

Mediation in Industrial & Commercial Dispute: Importance and Challenges

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Outlines:

- Introduction
- Some dispute resolution mechanism
- Mediation
- Scope of Mediation in Industrial and Commercial disputes
- Importance of mediation in IC disputes
- Challenges
- Way forwards

Issue Introduction-Why Mediation

- **Society and disputes** are twin sisters conjoining together to long & **both energise each other**
- Nepalese society originally is Mediation friendly
- Constitutional objectives- **Article ५१(८)(२)**, Legal protection-Mediation Act
- Mediation is well accepted in **CC** and **FM** disputes all over the world
- Mediation boost social peace and prosperity either in developed or developing world
- We believe in: **सर्वे भवन्तु सुखिनः सर्वे सन्तु निरामयाः । सर्वे भद्राणि पश्यन्तु मा कश्चिद्दुःखभागभवेत् ।**

May All be Happy, May All be Free from Illness, May All See what is Auspicious, May no one Suffer of sorrow;

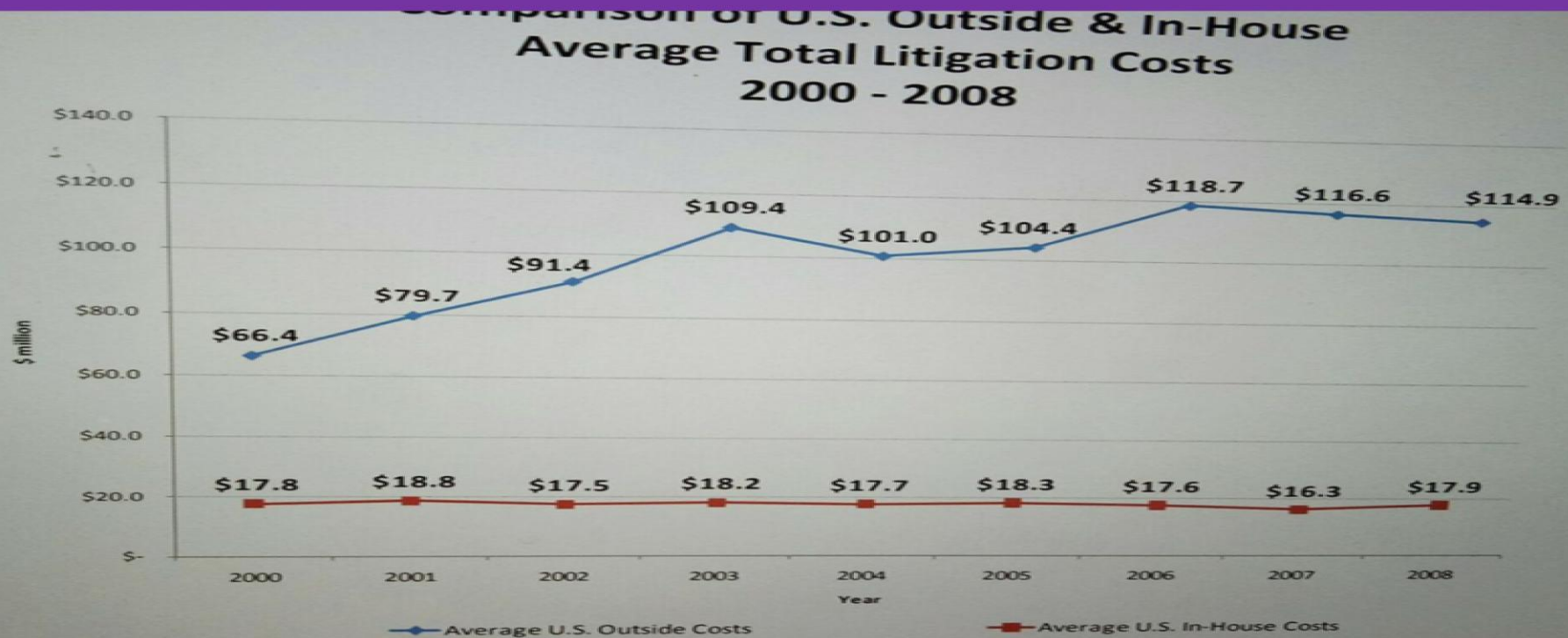
Society and Disputes conjoining like:



Disputes settlement mechanism in the world

- Litigation
- Arbitration
- Adjudication
- Negotiation
- Mediation
- Others

One example litigation cost



To account for the unbalanced nature of the response rate over time, a regression with a time trend and company

Cost contd..

Figure 10
Outside Legal Fees per Case of Major Cases Closed*
2004 - 2008

	2004	2005	2006	2007	2008
	<i>Average Company's Average Legal Fees per Case of Major Cases Closed</i>				
N (Companies)	24	26	26	29	30
Sum	\$43,742,766	\$42,125,232	\$49,125,663	\$51,795,765	\$60,577,443
Maximum	\$7,200,000	\$5,854,561	\$5,572,314	\$8,775,147	\$11,184,929
Minimum	\$437,986	\$303,200	\$253,750	\$276,555	\$352,324
Mean (by Company by Case)	\$1,822,615	\$1,620,201	\$1,889,449	\$1,786,061	\$2,019,248

*Excludes two companies reporting unusually high numbers of cases.

