

IMPROVING BUSINESS ENVIRONMENT IN NEPAL

Budget Recommendation



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Abbreviations and Acronyms

AoA	Articles of Association
ASYCUDA	Automated System for Custom Data
CMS	Case Management System
CTD	Custom Transit Declaration
DOI	Department of Industry
ECTS	Electronic Cargo Tracking System
GDP	Gross Domestic Product
IAO	Insolvency Administration Office
ICD	Inland Clearance Depot
IEE	Initial Environmental Examination
IRO	Inland Revenue Office
JC	Judicial Committee
MoA	Memorandum of Association
MOI	Ministry of Industry
NJA	National Judicial Academy
OCC	Office of the Controllers of Certification
OCR	Office of Company Registrar
OCR	Office of Company Registrar
SC	Supreme Court
UNCITRAL	United Nations Commission on International Trade
UNCTAD	United Nations Conference on Trade and Development
VAT	Value Added Tax
WB	World Bank

S.N	Agendas	Issues	Recommendation
1.	Easing up preparation of MoA and AoA	<p>-Entrepreneurs are not able to prepare MoA and AoA without professional help.</p> <p>-It requires NPR 10,000 and takes 5 days for the preparation of these documents, which is a huge percentage of the total time and cost involved.</p>	MoA and AoA is to be substituted with a single document which should be easy to prepare.
2.	Avoiding redundancy in application procedure	<p>-Online filing of the documents and again having to present physical copy of the original documents is redundant.</p> <p>-Due to the lack of implementation of digital signature and electronic transaction, making the registration process completely digital has not been possible.</p>	Use of digital signature should be brought into effect in order to avoid duplication in application procedure.
3.	Reducing direct cost of starting a business	<p>-Incorporation fee accounts to more than 10 percent of GDP per capita.</p> <p>-Total cost of company registration accounts to NPR 21,780, whereas Gross Domestic Savings (GDS) per capita of Nepal is about NPR 15510. These figures show that an entrepreneur has to save for 16 months just to register a new company.</p>	Reduce incorporation fees so that there is a direct reduction in cost of starting a business
4.	Make institution responsible, and not individual bureaucrats	Entrepreneurs themselves have to move from one desk to another to get services from different government officials (like getting signatures and approvals). This has created a maze within the regulatory office. The service delivery mechanism is such that the entrepreneurs have to seek services from individual bureaucrats within the same government agency and not from the agency as a whole. As bureaucrats are responsible for providing services, this has created room for corruption as well.	The service delivery mechanism should be such that it should be responsibility of the regulatory agency and not the individual bureaucrats to provide the service. This will save the entrepreneurs from having to move from desk to desk and as they will not have to personally meet the bureaucrats, it will also control the corruption to a certain extent.

5.	Reaping the benefits of specialization	The civil servants in Nepal are transferred in every two years. This means that the government officer working at the OCR would work there for 2 years, after which they would be transferred to some other office under completely different ministry. This mostly generates a lag between the day the worker joins their new office and the day they start working, as ample time is wasted while learning the skill required to do the new job.	Bureaucrats should only be transferred within the same department or ministry in order to reap benefits of specialization.
6.	Easing up post registration compliance	There are regulations related to taxes which are very difficult to comply with. There are three different types of system of income tax under which income tax can be paid. The particular system to be followed depends upon the size of the business. The existence of multiple systems may create confusion, especially among the micro entrepreneurs because neither are they able to understand the category they fall into and the tax systems that they have to follow, nor are they financially capable to spend money on hiring an expert who could deal with these matters.	Post- registration compliance such as compliances to taxes should also be made easy. Instead of having multiple system of taxation which is difficult to comply with, a simple flat tax regime which is easy to understand should be introduced
7.	Delegation of skilled human resource	Government agencies lack skilled human resource for effective implementation of digital signature for full implementation of electronic registration.	The government should assign technical human resource to these agencies so that digital signature can be immediately be brought in practice and electronic registration of businesses could be fully implemented.
8.	Operationalize one-window service centre	Multitude of government agencies like OCR, DOI, IRO and municipality are involved in business registration process. Having to visit all these agencies has increased time and cost of starting a business.	DOI has established one-window service center to provide all the services regarding business registration from a single window, but representatives of the relevant government agencies are still absent. Bringing together representatives of all the relevant government agencies will only make one-window service system practically effective and reduce time and cost of business registration.

Summary- Starting a Business

Summary- Trading Across Borders

S. N	Agendas	Issues	Recommendations
1.	Making information pertaining to Cross- border trade easily accessible.	<p>- The custom rules has only specified the type of documents required for import and export but there is no information regarding the procedure to prepare such documents.</p> <p>- Custom rules also specifies the additional documents like recommendations, license and certificate to be obtained from various institutions as per prevailing law. In order to comply with this provision, importers and exporters will have to spend time to read various laws to check if these laws require them to obtain additional documents or not.</p>	A comprehensive document detailing out the step by step procedure for both import and export, type of documents required and the purpose of the documents should be made so that the traders can have all the information regarding cross border trade from a single document.
2.	Prompting border compliance	-Manual inspection of container has increased time required for border compliance.	Installation of scanners and using it for inspection of the goods being imported and exported at border custom office could significantly reduce the total time required for border compliance.
3.	Easing up documentary compliance	<p>-Having to prepare and submit the physical copies to the custom authorities in both India and Nepal costs several days to the traders in Nepal. This has increased the total number of days required for documentary compliance significantly</p> <p>-The Memorandum to the Protocol of Treaty to Transit requires submission of CTD, Bill of Lading, invoice, packing list, import license (whenever issued) and Letter of Credit (certified by Consular General). However, as the CTD already consists of all the entries of Letter of Credit, Bill of Lading, packing list and invoice which is declared to be correct by the exporter upon his signature, the requirement to submit these documents is an added burden to the importer/ exporter.</p>	<p>-An electronic data interchange system between the Indian Customs and Nepali Customs could reduce the time required for border and documentary compliance.</p> <p>-As CTD already consists of all the entries of Letter of Credit, Bill of Lading, packing list and invoice which is declared to be correct by the exporter upon his signature, the Memorandum to the Protocol of Treaty to transit should be amended to only include provision of having to submit CTD.</p>

Summary- Contract Enforcement

S.N.	Agenda	Issues	Recommendation
1	Easing the dispute resolution process	<ul style="list-style-type: none"> Backlog of cases Delay in proceedings Increased costs (direct and indirect) 	<ul style="list-style-type: none"> Establishment of a fast track court Allocate a greater share of budget
2	Improvement of commercial cases handling in the justice system	<ul style="list-style-type: none"> Frequent transfer of judges Narrow scope and jurisdiction of Commercial bench 	<ul style="list-style-type: none"> Advocate for a commercial court Prohibit the transfer of judges Outline the scope and jurisdiction of the Commercial bench clearly
3	Strengthening the functionality of the National Judicial Academy	<ul style="list-style-type: none"> Lack of strong skill sets Lack of updated curriculum and sufficient training 	<ul style="list-style-type: none"> Introduce training modules and review curriculum periodically
4	Installation of a proper Case Management System (CMS)	<ul style="list-style-type: none"> Manual case filings Web portal, mobile App, SMS service Lack of execution in the lower tiers 	<ul style="list-style-type: none"> Introduction of an integrated Case Management System Scope for digitization
5	Improving the effectiveness of Alternative Dispute Mechanism	<ul style="list-style-type: none"> Lack of effectiveness, cost efficiency and expertise in Arbitration Lack of awareness regarding the importance of Mediation 	<ul style="list-style-type: none"> Promote the advantages of Arbitration and Mediation as speedier and effective dispute resolution mechanisms

Summary- Resolving Insolvency

S.N.	Agenda	Issues	Recommendation
1	Ensuring the proceedings are time-bound	<ul style="list-style-type: none"> No set time ceiling and no fixed procedural costs and fees Fees are determined by the liquidator 	<ul style="list-style-type: none"> Allow creditors to fix the basis of the fees Review the time ceilings
2	Improve Creditors' Participation	<ul style="list-style-type: none"> Increased role of liquidator Low to no role of creditors in the proceedings 	<ul style="list-style-type: none"> Allow creditors to participate in the proceedings
3	Review the Blacklisting Directive	<ul style="list-style-type: none"> Automatic blacklisting if a company initiates insolvency proceedings Discourages investment 	<ul style="list-style-type: none"> Establish criteria to de-list companies from blacklist
4	Reinforce the Office of Company Registrar (OCR)	<ul style="list-style-type: none"> Establishment of Insolvency Administration Office Adds to government expenditure 	<ul style="list-style-type: none"> Strengthen the dedicated desk at OCR

