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# EDITORIAL

This, the first *Asian Dispute Review* issue for 2015, is special in giving mediation added prominence. The attention that mediation receives in ADR circles in the Asian region is on the increase and we have considered it timely to publish an issue that emphasises it appropriately. To this end, this issue presents articles on the subject from a number of different perspectives. **David Ravenscroft** writes on aspects of confidentiality in mediation, **Dr Lim Lan Yuan's** article discusses how to coach parties to settle in mediation and **Dr Shahla Ali** discusses the prospects for utilising mediation and the UNCITRAL Transparency Rules in investor-State disputes relating to environmental disasters. In the In-House Counsel Focus section, **Amanda Lees** surveys the enforceability of negotiation and mediation clauses in Hong Kong and Singapore.

Before these articles on mediation, however, the issue commences with the Arbitration in Asia section, which includes a highly thought-provoking critique of investment arbitration by **Fali S Nariman** and an article by **Alex Larkin** and **Ly Sambo** on recent developments in arbitration in Cambodia.

This issue's articles close with a case note by Robert Morgan discussing the Hong Kong Court of Appeal decision on the challenge to an arbitral award and the standard of reasons in the *Arima Photovoltaic* case and a Book Review Essay by Olga Boltenko discussing new books on the enforcement of arbitral awards in Russia and China.

Any comments on articles published in the *Asian Dispute Review* are welcome.  
Please address them to [adr-editor@ninehillsmedia.com](mailto:adr-editor@ninehillsmedia.com).

We take this opportunity to wish our readers all the very best for 2015.

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# Recent Developments in Commercial Arbitration in Cambodia

Alex Larkin & Ly Sambo

This article discusses recent developments in and the current state of commercial arbitration in Cambodia, as well as reviewing the enforcement of foreign arbitral awards in that jurisdiction.

### Introduction

2014 has witnessed a number of significant positive developments in commercial arbitration in Cambodia. It has seen the first Cambodian final appellate court decision enforcing a foreign arbitral award and the adoption of arbitration rules by the Cambodian National Commercial Arbitration Center (NCAC). These developments have the potential to transform Cambodia rapidly into a jurisdiction where commercial disputes can be resolved efficiently and with a maximum of transparency. They may catapult Cambodia ahead of some other ASEAN jurisdictions which, by comparison, are lagging in the area of commercial dispute resolution.

Cambodia has long been considered an attractive destination for foreign investment, offering investment incentives in the form of certain tax holidays for qualifying projects, rapidly improving infrastructure and low-cost labour, among other factors. Coupling

such advantages with a dedicated arbitration body, focused solely on resolving commercial disputes, and a demonstrated ability to enforce foreign arbitral awards, will provide investors with a considerable degree of comfort in knowing that their commercial endeavours in Cambodia are protected.

### Development of a commercial arbitration centre in Cambodia

The NCAC is the product of Cambodia's Commercial Arbitration Law (2006)<sup>1</sup> and the related Sub-Decree on Organization and Functioning of the National Commercial Arbitration Center (2009) (the Sub-Decree).<sup>2</sup> Initial funding and assistance for the establishment of the NCAC were provided by the Asian Development Bank and the International Finance Corporation (IFC), a member of the World Bank Group.<sup>3</sup> Cambodia also enacted a revised Code of Civil Procedure (CCP) in 2006.<sup>4</sup> This includes key provisions

on the execution of arbitration decisions, both foreign and local, as well as provisions permitting courts to issue interim or injunctive relief in relation to matters that are subject to arbitration proceedings.

“... [A] dedicated arbitration body, focused solely on resolving commercial disputes, and a demonstrated ability to enforce foreign arbitral awards, will provide investors with a considerable degree of comfort in knowing that their commercial endeavours in Cambodia are protected.”

In accordance with the Commercial Arbitration Law and the Sub-Decree, the Cambodian Ministry of Commerce established a commission which, in turn, appointed the initial members of the NCAC. Those members underwent training by internationally-renowned arbitration experts associated with the Singapore International Arbitration Centre. In addition to the initial members, certain entities, such as chambers of commerce and business associations, have been appointed as representatives with voting rights in the General Assembly of the NCAC. In accordance with art 54 of the Sub-Decree, the NCAC has become a self-governing institution and is expected to complement the country's already successful Arbitration Council, which hears collective labour disputes.

