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International Arbitration 2021

Cambodia

Law & Practice
and
Trends & Developments

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CAMBODIA

Law and Practice

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1. GENERAL

1.1 Prevalence of Arbitration

The Kingdom of Cambodia has had a system of alternative dispute resolution outside the judicial system for a long time. There is a long tradition of resolving disputes by negotiation and compromise with assistance from respected elders, neighbours, monks or local authorities, instead of using the formal court system. Local forms of informal dispute resolution, known as *psahpsar* (conciliation), are widely practised throughout the country, mainly in civil, commercial and labour disputes.

The Kingdom of Cambodia has adopted a free-market economic system and developed a sound legal framework for international and domestic arbitration since 2001 by promulgating the law approving and implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Since then, the number of foreign arbitral awards which seek to be recognised and enforced in Cambodia has grown incrementally.

In 2006, the Law on Commercial Arbitration (LCA) was promulgated to provide a basis for local arbitration and international arbitration to grow. By virtue of the LCA, Article 10, the National Commercial Arbitration Centre of Cambodia (NCAC) was established, and its arbitration rules were introduced in 2014, which were subsequently replaced by the arbitration rules 2021 ("Rules 2021").

The NCAC started to operate formally and receive cases in 2015. So far it has received 25 cases, with a value of approximately USD72 million in dispute. In 2020 alone, the total value of matters in dispute reached almost USD29 million, which represents around 35% of the total amount in dispute of all cases.

In terms of the disputants, a total of 59 came from six different countries, of which 42% were natural persons, 56% were legal entities, and 2% were state entities. Cambodian nationals (including Cambodian residents) constituted 68% of the parties involved in arbitration and foreign nationals constituted 32%. The NCAC's data shows that foreign parties came mainly from China (13%), Malaysia (9%), Hong Kong (3%), Bermuda (3%) and Singapore (2%).

1.2 Impact of COVID-19

The outbreak of COVID-19 around February 2020 severely impacted the functioning of many institutions. Court proceedings and arbitration proceedings have slowed down because public officers, judges and arbitrators have been working remotely.

The Royal Government of Cambodia has been strictly implementing administrative and health measures. Despite the fact that government offices, courthouses and businesses have been gradually reopening, operations are not yet at the normal speed.

In response to challenges due to COVID-19, virtual conferences for arbitration tribunals were allowed subject to the agreement of the parties to arbitration. The NCAC's arbitration rules officialise the use of electronic means of communication during oral hearings and during proceedings with the emergency arbitrator. This helps facilitate and speed up the dispute resolution process.

1.3 Key Industries

There are various industries experiencing significant international arbitration activity. Based on the caseloads at the NCAC, the types of cases submitted to the NCAC are from the following industries:

- real estate (10 cases);

- banking and financial services (7 cases);
- international trade and sale of goods (3 cases);
- construction and engineering (3 cases); and
- others (2 cases).

The negative impact of the COVID-19 pandemic may likely contribute to an increase in the number of cases submitted to the NCAC, especially in the real estate/construction sector.

1.4 Arbitral Institutions

The NCAC is the only arbitration institution for resolving commercial disputes in the Kingdom of Cambodia. No new arbitration institution has been established in the last year.

1.5 National Courts

The Court of First Instance, the Court of Appeal and the Supreme Court play their respective roles according to the stages of proceedings and matters.

The Court of Appeal has jurisdiction to adjudicate disputes relating to the recourse/setting aside or the recognition of international and domestic awards. The decision of the Court of Appeal may be finally appealed to the Supreme Court. The Court of First Instance has jurisdiction to execute arbitral awards which have been recognised by the Court of Appeal or the Supreme Court.

2. GOVERNING LEGISLATION

2.1 Governing Law

In 2006 the LCA was enacted.

On 11 July 2014, the NCAC adopted its first arbitration rules, which were subsequently amended in March 2021 and became effective from 28 June 2021.

The LCA and the NCAC's arbitration rules have reflected, for the most part, the provisions of the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), while they also contain various modern features reflecting arbitration rules in other reputable arbitration centres in Asia.

2.2 Changes to National Law

Apart from the introduction of the Rules 2021, there are no other amendments being made to the existing national law governing arbitration.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

An "arbitration agreement" under the LCA is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 7 of the LCA states that the arbitration agreement shall be in writing meaning if "it is contained in a document signed by the parties or in an exchange of letters, or other means of electronic telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make the clause part of the contract."