Why a facilitative business environment matters; lessons from the neighbourhood

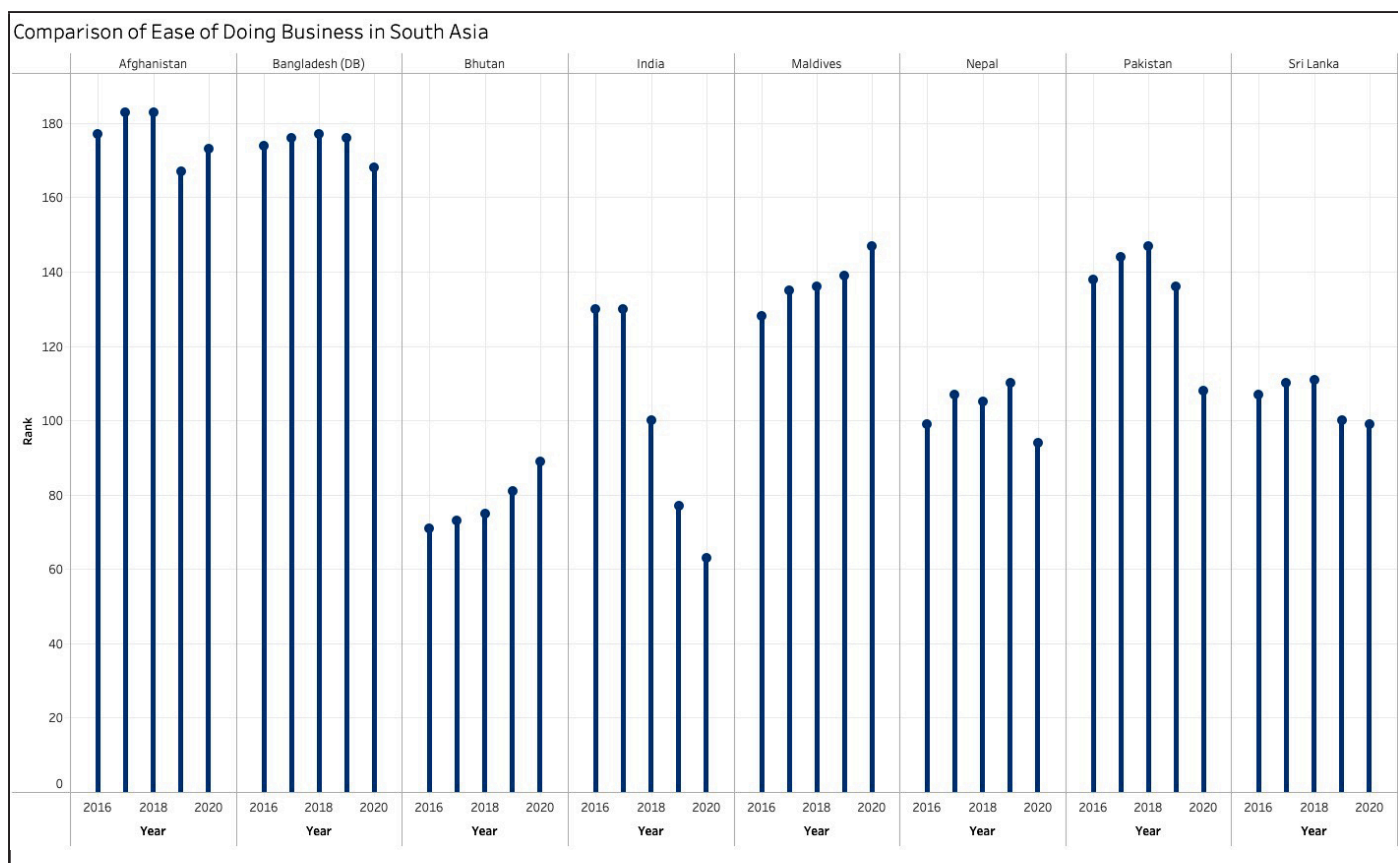
Nepali economy has been afflicted by Dutch disease for a very long time. Dutch disease, which economists describe as an economic phenomenon wherein the development of one sector precipitates a decline in other sectors. In the early 2000s, as economic opportunities in Nepal shrank, majority of the populace migrated abroad to the Gulf, Malaysia, and other parts of the world seeking for employment. The more migrants left Nepal, the more remittance they sent back home. With the increasing trend in migration, remittance became Nepal's one of the largest sources of income while agriculture and manufacturing remained neglected; the country has ever since been trapped in the 'Dutch Disease'.

The years of political instability induced by the Maoist insurgency, the second People's Movement, Madhes movements culminated in the promulgation of the Constitution of Nepal. While Nepali citizens continued to fight for their political freedom, economic freedom to push the country towards prosperity took a backseat. Since the liberal reforms of the 1990s, Nepal has paid little attention to economic reforms to achieve growth. The absence of a slew of major reforms in economic policies has stagnated the growth and economic opportunities in the country.

However, with the onset of the Covid-19 pandemic, the country is to face a reverse migration as hundreds of thousands of Nepali migrants are being laid off and are returning home. According to a preliminary study conducted by the Foreign Employment Board, 'at least 127,000 Nepali migrants are expected to return home once all travel restrictions are lifted.' (The Kathmandu Post, 2020). Similarly, the Nepal Association of Foreign Employment Agencies, a group of agencies outsourcing workers overseas, expected the number to be higher, at 500,000 (The Kathmandu Post, 2020).

As unfortunate as this pandemic is, it also presents us an opportunity to assess our policy decisions, or lack thereof, that entrapped the Nepali economy in Dutch disease. One important aspect that our policymakers have often overlooked is creating a facilitative business environment. A conducive environment to start, operate and close enterprise is key to tapping on the potential to generate employment opportunities in the country. Nepal's poor performance in the World Bank's Doing Business Index in the last five years reflects the state of doing business in Nepal. While neighboring countries improved their ranking in the index by leaps and bounds, Nepal's position has remained fairly stagnant.

A country's performance in global competitiveness indices like the World Bank's Doing Business Report, Economic Freedom of the World published by Fraser Institute and the Index of Economic Freedom published by The Heritage Foundation together signal the country's regulatory environment and give a measure of the degree of economic freedom. Economies that enjoy a higher degree of economic freedom, such as New Zealand, Hong Kong, Singapore, Australia, also rank at top positions in Doing Business report. The ease of doing business in these countries allows for economic mobility among people, which is key to these economies' pursuit of prosperity. Thus, it is safe to conclude that Nepal must prioritize improving its performance in these indices. These improved performances also signal to the investors (domestic and foreign) that the country is making effort to attract investments for its growth and is welcoming and facilitative to the entrepreneurs. In order for that to happen, the country must undertake policy reforms to reduce regulatory barriers.



Source: World Bank's Doing Business Reports, 2016-2020.

India, one of our largest trading partners, can offer us invaluable lessons on carrying out reforms that help in creating a facilitative business climate and attracting investment. In 2018, India ranked 77th as it climbed 53 spots from its 130th position in 2016. This was made possible by, among several other reforms, the introduction of an electronic system for paying employee state insurance contributions, amendment to the Companies Act that abolished the minimum capital requirement for company incorporation and eliminated the requirement to obtain a certificate to commence business operations, and the establishment of mechanisms for the efficient handling of commercial cases in the court. In these same years of ambitious reforms, India maintained a growth rate of 8.17%, and 7.17% in 2016 and 2017 respectively (World Bank, 2018).

The Indian reforms demonstrate that reforms that reduce regulatory compliances that businesses must satisfy are a must for attracting investments into the country. These reforms help the government leverage the domestic private sector as well as incentivizes foreign investors. When other South Asian countries are competing to woo the investors, the government of Nepal has instead, increased the minimum threshold for FDI to NRs 50 million, barring smaller investments. Although smaller investments have shown to generate more employment than investment above NRs 50 million. Decisions like this do not bode well for Nepal. In the wake of the Covid-19 pandemic and its immediate effect on the foreign employment industry, the government is certain to face unprecedented pressure to generate employment opportunities. However, the government alone cannot meet the need for employment opportunities. The government needs the private sector to generate more employment opportunities. For the same, the government must relax regulations that make it easier for emerging enterprises by facilitating the mechanisms to start, scale and exit the entrepreneurial ecosystem.

In order for that to occur, reducing regulatory barriers is very important. The following chapters of the paper delve deeper into Nepal's performance in specific indicators of Doing Business report and present analyses of that capture the nuances of key issues concerning these indicators. The paper also draws on international case studies that offer empirical evidence for the enactment of reforms that creates a facilitative business environment in Nepal.

Chapter I - STARTING A BUSINESS

World Bank Methodology

World Bank basically looks after 4 different parameters in order to score a country in Starting a Business category.

Number of Procedures to Start a Business- World Bank defines procedure as “any interaction of the company founders with external parties (for example, government agencies, lawyers, auditors or notaries) or spouses (if legally required).” Any procedure required by law or opted by majority of the entrepreneurs is regarded as a procedure. It also involves the pre- registration (name verification/ reservation, notarization, among others) and post registration requirements (social security registration, obtaining company seal). If an office is to be visited multiple times, each visit is considered a separate procedure. If electronic transactions are mandated by law, it is also regarded as a separate step. Professional services, if required by the law or opted by majority of the entrepreneurs (even if it is not mandatory), is also a separate procedure. If a company is mandated to open up a bank account in its name, it is also considered an additional step.

Time- Time is measured in days. In order to calculate the number of days required to complete a procedure, the median duration indicated by the incorporation lawyers or notaries is considered. The minimum time required to complete a procedure is assumed to be one day. However, if any procedures can be completed online, the minimum time required to consider to be half a day. It is assumed that the entrepreneurs have all the information they need to initiate incorporation procedure and the time spend on gathering information is not calculated.

Cost- Cost is measured as a percentage of Gross Domestic Product (GDP) per capita. While calculating costs, all the official fees, and fees for legal and professional services (if mandated by law or opted by majority of the companies) are included. Additionally, fees for purchasing and legalizing company books are also included if required by law.