Arbitration cost

- According to ICC statistics, on the average
 - 2% ICC Administration cost
 - 16% Arbitrators' fees
 - 82% Lawyers & related cost

ICC cost calculation

Just for example

Requested estimation

Amount in dispute	100000000
Number of arbitrators	3
Year (scale)	2017

Fees per arbitrator

Min	\$77867
Avg	\$214584
Max	\$351300

Advance on costs (without arbitrator expenses)

Average fees multiplied by number of arbitrators	\$643752
Administrative expenses	\$100975
Total	\$744727

Mediation

- What is Mediation: Mediation is dispute resolution process with a help of neutral third party-the Mediator
- According to Mediation Act of Nepal: Mediation Act 2068
 - 2 (h) "Mediation" means a process to be followed to settle a dispute or case with the assistance of a mediator.
- The mediator shall not work as Judges or Lawyer only work as neutral facilitator some time as evaluator-alike Mediator

Important of Mediation

- No any mechanism has remedy for:
- Wonderful process for Time saving
- Cost effective
- Relation restoration
- Permanent solution



Suitable for following cases: Also for non divorceable disputes

- करार सम्बन्धी सबै बिवाद
- कम्पनी सम्बन्धी सबै बिवाद
- लगानी (बिदेशी लगानी वा स्वदेशी लगानी) सम्बन्धी सबै बिवाद
- बिमा सम्बन्धी सबै बिवाद
- निर्माण तथा भौतिक पूर्वाधार सम्बन्धी सबै बिवाद
- बौद्धिक तथा औद्योगिक सम्पति सम्बन्धी सबै बिवाद
- श्रम तथा ब्यवस्थापन सम्बन्धी सबै बिवाद
- ब्यापार कारोवार तथा लेनदेन सम्बन्धी सबै बिवाद
- बैंक तथा ऋण असुली सम्बन्धी सबै बिवाद र अन्य बिवादहरु

श्रम व्यवस्थापन विवादमा अपरिहार्य

- घरेलु कामदारदेखि एक मात्रै कामदार रहेको सबै खालका प्रतिष्ठानमा लागू
- स्थायी र अस्थायीको विभेद हट्यो, चार किसिमको रोजगारीको व्यवस्था
- महिला कामदारलाई विशेष व्यवस्था
- पारिश्रमिक निर्धारण गर्न स्थायी समिति गठन
- काम थालेको मितिदेखि नै सबै कामदारलाई सञ्चय कोष र उपदान
- ७ लाखको दुर्घटना र एक लाखको औषधि उपचार बिमा
- आपसी हितको विषयमा मेलमिलाप नभएपछि मात्रै हडताल गर्न पाउने
- गैरकानुनी हडतालको पारिश्रमिक नपाउने
- रोजगारदातालाई 'ले अफ' र श्रमिक कटौतीको सुविधा
- कामदार सप्लाई गर्ने कम्पनी कानुनी दायराभित्र
- हरेक प्रतिष्ठानमा व्यवसायजन्य सुरक्षाको नीति अनिवार्य
- खराब आचारणका मालिक/कामदारलाई एक वर्षसम्म कैद

Mediation possibility in ICC disputes

- Peace and harmony works for ICC prosperity
- ICC sectors is calculative for time, cost and relation
- ICC sector is **Egoless sector**
- Time and relation is wealth in ICC
- Domestic and International practice are flourishing in world
- Aware and professional mediators are working gradually in ICC disputes
- Mediation in ICC disputes can release ICC tension
- Nepal located in ASIAN ICC hob-India and China
- Lots of disputes waiting mediation in Bank, Investment, Insurance, IP, construction and so on

Mediation challenges in ICC disputes

- Reluctant private sector towards Mediation
- Lack of Awareness
- Lack of Acceptance like Global forum-AAA,ICC,CIArb, KLRAC
- Lack of Institutional developments on Mediation & ADR
- Lack of well equipped Mediation or ADR center
- Lack of commitment to work for ADR hob in Nepal
- Lack of support from Gov. Corporate and Industrial sectors
- Lack of infrastructural and logistic supports
- Political instability

Way forwards

- Accept mediation before Arbitration and Litigation in contract drafting
- Accelerate awareness, workshops, seminar and trainings in ICC sector
- Specialized trainings and workshops on ICC disputes
- Get involvement and cooperation of Mediation Council
- Get resolved such difficulties and challenges noted above
- Setup mediation desk in every enterprises specially in private sector
- Get energies and accelerate mediation process in every ICC disputes

Otherwise; the days may come:



Finally thanks to all