In addition to specific requirements under the LCA, the validity of the arbitration agreement shall also be subject to the general conditions of validity of contract as stipulated in the Civil Code.

3.2 Arbitrability

The NCAC has competence to arbitrate commercial disputes. According to Article 2(i) of the LCA, the term "commercial" should be given a "wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreements or concessions; joint ventures and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road."

This general interpretation allows for a wide range of matters to fall under the scope of the NCAC.

3.3 National Courts' Approach

Generally, the parties to arbitration are free to choose the governing law for an arbitration agreement. Freedom of contract and party autonomy are stipulated as general principles of the Civil Code of Cambodia. In the absence of parties' agreement, national courts would apply the principle of lex loci, meaning the law of the seat of arbitration would apply.

The national courts are generally supportive of arbitration and will enforce arbitration agreements as to their purposes and substance provided that they do not violate any mandatory law or public policy of the Kingdom of Cambodia.

3.4 Validity

There is no express provision under the LCA or the Civil Code regarding the separability of arbitration clauses. However, this matter is addressed specifically in Rule No 34.3 of the Rules 2021, which states that "if an arbitration clause forms part of a contract, it shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause."

There is no judicial precedent ruling on the application of the rule of separability. However, we believe that if such issue were raised, the national court would apply the rule of separability to determine the validity of an arbitration clause in an invalid agreement.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

The parties have carte blanche to select the arbitrator(s) as long as the number of arbitrator(s) is odd (the usual number is three).

The NCAC has an obligation to determine the arbitrators' qualifications and to make an annual list of arbitrators publicly available. However, the parties are free to choose arbitrators outside of the published list.

The arbitrators can be Khmer nationals or foreigners.

4.2 Default Procedures

Under Rule No 25.3 of the Rules 2021, should the parties to the arbitration not manage to choose the arbitrators, the Appointment and Proceedings Committee (APC) of the NCAC shall appoint, on behalf of the failing party(ies), the arbitrator(s).

Rule No 25.4 states that in the case of a multi-party arbitration, the multiple claimants shall jointly appoint one or more arbitrator(s) and the multiple respondents shall jointly appoint one or

more arbitrator(s). Should they fail to do so, the APC will appoint the necessary arbitrator(s).

4.3 Court Intervention

Article 19.3 of the LCA states that the Court (Commercial, Appeal or Supreme) or the NCAC can intervene during the appointment of arbitrators as follows upon request of a party:

- in the case of three arbitrators, if any party fails to appoint an arbitrator within 30 days after being so requested or if the two appointed arbitrators fail to appoint the third arbitrator within 30 days upon their appointment; and
- in the case of a sole arbitrator, if the parties cannot agree on the appointment of the arbitrator.

4.4 Challenge and Removal of Arbitrators

Both the LCA and the Rules 2021 stipulate the various grounds for challenge or removal of an arbitrator relating to circumstances which give rise to justifiable doubts such as qualification, impartiality, independence, disclosure or other ethical matters at the time of or after his or her appointment.

According to Rule No 28, if there is any reason to question the impartiality or independence of an arbitrator, or if an arbitrator does not meet a qualification on which parties have agreed, the arbitrator may be challenged. Article 20 of the LCA states the same.

A party may challenge an arbitrator appointed by it, or in whose appointment it participated, only for reasons of which it became aware after the appointment was made.

4.5 Arbitrator Requirements

Rule No 27.1 of the Rules 2021 requires the arbitrators to be independent and impartial. Upon being appointed as an arbitrator until the final award if issued, including any period for requesting or issuing the correction, amplification or interpretation of the award or an additional award, the arbitrator cannot represent or be an adviser for any party.

Rule No 27.2 adds that a prospective arbitrator shall immediately disclose any circumstances that are likely to bring doubt as to his or her independence or impartiality to any person who approaches the prospective arbitrator for possible appointment.

The disclosure should be immediately made to the parties, the General Secretariat of the NCAC and any other members of the tribunal after being appointed or at any stage during the arbitration if a new circumstance arises that could give rise to such doubt.