Paid-in minimum capital- Paid-minimum capital is the minimum amount to be deposited by the company in a bank. The amount is to be deposited before registration or within 3 months after incorporation. World Bank while preparing the index, measures the paid-in minimum capital as a percentage of per capital income.

Time, Cost and Procedure for Starting a Business in Nepal

Procedure	Time	Cost	Agency Involved
1. Verify the uniqueness of the proposed company name and reserve it- Verify the uniqueness of a company name and reserve the name online at Verify the uniqueness of the proposed company name and reserve it online at http://www.ocr.gov.np/index.php/en/ .	Less than a day	no fees/charge	

Procedure	Time	Cost	Agency Involved
2. A professional/ companies providing legal services verifies and certifies memorandum and articles of association. It is not legally mandatory to use the professional services in order to verify the Memorandum and Articles of association (MoA and AoA). However, since there are no standard memorandum and articles of association form that entrepreneurs can use without the help of the legal professionals, majority of entrepreneurs have been opting for professional help to avoid mistakes.	5 days	NPR 10,000	
3. Buy a stamp to be attached to registration form- Before presenting the company registration form at office of the company registrar, a 5 rupee stamp available at the post office is to be attached to be form.	1 day	NPR 5	
4. Register at the Office of the Company registrar (OCR) - In order to register a company, the promoter must submit an application as prescribed by Ministry of Industry (Mol). All the documents have to be initially filed online. After filing all the required documents online, the original documents is also to be submitted to the OCR.	1 week	NPR 9,500	
5. Make a company seal/ rubber stamp	1 day	NPR 275	
6. Register at the Local ward and pay business registration tax	2 days on average	NPR 2,000	
7. Register for Value Added Tax (VAT) and income tax at the Inland Revenue Office (IRO).	1 day	no fees/charge	
8. Enroll the employees in the Social Security Fund- According to the Labor Act 2017 and Social Security regulations (November 19, 2018) companies are required to deduct every month 10% from the basic salary of each employee, matched by a contribution from the employer. The contribution is made to the Social Security Fund. The employer further needs to pay gratuity amount at the rate of 8.33 percent of basic remuneration and deposit at social security fund at the time of payment of services may it be daily or monthly.	5 days on average	no fees/charge	

Source: Doing Business Report 2020

Various Issues overlooked by Doing Business Report

Apart from the procedure mentioned in the World Bank's Doing Business Report, businesses also have to comply with additional regulation of registering with Department of Industry. An entrepreneur has to submit documents specifying project details or scheme, company incorporation certificate, copies of MoA and AoA, citizenship certificate along with prescribed form.

Again, if the industry to be registered is categorized as harmful to the environment, the business has to get the Initial Environment Examination (IEE)¹ approval. The report is analysed by the Department of Industry (DOI). After the report is analysed and if it is found that the industry will not have any significant negative affect on environment, Environment Protection Regulation specifies that DOI should give IEE approval within 21 days from the date when application was received. However, a study conducted by Samriddhi Foundation has shown that there has been instances where obtaining the IEE approval has taken from 3-6 months. Instances like this have occurred as there is no provision regarding the circumstance when the approval cannot be granted within 21 days.

Besides the requirements of DOI, some special industries need recommendation letter from related offices or departments, for example Tourism Office for lodges with more than 10 beds, Department of Livestock Services for meat shop, Department of Food Technology and Standards for food processing industries etc. There are additional regulations to be met by entrepreneurs which requires visiting additional government agencies and preparing additional documents which costs more time and money. Hence, these additional compliances are also to be considered while calculating the actual time and cost of business registration and reforms are also to be made by considering these.

1 As per the Environment Protection Regulation, 2054, businesses related to forest, industry, mining, roads, residential construction or urban development, water resources and energy, tourism, water, waste management, agriculture and health require an IEE if they fall under the criteria.

COMPANY REGISTRATION PROCESS

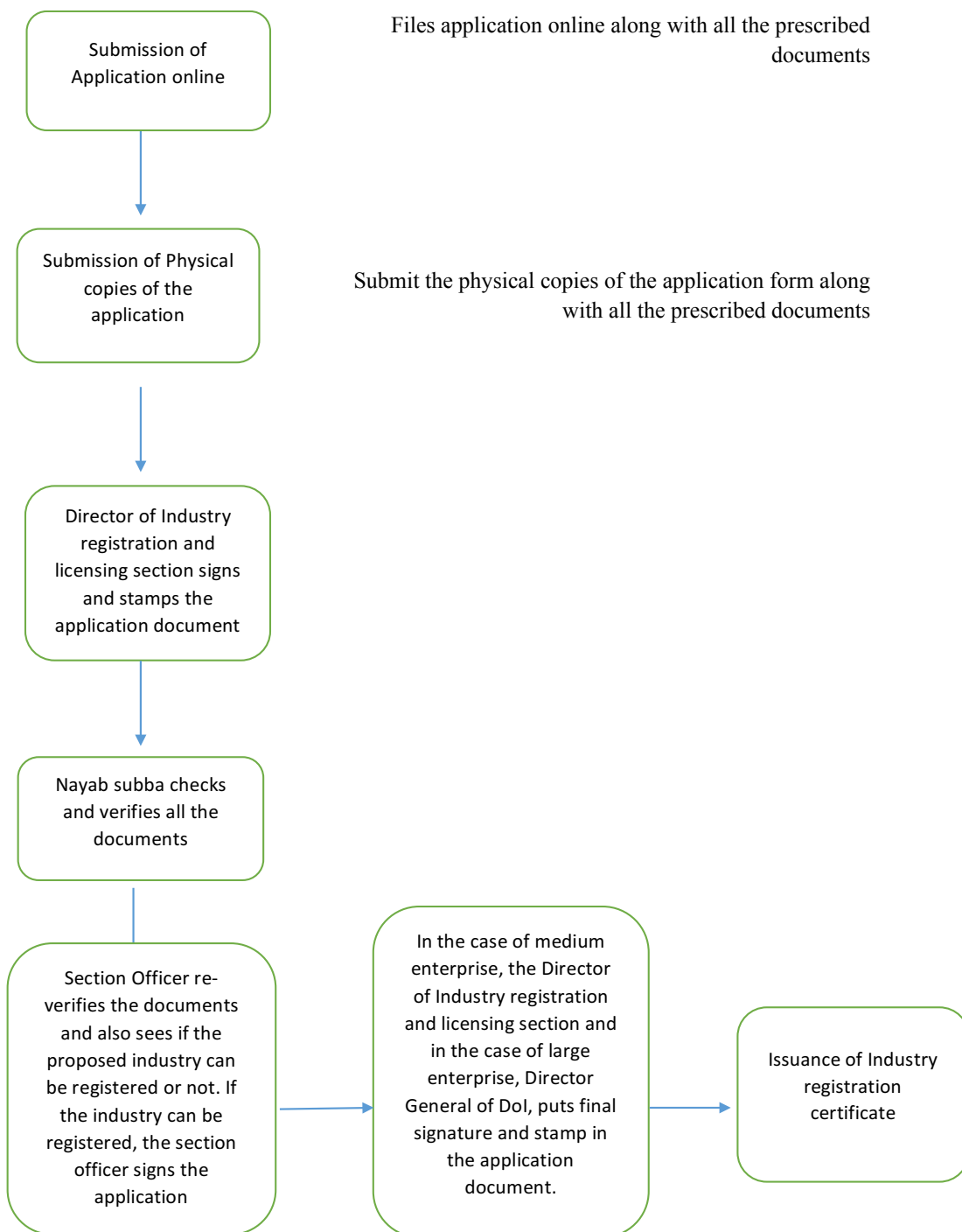
Official Duration: 7 Days

- Online Applicant
- Computer Operator
- Assistant Registrar
- Deputy Registrar
- Accountant
- Branch Officer | Senior Assistant | Senior Registrar

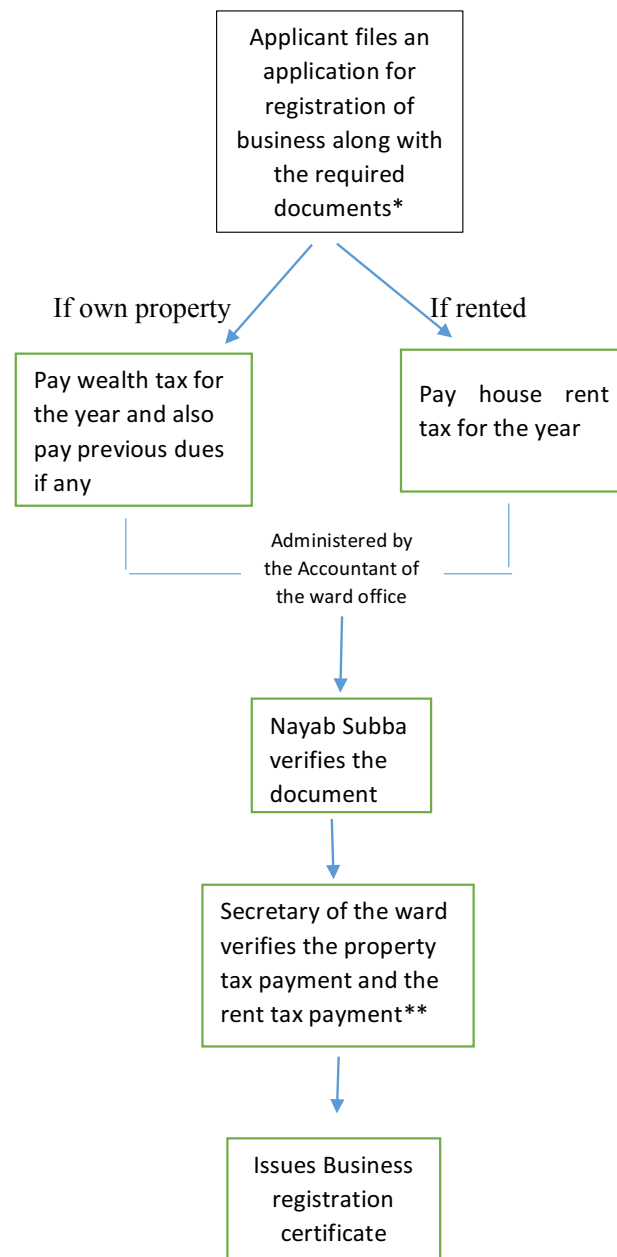


* According to OCR'S official work flowchart, the applicant should go to Deputy Registrar directly. But in practice, it goes through this addition step.