In organising itself as an institution, the NCAC established working groups which developed (*inter alia*) its Arbitration Rules and its Internal Rules.

#### **NCAC Arbitration Rules and Internal Rules**

On 11 July 2014, the NCAC held its first annual general meeting at which its members discussed and adopted the NCAC Arbitration Rules<sup>5</sup> (NCAC Rules or ‘the Rules’) and the Internal Rules,<sup>6</sup> marking a significant step towards full operation of the new commercial dispute resolution body and

the completion of months of drafting and review by dedicated working groups.

As with most arbitration rules, the NCAC Rules are flexible and allow disputing parties significant control over arbitration proceedings. A select number of key provisions of the NCAC Rules are highlighted below.

The parties may determine the law to be applied to the substance of the dispute.<sup>7</sup> They may select the language of the proceedings,<sup>8</sup> though any award or order issued by the arbitral tribunal must be expressed in Khmer or English.<sup>9</sup> Parties may be represented by any person of their choice.<sup>10</sup> The Rules prohibit *ex parte* communications, *viz* a communication between one party and an arbitrator without including the other party in it or simultaneously providing the same communication in written form to that party.<sup>11</sup>

With regard to arbitrators, the parties may determine the number of arbitrators (which must be an odd number)<sup>12</sup> and may select the arbitrators,<sup>13</sup> so long as the persons selected meet the qualification criteria set out in the NCAC Internal Rules. Parties may generally appoint any arbitrator who is registered with the NCAC or any person who has served or is registered as a commercial arbitrator with any local or international commercial arbitration institution.<sup>14</sup> Neither the NCAC Rules nor the Internal Rules lay down any requirement that arbitrators be lawyers or otherwise trained in the law. Rather, the spirit of both sets of rules is in keeping with the desire to appoint arbitrators who have experience and expertise in the specific commercial area associated with the subject-matter of the dispute. This is in stark contrast to litigation in most jurisdictions, where cases, whether commercial or otherwise, are randomly assigned to judges who, depending on their experience and background, may have to be educated by the parties or their counsel in specialist aspects of the dispute in order to provide a basis for resolving it. The aim of the NCAC Rules is to enable parties to a dispute to appoint an arbitrator who is well-suited to resolve the dispute efficiently and on the basis of, in part, his/her familiarity with the type of commercial activity underlying the dispute.

“ ... [A] revised Code of Civil Procedure [2006] ... includes key provisions on the execution of arbitration decisions, both foreign and local, as well as provisions permitting courts to issue interim or injunctive relief in the context of matters that are subject to arbitration proceedings. ”

The NCAC Rules permit consolidation of two or more arbitrations,<sup>15</sup> joinder of third parties<sup>16</sup> and bifurcation of proceedings.<sup>17</sup> Further, the parties may agree to have their arbitration proceedings conducted without a hearing and instead opt for documents-only proceedings.<sup>18</sup>

Arbitral proceedings are confidential and closed to the public, unless the parties agree otherwise.<sup>19</sup> The arbitral tribunal may publish redacted versions of its award, unless a party objects.<sup>20</sup> NCAC awards are final and binding, and may only be reopened for reasons of correction, amplification, interpretation or addition.<sup>21</sup>

With regard to fees, the NCAC Rules set out provisions requiring payment of a registration fee, an arbitrator appointment fee (which applies if the parties request the NCAC to appoint arbitrators rather than making appointments themselves), an administration fee and a tribunal fee.<sup>22</sup> The registration fee and arbitrator appointment fee are fixed amounts, regardless of the sum in dispute. The administration fee and tribunal fee are based on a sliding fee scale, depending on the sum in dispute.

### **The first case of enforcement of a foreign arbitral award in Cambodia**

Enforcement of an arbitral award usually requires a separate legal action, whether the arbitration proceedings were conducted locally or in a foreign jurisdiction. In the specific context of foreign arbitral awards, however, many countries

– including Cambodia – are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

Prior to 2014, there had not been a successful attempt to enforce a foreign arbitral award in Cambodia. In March 2014, however, the Supreme Court of Cambodia confirmed a decision of the Cambodian Court of Appeal, which had ruled in favour of the recognition and enforcement of an arbitral award issued by the Korean Commercial Arbitration Board (KCAB) of Seoul, South Korea.