5. JURISDICTION

5.1 Matters Excluded from Arbitration

The LCA does not place specific restrictions on the subject matters that may not be referred to arbitration. The LCA only stipulates that it must be a commercial dispute, with a wide interpretation. Therefore, as long as the dispute arises from relationships of a commercial nature, it may be referred to arbitration.

5.2 Challenges to Jurisdiction

According to paragraph 1 of Rule No 34.2, the tribunal shall have the power to rule on its own jurisdiction, including on any objections with respect to the existence, validity or scope of the arbitration agreement.

5.3 Circumstances for Court Intervention

If the arbitral tribunal rules that it has jurisdiction, any party may request that a competent

court adjudicate on such matter within 30 calendar days upon the receipt of the notice of that ruling. While a request for a court decision on the question of the jurisdiction is pending, the arbitral tribunal may continue the arbitration proceedings and issue an award (Paragraph 2 of Rule No 34.2).

As Cambodian courts do not publish decisions, it is not clear whether there is general reluctance or willingness to intervene in such jurisdictional matters.

5.4 Timing of Challenge

According to Rule No 34.4, the party has to raise a plea that the arbitral tribunal does not have jurisdiction before the submission of the Statement of Defence or Statement of Defence to Counterclaim. Despite having participated in the appointment of, or having appointed, an arbitrator, the party is still entitled to raise such a plea.

Moreover, if the tribunal exceeds the scope of its jurisdiction, the party has to raise such a plea as soon as such matter arises. If there is a justifiable reason for any delay in raising such plea, the tribunal may decide to admit the plea (Rule No 34.5).

Only after the tribunal has decided upon such plea that the tribunal has jurisdiction can the party refer such decision to a competent court. The party has to refer such case to the court within 30 calendar days upon the receipt of the notice of the decision. The decision of the court cannot be appealed.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Both the LCA and the Rules 2021 are silent about this matter.

5.6 Breach of Arbitration Agreement

Paragraph 1 of Article 8 of the LCA states that if the disputed matter is subject to an arbitration agreement, the court shall refer the case to arbitration upon any party's request unless the court deems that the arbitration agreement is null and void.

As Cambodian courts do not publish court decisions, it is not clear whether courts are reluctant or willing to allow such proceedings.

5.7 Third Parties

According to Rule No 35.5, the arbitral tribunal shall have the power to allow a third party to join as a party in the arbitration, provided that all parties, including the third party, have consented to such joinder in writing. In such case, the arbitral tribunal may make a single final award or separate awards resolving all disputes between all parties.

When submitting an application for third-party joinder pursuant to Rule No 35.5, the party filing such application shall pay a third-party joinder application fee of USD500 or it will not be considered.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Article 25 of the LCA stipulates that unless otherwise agreed by the parties, the arbitral panel may, at the request of a party, order any party to take such interim protection measures as the arbitral panel may consider necessary in respect of the subject matter of the dispute. The arbitral panel may require any party to provide appropriate security in connection with such a measure.

The parties to a commercial arbitration have, as of now, the possibility to seek emergency interim

measures issued by an emergency arbitrator, before the constitution of the arbitral tribunal itself. Under the 2014 arbitration rules of the NCAC, the parties could seek interim measures from either the arbitral tribunal or the Cambodian courts, but not pre-proceedings.

Rule No 43.6 of the Rules 2021 states that interim measures "are necessary and urgent measures which in no way shall prejudice the final judgment of the Tribunal with regard to the merits of the case".

Interim measures include but are not limited to orders:

- to maintain or restore the status quo, pending the resolution of the dispute;
- to take action that would prevent, or to refrain from taking action that is likely to cause current or imminent harm, or prejudice to the arbitration process itself;
- to provide a means of preserving assets out of which a subsequent award may be satisfied; or
- to preserve evidence that may be relevant and material to the resolution of the dispute.

6.2 Role of Courts

A party to the arbitration is empowered by Article 9 of the LCA and Rule No 43.8 to seek an interim relief from the court despite the arbitration agreement. Neither the LCA nor the Rules 2021 specify circumstances under which the court may grant an interim relief, but Article 541 of Code of Civil Procedures (CCP) provides that interim relief may be granted if there is a necessity to preserve the status quo of assets of debtors for any future compulsory execution or to prevent harm to the position of any party to the dispute.

The LCA and CCP are silent on whether the court can grant an interim relief in aid of a foreign-seated arbitration.