Process Map of Industry Registration at Department of Industry



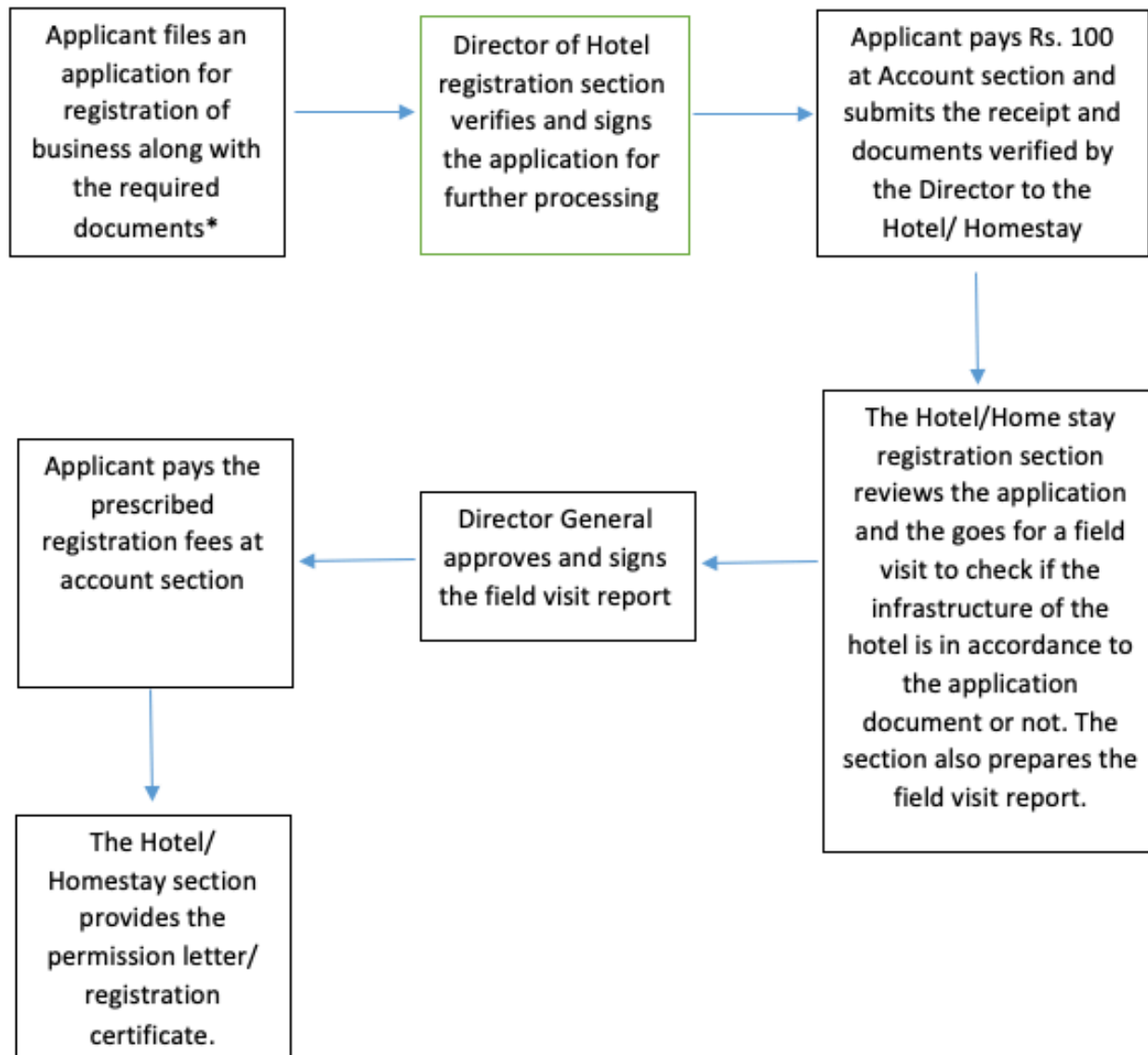
Process Map of Business Registration in the Municipality



*Registration Application form, Photocopy of Citizenship, Company or firm registration certificate, Property ownership certificate or rental agreement.

** Checks if the property valuation is in accordance with the municipal valuation. If in doubt field visit is done to check the property of the taxpayer.

Process Map of Business Registration at concerned government department (Registration of hotel at Department of Tourism has been taken as a sample)



*Application letter on the official letterhead of the company/ firm, municipality certified map of construction work, photocopy of the citizenship certificate of shareholders, photocopy of the certificate of landownership of the company, certificate of rental agreement if the land and building is rented, industry registration certificate, company registration certificate (in the case of company), photocopy of Memorandum and Articles of Association of the company, certificate of PAN registration, IEE report if the number of beds are 50- 100 and EIA report if the number of beds are more than 100.

Analysis

1. Difficult to prepare Memorandum and Articles of Association

The second procedure which costs the most amount of money and significant amount of time, can be entirely avoided. Currently, the entrepreneurs are not able to prepare MoA and AoA without professional help. Even though formats of MoA and AoA are available and provided by the government, entrepreneurs cannot use it themselves without any professional help from lawyers. As per the World Bank, entrepreneurs find it difficult to avoid mistake while preparing these documents themselves. It requires NPR 10,000 and takes 5 days for the preparation of these documents, which is a huge percentage of the total time and cost involved.

Hence it is highly recommended that MoA and AoA is to be substituted with a single document which only requires entrepreneurs to fill basic information about the company, its shareholders and objectives. This could reduce the cost and time of starting a business significantly. The new proposed amendment of the Companies Act, 2006 has withdrawn the previous provision of having to submit MoA while making application to register a company. Hence, submitting only AoA will suffice. This is a commendable move which should immediately brought into effect.

2. Redundancy in Application Procedure

Secondly, online filing of the documents and again having to present physical copy of the original documents is redundant. This procedure could be reduced to a single step by making the registration at the OCR completely electronic. However, due to the lack of implementation of digital signature and electronic transaction, making the registration process completely digital has not been possible. If electronic registration cannot be immediately brought into implementation, the process of having to submit documents online should be entirely removed.

3. High incorporation fees

Additionally, the incorporation fee is also very high. It is more than 10 percent of the per capital income. Reducing this fee can significantly reduce the cost of starting a business. However, the government might not easily accept the idea of reducing the fee as it directly affects their total revenue. Therefore, it will be very difficult to advocate this idea. However, if we can show that there is negative relationship between high incorporation fees and number of new businesses being established, we can show that reducing incorporation fees might increase the number of new companies coming into that market. The increased number of companies means higher revenue base which can cover the deficit arising from reduction in the fees. Additionally, as more numbers of companies get registered, the total tax base of the economy also increases which leads to increased revenue from various taxes² these corporation will be paying in the process of their operation. Thus, the increased revenue will more than offset the reduction in the revenue resulting from reduced incorporation fees. Apart from this, when new businesses and companies enter into the market they will also be creating additional jobs in the economy. The additional jobs created will also serve as the tax base as the taxes paid by these new employees will also be deposited into government's vault. Hence, the cost of reduction in the incorporation fees will be negligible in compared to the total benefits received out of it.

If we take figures from World Bank's figure, the total cost of company registration is NPR 21,780. The data obtained from Central Bureau of Statistics (CBS) shows that Gross Domestic Savings (GDS) per capital of Nepal is about NPR 15510. These figures show that an entrepreneur has to save for 16 months just to register a new company.

² The taxes to be paid under various tax headings can be found in the 'Paying Taxes' indicator of Doing Business Index which has been covered in the separate chapter in the paper.

4. Excessive bureaucracy

One of the difficulties in registration of a business is bureaucratic hurdles. Excessive bureaucracy has led to increase in the time of business registration. Currently, multiple layers of tasks have to be conducted under the same government agencies. Entrepreneurs themselves have to move from one desk to another to get services from different government officials (like getting signatures and approvals). This has created a maze within the regulatory office. The service delivery mechanism is such that the entrepreneurs have to seek services from individual bureaucrats within the same government agency and not from the agency as a whole. As bureaucrats are responsible for providing services, this has created room for corruption as well.