The KCAB award resolved a commercial dispute between multiple Korean parties who had entered into contractual agreements in relation to the financing and development of a large-scale commercial and residential project in Phnom Penh. In May 2012, in accordance with art 353 of the CCP and arts 6 and 7 of the Law on the Approval and Implementation of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (2001), the prevailing party in the KCAB arbitration proceedings sought enforcement of the award in Cambodia by filing a motion in the Court of Appeal of Cambodia. The Court of Appeal issued its decision recognising and enforcing the award in April 2013.

One of the non-prevailing parties subsequently filed an appeal motion with the Supreme Court of Cambodia seeking annulment of the Court of Appeal's decision. That motion was ultimately rejected by the Supreme Court, on the ground that the appeal had been brought out of time.

### **Conclusion**

Cambodia's rapid progress in developing the NCAC as an institution, and in adopting both the NCAC Rules and Internal Rules, constitute significant steps forward in the availability of commercial dispute resolution mechanisms. All of the constituent elements necessary for arbitration in Cambodia – including the Commercial Arbitration Law and the Sub-Decree, the NCAC Rules and Internal Rules, and the relevant and very necessary provisions of the CCP enabling the execution of arbitral awards - are in place. Parties to commercial

transactions and relationships in Cambodia can therefore conduct their activities with the confidence of knowing that an efficient means of resolving commercial disputes exists.

“... [T]he successful enforcement of a foreign arbitral award in Cambodia means that commercial parties are free to agree to foreign arbitration as an alternative to arbitration through the NCAC. Foreign arbitral awards will be equally enforceable in Cambodia, provided that they are issued in New York Convention jurisdictions.”

Further, the successful enforcement of a foreign arbitral award in Cambodia means that commercial parties are also free to agree to foreign arbitration as an alternative to arbitration through the NCAC. Foreign arbitral awards will be equally enforceable in Cambodia, provided that they are issued in New York Convention jurisdictions.

The present discussion is merely a summary of the current status of and recent developments in commercial arbitration in Cambodia. Any questions about potential commercial disputes or the applicability and interpretation of applicable laws, the NCAC Rules and Internal Rules, the New York Convention etc should be directed to appropriate legal counsel. ■■

*Cambodia* (Private Sector Discussions No 24, September 2009) – available at <https://www.wbginvestmentclimate.org/uploads/PSDP+24+ADR-Cambodia.pdf>.

- 4 *Editorial note:* An unofficial English translation prepared by the Cambodian Ministry of Justice is available at <https://cambodianbusinesscorner.files.wordpress.com/2013/01/code-of-civil-procedure-en.pdf>.
- 5 *Editorial note:* Available in English at [http://ncac.org.kh/items/NCAC\\_Arbitration\\_Rules\\_En\\_Final\\_141003.pdf](http://ncac.org.kh/items/NCAC_Arbitration_Rules_En_Final_141003.pdf).
- 6 *Editorial note:* Available in English at [http://ncac.org.kh/items/Internal\\_Rules\\_%28NCAC%29\\_Adopted\\_Jul\\_2014\\_E.pdf](http://ncac.org.kh/items/Internal_Rules_%28NCAC%29_Adopted_Jul_2014_E.pdf).
- 7 Article 17.1 of the NCAC Arbitration Rules.
- 8 *Ibid*, art 18.1.
- 9 *Ibid*, art 18.3.
- 10 *Ibid*, art 3.
- 11 *Ibid*, art 4.5.
- 12 *Ibid*, art 9.
- 13 *Ibid*, art 10.
- 14 *Ibid*, art 11.
- 15 *Ibid*, art 21.
- 16 *Ibid*, art 20.5.
- 17 *Ibid*, art 20.4.
- 18 *Ibid*, art 24.1.
- 19 *Ibid*, art 49.
- 20 *Ibid*, art 50.
- 21 *Ibid*, arts 37 and 38.
- 22 *Ibid*, arts 41-45.



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1 *Editorial note:* Available in English at [http://ncac.org.kh/items/LAW-Commercial\\_Arbitration\\_\(2006\)\\_En.pdf](http://ncac.org.kh/items/LAW-Commercial_Arbitration_(2006)_En.pdf).  
2 *Editorial note:* Not yet published online.  
3 *Editorial note:* See IFC, *The Establishment of Commercial Arbitration Services in*