant has a good cause of action against the respondent. Secondly, the time has come when it is appropriate for the claimant to initiate proceedings in court or by arbitration, as the case may be. In some cases (as in *Raghubar Shrestha and Nepal Industrial and Commercial Bank*), both conditions are met on the date when one party unilaterally terminates the contract between the parties. But that is not always the case, as the Supreme Court stated in its review of the Nepalese jurisprudence at *Shreeram Sugar Mills*, paragraph 5.

26. In order to address the question as to when in this case ‘the date when the reason to settle a dispute through arbitration arises’ it is first necessary to characterize the dispute that is referred to arbitration.

KEY CONTACTS

If you have any questions or would like to know how this might affect your business, get in touch with these key contacts



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