5. Frequent transfers of government employees

The civil servants in Nepal are transferred in every two years. This means that the government officer working at the OCR would work there for 2 years, after which they would be transferred to some other office under completely different ministry. This mostly generates a lag between the day the worker joins their new office and the day they start working, as ample time is wasted while learning the skill required to do the new job. During this lag time, the government officials are not able to work efficiently and deliver the services effectively which leads to rise in time required for business registration. Also, because of this we have not been able to reap benefits of specialisation. To list a few of the benefits, specialisation helps to work more effectively. Secondly, with years of experience in the same field, workers would be better decision makers, especially in bureaucracy where lots of discretionary powers are given to bureaucrats. Thirdly, with years of hands-on experience doing day-to-day chores, workers would be able to identify their weak areas and improve on those.

6. Cumbersome post registration compliances

Businesses, especially micro and small ones are reluctant to register and are instead operating their businesses informally, not only because of the hassles faced by them while registering their business but also because of the various compliances to be met while operating the business. For example, there are regulations related to taxes which are very difficult to comply with. There are three different types of system of income tax under which income tax can be paid. The particular system to be followed depends upon the size of the business. The existence of multiple systems may create confusion, especially among the micro entrepreneurs because neither are they able to understand the category they fall into and the tax systems that they have to follow, nor are they financially capable to spend money on hiring an expert who could deal with these matters.

7. Lack of skilled human resource

The infrastructure for the implementation of digital signature which is the most important factor for electronic registration of businesses are in place at the government agencies responsible for business registration. But, these agencies lack skilled human resource for effective implementation of digital signature for full implementation of electronic registration.

8. Multiple regulatory agencies involved

One of the common problems faced entrepreneurs is the hassle and cost of visiting a multitude of government agencies like OCR, DOI, IRO and municipality to get their businesses ready for operation. Even though the direct cost of registration or fees may not be very high, the indirect cost manifested in the form of labour cost and time is highly significant (Shrestha and Venaik, 2018).

Nepal's reform process

The debate about e-governance has been going for a long time in Nepal. Nepal saw initiation of e-governance after the enactment of the Electronic Transaction Act, 2008 which finally recognized digital signature. The Office of the Controller of Certification (OCC) which is the legal body responsible for the validation of digital signature is also in place. It is also the root certifying agency and it has also appointed Certifying agency whose task is to generate uncertified digital signature for public use. These agencies have already developed necessary infrastructure and technology for generating uncertified digital signatures, certifying them and storing public key signatures. In simple terms, all the pre-requisites have been fulfilled for the use of digital signature in practice. However, the Office of the Company registrar and Inland Revenue Office which are the two major government agencies responsible for company incorporation do not accept digital signatures. Even though necessary infrastructure have been built in these agencies, due to the lack of technical manpower who can help bring digital signature into practice.

The new proposed amendment of the Companies Act, 2006 has withdrawn the previous provision of having to submit MoA while making application to register a company. Hence, submitting only AoA will suffice. The amendment should immediately be ratified and brought into effect.

International experience

World Bank's Doing Business Report 2010 presents various cases where digitalization of registration process has had significant positive impact. In Bangladesh, introduction of online registration system has increased the business registration by 90 percent. Similarly, Malaysia saw an increase in new business registration by 19 percent in 3 years after the company registry invested USD 12.7million in a sophisticated electronic registration infrastructure over a period of 5 years. Also, the investment was fully recovered through the fees generated from the new businesses by the registry.

Starting from 2010 Chile has made several reforms in Starting a Business. Of those reforms, the major reform was introduction of online system of company registration. As a result, the time taken to register a company in Chile fell from 27 days in 2009 to 5.5 days in 2013.

In 2010, Armenia merged three of the procedures into one and made the system electronic. Reserving a business name, registration of company and tax identification number issuance was merged into a single step which could be done electronically. In a similar manner, Liberia made the business registration process completely online, whereby the entire registration process can be completed within 1.5 days. Moreover, entrepreneurs can also track their application status online.

Estonia's reform on starting a business by launching electronic business registration portal can be considered one of the most successful reforms. The company registration portal was launched in 2007 and currently, 85 percent of the new private limited are registered through this portal.³

In January 2008, Azerbaijan started the operation of one-stop shop for business registration. This single reform reduced the time and cost in starting a new business by half. Furthermore, business registration increased by as high as 40% in just 6 months. (Doing Business 2009, 2008)

³ <http://www.rik.ee/en/international/e-business-register>

Recommendations

1. Substituting Memorandum and Articles of Association by a single document

It is highly recommended that MoA and AoA is substituted by a single document which can be easily prepared by layman without any professional help. This could reduce the cost and time of starting a business significantly.

2. Allocating technical human resource for effective implementation of electronic registration

Even though agencies like OCR, IRD, and DOI have built necessary infrastructure for accepting digital signature, they lack technical human resource for administering it. Hence, the government should assign technical human resource to these agencies so that digital signature can be immediately be brought in practice and electronic registration of businesses could be fully implemented.

3. Reducing Incorporation fees

Registration fees amounts to more than 10 percent of the per capital income which is very high. By reducing the incorporation fees, many informal and new businesses can be attracted to get registered. As many new businesses will get registered, the loss in the revenue resulting from the reduction of the fees can be easily recovered through the increased revenue base.

4. Making regulatory agencies responsible instead of individual bureaucrats

Multiple tasks have to be performed under the same government agency for which entrepreneurs themselves have to move from one desk to another. This has created a maze within the regulatory office which has created confusions and made the registration process more complicated to the entrepreneurs. In order to solve this problem, the service delivery mechanism should be such that it should be responsibility of the regulatory agency and not the individual bureaucrats to provide the service. This will save the entrepreneurs from having to move from desk to desk and as they will not have to personally meet the bureaucrats, it will also control the corruption to a certain extent.

5. Easing up post registration compliance

In order to encourage small and micro businesses who are operating informally, post- registration compliance such as compliances to taxes should also be made easy. Instead of having multiple system of taxation which is difficult to comply with, a simple flat tax regime which is easy to understand should be introduced. As post registration compliance also plays an important role in entrepreneurs decision to register new businesses, these should also be made easy.

6. Transfer of bureaucrats within same department/ ministry

Frequent transfers of bureaucrats has been cited as one of the reasons which has adversely affected service delivery. Also, we have not been able to rip benefits of specialisation. Therefore, it is highly recommended that the bureaucrats should only be transferred within the same department or ministry.

7. Operationalize one-window service center

DOI has established one-window service center to provide all the services regarding business registration from a single window, but representatives of the relevant government agencies are still absent. Bringing together representatives of all the relevant government agencies will only make one-window service system practically effective and reduce time and cost of business registration.

Chapter II - TRADING ACROSS BOARDERS

World Bank Doing Business Methodology

While calculating the index of Trading across borders, World Bank (WB) looks at the time and cost involved in completing the documentary compliance, border compliance and domestic transport in the process of exporting or importing a consignment. The economies are ranked on the basis of distance to the frontier score of trading across borders category. The scores are calculated by taking simple average of distance to the frontier scores for time and cost of border and documentary compliance to export and import.

Documentary compliance- Time and cost involved in compliance with the documentary requirements of all government agencies in the origin economy, the destination economy and transit economy are accounted for in documentary compliance. It includes the time and cost involved in obtaining documents such as time and cost to get the documents issued and stamped), preparing documents (for example, time spent on gathering information to complete customs declaration or certificate of origin), processing documents (such as time taken for the authority to issue a phytosanitary certificate), presenting documents (such as time spent showing a port terminal receipt to port authorities), and submitting documents (such as time spent in submitting customs declaration to the customs agency). Additionally, any documents prepared and submitted in order to get access to preferential treatment like certificate of origin are included in calculation of cost and time. Any documents prepared and submitted because of the perception that they ease the passage of shipment are also included in the calculation.

Border Compliance- Border compliance measures the time and cost involved in compliance with the economy's custom regulations and with regulations related to other inspections that are mandatory in order for the shipment to cross the economy's border. Additionally, time and cost for handling at port or border is also accounted for. If any custom inspections takes place at a location other than the border or port, the time and cost involved in such inspections are also added. If inspections by other agencies such as the ones conducting inspections related to health, safety, phytosanitary standards, etc. are conducted in more than 20 percent of the cases, then time and cost for such inspections are also included.

Nepal's current status

While calculating the time and cost of import, a single shipment (15 metric tons) of containerized auto parts in considered from the economy exporting the largest value of the auto parts is considered. Whereas, calculation of time and cost of export involves the time and cost of exporting a shipment of the product of comparative advantage (product of largest export value) to the country which is the largest buyer of the product is considered. In the case of Nepal Iron and steel is considered as the product of largest export value by the World Bank. For both import and export, Birgunj is considered as the major border whose distance from the major city (Kathmandu) is 140 km. Domestic transport time for export is 16 hours and import is 19 hours. Similarly transport cost for export is 220 USD and import is 407 USD.

Documents required for Import and export in Nepal

Documents required for Import	Documents required for Export
EXIM certificate	Commercial Invoice
Certificate of Origin	Roadway Bill
Shipping Bill (Bill of Export)	Export permit
BBN	Packing List
Single Administrative Document	Certificate of Origin (VSC)
Truck Chalan	Custom Export Declaration
Document of Insurance	Authority Letter
Type of Approval (for auto parts)	Single Administrative Document
Packing List	Special Vehicle Permit
ARE- 1	EXIM certificate

Source: Doing Business Report 2020

Time and Cost of Import and export in Nepal

Import	Time (hours)	Cost (USD)
Clearance and inspection by customs	10	190
Clearance and inspection by agencies other than customs	0	0
Port and border handling	11	0

Export	Time (hours)	Cost (USD)
Clearance and inspection by customs	10	92.9
Clearance and inspection by agencies other than customs	0	0
Port and border handling	11	10

Source: Doing Business Report 2020

Analysis

1. One of the problems currently faced by exporters and importers, specifically small and medium ones is lack of proper access to detailed information regarding the preparation of documents required for cross-border trade. The custom rules has only specified the type of documents required for import and export but there is no information regarding the procedure to prepare such documents. Hence a lot of time has to be spent on gathering information for the preparation of these documents which increases the total time to be spent on complying with documentary requirements. Also, apart from the list of documents required for import and export, Custom rules also specifies the additional documents like recommendations, license and certificate to be obtained from various institutions as per prevailing law. In order to comply with this provision, importers and exporters will have to spend time to read various laws to check if these laws require them to obtain additional documents or not. This further increases the time required for documentary compliance.
2. Regarding border compliance, the total time required for border compliance is longest among the land locked countries. The manual inspections of containers has been cited by freight-forwarders as one of the reason for such delay. Customs in Nepal have not made use of the scanners for inspections of the goods and hence the goods are still being inspected manually. This has unnecessarily increased the time required for border compliance.
3. According to the Customs Regulation 2007, importer or exporter may clear the goods or perform other works related to customs or they may also appoint a licensed custom agent to perform such works for them. This gives them the choice. However, while talking to the freight forwarders, it was found that traders mandatorily have to appoint a custom agent in practice. Hence, there exists discrepancy between what is mentioned in the law and what is actually in practice.
4. Currently, importers and exporters have to prepare physical copies of the all the documents that are required for cross-border trade. Even though Automated System for Custom Data (ASYCUDA), a computerized system designed by United Nations Conference on Trade and Development (UNCTAD) for automation of custom procedures has been adopted by Nepal, it has only been used for filing Custom Declaration or Single Administrative Document. The physical copy of all other documents along with the printed copy of Custom Declaration has to be prepared by the traders. Having to prepare and submit the physical copies to the custom authorities in both India and Nepal costs several days to the traders in Nepal. This has increased the total number of days required for documentary compliance significantly. Currently, the Custom Transit Declaration (CTD) has to be made in sextuplicate by the importer. Upon arrival of goods at Kolkata port, the Custom House endorses all the copies of CTD, hand over the original copy to the importer, send duplicate and triplicate to Indian border customs officer by post and retains the remaining copy. Upon arrival at border land customs or border railway station, the importer has to present the original copy of CTD endorsed by the Indian Customs House of entry to Indian custom officer at border land custom station who then compares the original copy with duplicate and triplicate received by him and endorses all the copies of CTD. The Indian custom officer then hand over the original copy of CTD to importer, send the duplicate to Indian Custom House at the port of entry, send the triplicate to Nepalese custom officer. Then, after being endorsed by Nepalese Custom Officer at the corresponding Nepalese post, it retains the triplicate copy for the record.

Here, the process of circulation of copies of CTD among Indian custom house of entry, Indian custom officer at border and Nepalese custom officer has increased the border compliance while importing from third country. Use of electronic data interchange system for sharing CTD along with other

documents among various parties mentioned above could significantly reduce the border compliance time.

5. The Memorandum to the Protocol of Treaty to Transit requires Submission of CTD, Bill of Lading, invoice, packing list, import license (whenever issued) and Letter of Credit (certified by Consular General). However, as the CTD already consists of all the entries of Letter of Credit, Bill of Lading, packing list and invoice which is declared to be correct by the exporter upon his signature, the requirement to submit these documents is an added burden to the importer/ exporter.
6. The trade and transit treaty agreement between Nepal and India specifies that Goods specified as sensitive goods from time to time with prior intimation to the Government of Nepal, shall be covered by insurance policy or bank guarantee. This provision has been made so that Indian customs is able to realize the duties in case Nepal bound goods do not reach Nepal. However, the basis of determining the list of sensitive goods is not clear and even the list is not made available in the timely manner. Also, only two insurance company, Indian National Insurance Company Limited and Oriental Insurance Company have authority to issue guarantees. This has led the premium level to be higher than what would have been in a more competitive setting (Taneja, Bimal and Dayal, 2016).

Nepal's Performance compared with other countries

In Trading across Borders category of World Bank's Doing Business Report, Bhutan is the top performer among South Asian economies. It ranks 30 in the global ranking of Trading across Borders. Both Bhutan and Nepal's major export includes Iron and Steel⁴. Moreover, both the countries are land-locked and have India as a major trading partners. Despite similar characteristics, the ranking of these economies are nowhere near to each other. Nepal is in 60 position, 30 place below Bhutan.

	Bhutan	Nepal
Time to export: Border Compliance (hours)	5	11
Cost to export: Border Compliance (USD)	59	103
Time to export: Documentary Compliance (hours)	9	43
Cost to export: Documentary Compliance (USD)	50	110
Time to import: Border Compliance (hours)	5	11
Cost to import: Border Compliance (USD)	110	190
Time to import: Documentary Compliance (hours)	8	48
Cost to import: Documentary Compliance (USD)	50	80

Source: World Bank Doing Business Report 2020

⁴ World Bank has taken Iron and Steel as the major export item of both Nepal and Bhutan to measure the time and cost involved in export.

Regulatory Compliance for Import in Land locked countries

Countries	Border Compliance		Documentary Compliance		Number of Documents Required
	Time (hours)	Cost (USD)	Time (hours)	Cost (USD)	
Botswana	4	98	3	67	5
Czech Republic	0	0	1	0	4
Macedonia	8	150	3	50	6
Mongolia	48	210	115	83	6
Serbia	5	52	3	35	7
Bhutan	5	110	8	50	6
Nepal	11	190	48	80	10

Regulatory Compliance for Export in Land locked countries

Countries	Border Compliance		Documentary Compliance		Number of Documents Required
	Time (hours)	Cost (USD)	Time (hours)	Cost (USD)	
Botswana	3	317	18	179	7
Czech Republic	0	0	1	0	4
Macedonia	9	103	2	45	6
Mongolia	134	225	168	64	9
Serbia	4	47	2	35	7
Bhutan	5	59	9	50	8
Nepal	11	103	43	110	10

Source: World Bank Doing Business Report 2020

The above two tables compare the regulatory compliance for export and import in land locked countries. Among the land locked countries, Nepal is the worst performer after Mongolia in Trading across Borders category of the Doing Business Index. Time and cost required for both border and documentary compliance in Nepal are very high even among the land locked countries.

Notable Reforms

Benin is one of the countries which has made most number of reforms in Trading across Borders. In 2008/09, Benin introduced electronic data interchange system, thus reducing time needed to clear goods through customs. Again in 2011/12, Benin implemented electronic single window system integrating customs, control agencies, port authorities and other service providers, which again reduced the time to export and import. Again in 2013/14, Benin made imports less time consuming by reducing the number of documents required for imports.

Sri Lanka made trading across border easier by introducing a new electronic data interchange system that enabled electronic submission and processing of custom declaration. In 2012/13, Sri Lanka made trading across borders by easier by introducing an electronic payment system for port services. Further in 2016/17, Sri Lanka made exporting and importing easier by developing a custom single window.

Similarly, Botswana expedited the process of customs clearance by installing scanners for inspection of goods.

Recommendations

1. The detailed procedure regarding import and export is not easily available and hence traders, specifically new ones face difficulties while trading across borders. Even though the custom rules have specified the documents required from imports and exports, it also has a provision of requirement of additional documents like recommendations, license and certificate to be obtained from various institutions as per prevailing law. In order to access the information regarding all these documents various laws have to be referred which costs a lot of time. Hence, a comprehensive document detailing out the step by step procedure for both import and export, type of documents required and the purpose of the documents should be made so that the traders can have all the information regarding cross border trade from a single document. It will reduce the time required for preparing the necessary documents, thus improving Nepal's rank in one of the sub-indicators of Trading across Borders in Doing Business Index of the World Bank.
2. Manual inspections of the goods by customs has increased the total time required for border compliance. Installation of scanners and using it for inspection of the goods being imported and exported at border custom office could significantly reduce the total time required for border compliance.
3. An electronic data interchange system between the Indian Customs and Nepali Customs could also reduce the time required for border and documentary compliance. As mentioned above, the circulation of physical copy of documents like CTD among Indian Customs House of entry, Indian Custom office and Nepali Custom office at border which requires a lot of time could be entirely avoided with introduction of Electronic Data Interchange system.
4. With the introduction of Electronic Cargo Tracking System (ECTS) for Nepal- bound cargoes from Vishakhapatnam (Vizag) port traders will be able to enjoy transshipment facility and they will not be required to carry out CTD at Vizag port and it will be done at Inland Clearance Depot (ICD), Birgunj (The Himalayan Times, 2018). With this time and cost of third country trade is expected to be reduced significantly. Therefore, it is recommended that ECTS should also be extended to Kolkata-Haldia port from which highest volume of third country trade takes place. This will reduce the cost of third country trade for all the traders.
5. As mentioned above, currently only two insurance company, Indian National Insurance Company Limited and Oriental Insurance Company have authority to issue guarantees in cases of the sensitive goods as declared by India, which has caused the premium level to be high. The premium would be lesser in a more competitive setting. Hence, giving permission to other insurance companies to issues guarantees could significantly reduce the premium.

CHAPTER III- CONTRACT ENFORCEMENT

1. Easing the dispute resolution process

The three perennial problems of cost, delay and complexity have been inflicting the justice system in Nepal. At present, the High Court and the District Court have comparatively less backlogs as compared to the Supreme Court. As per the Annual Report of Supreme Court 2075/76, 71.81 percent of the cases are solved in the High Court, 75.22 percent in the District Court and only 30.76 percent in the Supreme Court; while the rest are pending. Such backlog in the judiciary system results in the delay of proceedings, not to forget that it also results in lack of accessibility of justice to the average citizen. As the dockets get crowded, it takes more time to resolve a dispute through the judicial system and results in the parties having to bear additional costs. According to the data of the Doing Business, enforcing a contract in Nepal takes an average of 910 days, which is equivalent to approximately 2.5 years, and costs 27.3% of the value of the claim. This not only increases the direct costs (court fees and attorney fees) but also surges the transaction costs (time spent in court, cost of preparation, bribes).

Recommendation

Since litigation is high at cost and slow in proceedings, businesses and entrepreneurs can seek for either Mediation or Arbitration, both of which account as efficient, low-cost and quick alternatives. In order to reduce the backlog, targets need to be set for the elimination of older cases. The backlogs can be settled systematically starting with the closure of the oldest cases and moving up with the recent ones. The inactive cases need to be separated for rapid closure or for further processing, depending on the interest of the parties. This can be done through the establishment of a fast track court, by adding the number of judges and/or by designating a particular day in a week for the disposal of the pending cases. Grenada assigned an additional judge to the high court for reducing backlogs and easing contracts enforcements. The backlog reduction can also be curbed by the introduction of a case management system and a tracking system. A tracking system will facilitate the closure of older cases. The cases can be assigned to the judges based on weekly quotas. This not only will help to control the perennial problems of cost, delay, complexity but also will help lessen the backlog. In 2015, Portugal adopted a new code of civil procedure that has since assisted in reducing case backlogs, streamlining court procedures and enhancing the role of judges to speed up the resolution of standard civil and commercial disputes.

Moreover, as the budget allocation for the judiciary is comparatively lower than other sectors, the government needs to increase the budget share. This will thus enable the judiciary to enhance its performance.

2. Improvement of commercial cases handling in the justice system

The judicial system in Nepal is deemed to be slow, unpredictable and vulnerable to excessive politicization and corruption. The key problems and bottlenecks in the various tiers of the justice system are outlined below.

Courts

The commercial bench was introduced with an intention to provide specialized and prompt service. However, this hasn't been the case. Not only the judges but also the judicial officers on the panel are subject to rotations every two years. Even though this model has been posed by the Government of Nepal to ensure that the remote areas of the country get the same quality access to justice, this administrative arrangement has resulted in the inability to build sectoral expertise in part of both

the judges and the judicial officers. Similarly, even within a single posting, the judges are transferred to different benches thereby leading to inconsistency and incompetency in the area of commercial know-how.

As per the Court Procedure Rules⁵, five types⁶ disputes are directed to the commercial bench without a preliminary hearing elsewhere in the court system. Other commercial cases are redirected to the commercial bench by the Chief Judge at the High Court. Likewise, contractual disputes may or may not be included in the commercial bench's first instance jurisdiction and are thus taken to the District Court with a prospect of reaching the specialist bench only through appeal to the High Court. This shows that the scope as well as the jurisdiction of the commercial bench is narrow as the commercial cases either directly go to the commercial bench or go to other courts or tribunals that are supervised by the commercial bench (Economic Policy Incubator, 2018).

Tribunals

The tribunals consist of a panel of three- one judge and two legal professionals- who oversee the cases. Similar to the court system, the judge at the tribunal is deemed to frequent rotations that prevents him/her from being acquainted with the technical know-hows. This further leads to poor judgement. Due to severe backlog, the case proceedings in the tribunals are slow and thus take a longer time to conclude. The already lengthy and delayed proceeding is followed by appeals to higher tiers of court thereby increasing the cost of litigation.

Judicial Committees (JCs)

The JCs are headed by the deputy mayor in the municipalities and by the deputy chairperson in rural municipalities who deliver justice on specific disputes at the local level. With the transition to the federal structure, the local level structures themselves are in a state of disarray. To top it all, the elected representatives who are also new to the recent change, lack experience in managerial matters, let alone judicial processes. This thwarts the entire intention of creating the JCs as a place to settle cases promptly and enhancing access to justice at the local level.

Recommendation

Courts

In order to establish an efficient court system, a commercial court needs to be advocated for. A commercial court will automatically eliminate the issues associated with the frequent rotations of judges and judicial officers and appoint judges who have considerable expertise on commercial cases. Established in 2008, The commercial courts in Rwanda were introduced to handle commercial matters in order to deal with the backlog of commercial cases and speed up the resolution of business disputes. As of 2018, Rwanda's judiciary pushed for more uptake of mediation in commercial cases in a bid to reduce the huge number of cases flooding the relatively young commercial courts and also to develop a well-functioning court-based mediation process that complements the existing litigation system.

If the commercial court cannot be brought into place and the commercial bench continues to be in operation, efforts can be made to review and strengthen the bench. The judges and the judicial officers should not be transferred for at least a span of five years. This immobility will allow them to build the necessary sectoral expertise pertaining to large scale commercial undertakings and contract interpretation. Likewise, if the NJA is able to provide substantial training to all the judges equally, both

⁵ Chapter 7, High Court Procedure Rules, 2073

⁶ Banking Offence and Punishment Act 2066, Company Act 2063, Competition Promotion and Market Protection Act 2063, Insolvency Act 2063 and Secured Transaction Act 2063

the judges and the court system can be self-standing without the need to rotate judges to the remoter areas. Moreover, the scope as well as the jurisdiction of the commercial bench should be outlined clearly, preferably in the High Court Procedure Rules, so that all the concerned cases are redirected to the commercial bench and are not disseminated in different tribunals/benches.

Tribunals

The same reforms that are used in a court system can be employed in the tribunals whereby the judge is prohibited from transfers as well as the existent backlog can be curbed.

Judicial Committees

There is a need to provide orientation and training to office holders on the judicial matters. A handbook that provides an easy and effective protocol in addressing disputes in a specific manner can be prepared. If we can strengthen the Judicial Committees, the jurisdiction of the District Court can be gradually transferred to these local courts (Pradhan, 2018). Council of Europe has its educational platform on human rights for judges and prosecutors and lawyers. Likewise, The European Judicial Training Network has been helping to coordinate, through its members, national training activities across the European Union and to develop a cross-border training offering for judges and prosecutors.

3. Strengthening the functionality of the National Judicial Academy

As per consultations with the experts, it was found that there exists a need to acquaint the judges, judicial officers, government attorneys and private law practitioners with a stronger skill set in order to successfully settle the disputes and result in stronger judgements. Since, NJA is the autonomous body that orients these individuals to the emerging ideas of law and justice and enhances their professional competence, the role played by NJA to institute attitudinal changes and streamline the practices to deal with commercial cases hasn't been effective. Likewise, the curriculum and regular training do not incorporate subject matters that are relevant to the sound understanding of the market and businesses in practice.

Recommendation

In order to build competence in the commercial law practices, the NJA can pool resources to support and facilitate the reforms in the judiciary. The NJA can facilitate judicial training in commercial law to conduct efficacious trials for legal professionals. These training modules need to be created for a particular case so that the professionals can build greater proficiency in the same. Likewise, the curriculum needs to be reviewed periodically. The rapid changes in the market need to be incorporated in the curriculum and there must be continuous consultation with the business community concerning topical issues that may give rise to legal disputes. The Judicial Institute of Scotland is equipped with the state-of-the-art technology that enables the Judicial Institute to deliver a wide range of training courses to the judges to ensure that they are in a position to deal with the raft of new legislation and case law, and that they are fully conversant with courtroom technology and case-management expectations.

4. Installation of a proper Case Management System (CMS)

At present, Nepal has a Supreme Court (SC) web portal allows public users to enquire and effectively track the status of their cases and position in the court. The SC also has an official mobile app which is part of the digital drive and e-governance. Also, the SC sends SMS to the applicants for three main services- registration of a case, final hearing date and status of the case at the bench. While the provision of the web portal is available at the tribunals and special court and lower tiers of the court, the SMS service is not included in this particular scheme.

However, the registries of case filings are still manual which add to the cost of both the clients and the legal professionals.

Though we cannot discredit the technological developments that have taken place in the recent years, the system still lacks decent execution of such technological solutions. The concerned people are not trained in order for them to incorporate the technological improvements in their everyday work.

Recommendation

A well-functioning CMS that enables the creation of a database for judges to deal more effectively with their caseloads, is essential. A CMS that automates the existent manual processes, provides courts with registries of case filings and events, and introduces modules to handle e-filing as well as to program the hearings. This will save the cost, time and effort both in part of the clients and the legal professionals. This system should also be implemented not only in the SC but also in the lower tiers. The Islamic Republic of Iran, had introduced electronic filing of documents, text messages notification and an electronic case management system. Recently, Iran also implemented electronic service processes that have made enforcing contracts easier. Similarly, in Jordan, courts are equipped with computer aided case management systems for better enforcement of contracts.

Application of pretrial conference as part of the case management technique will also assist the courts to establish control over the cases and discourage wasteful pretrial activities as well as improve the quality of the trial facilitating the settlement of cases. Nigeria, Sri Lanka, Ukraine and many other countries have already introduced pretrial conferences as a technique for case management.

The mobile application is at a nascent stage both in terms of development and usage. The application needs to be enhanced by adding more features such as notification for tracking the case status, assisting with the process map of the legal procedures, and chatbot service which enables two-way communication. Likewise, the instant messaging service can be introduced for non-smartphone users. Also, a library initiative can be designed to increase the access to legal information and self-help resources for the general public.

5. Improving the effectiveness of Arbitration and Mediation as an alternative to Court

Arbitration

Arbitration in Nepal can be challenged by the higher courts on points of law. Section 30 of the Arbitration Act, 2055 (1999 AD), provides for circumstances under which the decision taken by the arbitrator can be set aside. As per the experts, the court under cited circumstances can invalidate the award granted through arbitration.

- (a) In case any party to the agreement was incompetent for any reason to sign the agreement at the time of signing the agreement, or in case the agreement is not valid under the law of that the nation which governs jurisdiction over the parties, or in case such law is not clear and agreement is not valid under the laws of Nepal.
- (b) In case the due petition was not given a notice to appoint an arbitrator or about the arbitration proceedings in time.
- (c) In case the decision has been taken on a disputed matter which had not been referred to the arbitrator, or in a manner contrary to the conditions prescribed for the arbitrator, or by acting beyond the jurisdiction prescribed for the arbitrator.
- (d) Except when an agreement has been signed contrary to the laws of Nepal, in case the procedure of designation of arbitrators or their functions and actions do not conform to the agreement signed between the parties, or in case there is no such agreement it has not been done as per this Act.

In case the petitioner is able to prove that the arbitration decision contains certain matters outlined in the Act, the award can be invalidated and thus the party can file a petition to the High Court. This has thus led to parties filing petition numerous times and not complying with the arbitral award thereby lengthening the process.

Oftentimes when the court becomes involved in the Arbitration, serious delays are likely to occur. The parties may resort to the court for assistance during and after the arbitration process. Even though the scope of the court's involvement is narrow and clearly defined by the Arbitration Act, it is widely seen that the courts interpret the Act liberally and exceed their jurisdictions.

All of this, challenges the arbitral award and thus deems arbitration as non-equivalent to an independent authority. The level of court involvement in arbitration cases causes significant delays and undermines the necessary role of arbitration to be an attractive alternative to the court for business disputes.

Mediation

The major drawback associated with mediation is that the judges, lawyers and clients are not aware of the benefits offered by mediation. Even though mediation is quicker than both arbitration and litigation, it has not widely come into force. As per experts it was found that, the law practitioners tacitly disfavor the use of mediation as it curbs and reduces the professional scope of lawyers. Similarly, the clients have a perception that mediation is unsuitable for certain less technical cases and are thus not convinced that mediation will lead to a favorable decision.

Recommendation

Arbitration

Article 30 of the Arbitration Act needs to be reviewed and amended to provide a clear and specific list of circumstances about the finality of the award. A provision to draw a limited list of circumstances for appeal grounds to the High court can be added in the Arbitration Act. This section is in line with the New York Convention on the recognition and enforcement of foreign awards and the United Nations Commission on International Trade Law (UNCITRAL) Model Law. It is important that we do not derogate from the categories provided. Doing so would prevent the malpractice of discretionary interpretation of the circumstance in the applicant's favor. This will reduce the number of cases that further appeal to the High court thus allowing the applicants to comply with the arbitration decision.

Further, it is important that judges and lawyers alike understand why arbitration was introduced, in the first place, to avoid the complexities of court, for speedier dispute resolution and so on. Therefore, lawyers and courts have to be wary of unnecessary court interference even though the act may permit it, for instance Section 21(2).

Mediation

The public needs to be made aware about mediation and its benefits and how it incurs fewer costs and how it protects privacy and confidentiality. For this, the court must commit to promote and refer to mediation as a fair and a legitimate resolution process. This not only will allow the law practitioners to transform their assumptions and attitudes but also will instate confidence in the public that mediation can result in improved and speedier justice.

CHAPTER IV- RESOLVING INSOLVENCY

1. Ensuring the proceedings are time-bound

Insolvency is difficult to compute in terms of time and cost after it is guaranteed that the company will go into liquidation. This is usually because companies that are forced to undergo liquidation or reorganization may be of different sizes and the time & cost taken by them may vary accordingly. Time is a critical factor when a company is teetering on the brink of insolvency. In case of Nepal, there is no set time ceiling within which the liquidation needs to be completed. Likewise, the cost associated with the liquidation process that includes procedural costs and fees for attorneys, assessors, and auctioneers is not fixed. These fees are determined by the liquidator, whose fees in turn are determined by the court. The creditors, who have a direct interest in the level of costs and who hope to recover some of their debts out of the assets, have no say.

Recommendation:

When a company goes into liquidation, the cost of proceedings is paid out in assets. A large share of money is gone out to liquidators and assessors as part of their fees. These fees are determined by the liquidator which gives them the discretionary power. Thus, the insolvency legislation must recognize this creditors' interest and provide a mechanism for creditors to fix the basis of the fees. Moreover, there needs to be a defined time ceiling based on which the insolvency proceeding must be carried out. Since, the court does not state any time limit for companies who have begun insolvency, the only real beneficiaries are the liquidators as they do not have to strictly adhere to a ceiling and can, meanwhile, seek the fixed remuneration.

Similarly, Moldova eliminated formalities and shortened statutory periods for several stages of insolvency proceedings, including the maximum duration of liquidation and restructuring procedures along with reduced opportunities for appeal.

2. Improved Creditors' Participation

Nepal fares very low in terms of creditors' participation index. In Nepal, the establishment of creditors committee is limited to the liquidation process. The Insolvency Act, 2006, does not prescribe the roles, terms of reference, process of appointment, meetings, voting or removal of the creditors' committee. According to the Act, the power to create a creditors' committee is vested upon the liquidator and the creditors are, thus, not subject to any powers. The liquidator is responsible to outline the scope of work of the committee, the rules of procedures relating to the meeting and other necessary matters at the time of the committee formation. The committee cannot appoint a chairman of its choice; the liquidator or restructuring manager, chairs the committee. Provisions do not exist for consultation with the creditors' committee on important decisions.

Recommendation

The Act needs to outline the roles, scope of work and procedure of committee formation. The creditor must be given more participatory roles in the insolvency proceedings rather than entrusting the entire power to the liquidator. In practice, the courts should push the creditors to participate during any decision that is to be made or executed.

Azerbaijan provides a good example of a successful evolutionary reform in terms of creditors' participation. The country made resolving insolvency easier, in 2017, by making the insolvency proceedings more accessible and granting greater participation to the creditors. The country amended

its 'Insolvency and Bankruptcy' law to provide creditors with additional safeguards and enable their participation in decisions that affect their interest. Also, Azerbaijan reformed its insolvency law to provide creditors with the right to request information on the financial affairs of the debtor.

3. Review of the Blacklisting Directive

The philosophy underpinning the Insolvency law is 'clean exit and fresh start'. However, the Unified Directive 2076 (Directive-12) issued by the Nepal Rastra Bank interferes with the insolvency procedure of a company. As stated in the Directive, a financially distressed or an insolvent company is automatically blacklisted if it applies to the Court to initiate the insolvency proceedings either through reorganization or through liquidation. In practice, a shareholder who holds 15 percent or more ownership in the firm is blacklisted. Additionally, if the loan defaulter is a shareholder who holds 15 percent or more in another firm (and may or may not have active links to the blacklisted company), the Director and the Chief Executive Officer (CEO) of that firm are also kept on the same blacklist. 'This provision discourages investors to invest more than 15 percent in ventures' (Uprety, 2016). This also discourages parties as they are ineligible to take further loans and other facilities from the Banks and financial institutions thereby denying them an option of a 'clean slate'.

Recommendation

The Unified Directive, 2076 that governs the blacklisting policy must be revised in order to encourage businesses to take risks. Certain criterions need to be established so that the parties who have been blacklisted can de-list themselves from the same. Only companies that are forced into liquidation because of their inability to pay should be blacklisted. Blacklisting shareholders who own certain percent of the business but are not actively engaged in management of the company is certainly a provision that needs to be revised. Additionally, blacklisting persons of authority of firms where the defaulter has shares also needs to be removed, unless proven (by due process) that the people in question were also involved in wrongful defaulting.

4. Reinforce the Office of Company Registrar

The establishment of an Insolvency Administration Office (IAO) has been mentioned in Section 65 of the Insolvency Act, 2006. But even until now, the unit hasn't come into being. The Act does state that in the absence of an Insolvency Administration Office, the Government of Nepal may designate any existing office the tasks of the Insolvency Office. Currently the Office of Company Registrar (OCR) is administering the insolvency cases. However, since the volume of the cases is very low and the scope of work (issuance and renewal of licenses) is very narrow at present, there is no need for an office in specific as it will only add to the government expenditure.

Recommendation

As OCR is currently administering the insolvency related matters on behalf of the IAO, the government must provide a dedicated desk at the OCR that would help serve the general administrative functions of the insolvency cases. The idea is to strengthen the desk at OCR to enhance capacity building and provide necessary training to the concerned people.

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