The LCA does not specify regarding emergency arbitrators. However, the concept of emergency arbitrator is introduced in the Rules 2021, as mentioned in **6.1 Types of Relief**.

Rule No 17 states that the emergency arbitrator is empowered to order or award any interim measure as the arbitrator sees fit, including preliminary orders that may be made pending any hearing or any proceedings by videoconference, telephone or documents and other materials by the parties. The emergency arbitrator shall give summary reasons for his or her decision in writing. Pursuant to Rule No 21, the order or award is final and binding upon parties.

6.3 Security for Costs

The LCA is silent in relation to security for costs in general. According to Article 25 of the LCA, the arbitral tribunal may order any party to provide security for an interim measure. However, security for costs is stipulated in the Rules 2021.

According to Rule No 55 (e) and (f), the arbitral tribunal shall have the power to order to order any party to provide (i) security for legal or other costs in any manner the tribunal thinks fit, and (ii) security deposits for all or part of any amount in dispute in the arbitration.

Rule No 43.5 states that unless otherwise agreed by the parties, the arbitral tribunal may make the granting of a request for interim measures subject to appropriate security being furnished by the requesting party in order to cover any cost or damage incurred by the other party as the result of an interim measure granted by the tribunal. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the tribunal later deter-

mines that, in the circumstances then prevailing, the measure should not have been granted. The tribunal may award such costs and damages at any point during the arbitration proceedings.

Finally, Rule No 20 states that any interim order or award issued by the emergency arbitrator may be conditioned on the provision by the party seeking such measure of appropriate security.

7. PROCEDURE

7.1 Governing Rules

Cambodia promulgated the LCA on 5 May 2006. The rules of the NCAC were first issued on 11 July 2014 and recently amended on 28 March 2021, which became effective from 28 June 2021.

7.2 Procedural Steps

Article 27 of the LCA provides that parties are free to determine the procedures in the arbitration proceeding. In absence of such determination, the arbitral tribunal may proceed with the arbitration in any manner it sees fit or in accordance with the arbitration rules chosen by the parties.

7.3 Powers and Duties of Arbitrators

The LCA does not impose any particular powers or duties upon arbitrators.

The Rules 2021 state the specific powers of the emergency arbitrator under Rule No 17 as "to order or award any interim measure that she/he deems necessary, including preliminary orders that may be made pending any hearing or any proceedings".

7.4 Legal Representatives

There is no particular requirement or qualification to be a legal representative. However, Rule No 3 states that a party can choose to be represented by anyone in the arbitration proceedings under the Rules 2021, subject to such proof of authority as required by the General Secretariat or the arbitral tribunal.

8. EVIDENCE

8.1 Collection and Submission of Evidence

In general, the arbitral tribunal is entitled to conduct inquiries at any time during the arbitration proceeding as it deems appropriate including but not limited to ordering any party to submit documents, exhibits or evidence as mentioned in Rule No 40.2.

There are some rules relating to the collection and submission of evidence as follows.

- Disclosure – any person who has direct or indirect involvement in the arbitration proceeding shall keep all facts related or learnt through the arbitration case confidential unless permitted under Rule No 66.3.
- Use of witness statements – the arbitral tribunal may decide whether the testimony of a witness may be presented through his or her written statement or any other forms. If the arbitral tribunal allows the witness to attend the oral examination upon a request of a party, the tribunal has discretion whether to take account of the written statement or disregard it as the tribunal deems appropriate in case the witness is absent from the oral examination (Rule No 41.3).

8.2 Rules of Evidence

Rule No 40.3 states that "the tribunal shall determine the admissibility, relevance, materiality and weight of all evidence. The tribunal is not required to apply the rules of evidence of any applicable law in making such determination."

This Rule No 40.3 is applicable to all disputes referred to the NCAC.

8.3 Powers of Compulsion

Based on Article 5 of the LCA, the court can intervene in the arbitration proceeding only if it is allowed under the law. Article 35 of the LCA states that the tribunal or a party upon approval from the tribunal may seek assistance from the court in gathering evidence, and the court may assist in compliance with its relevant rules.

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

Rule No 66 deals with confidentiality as follows:

- all meetings and hearings shall be conducted in private, and any recordings and transcripts of documents used shall be kept confidential, unless otherwise agreed by the parties; and
- the deliberations of the tribunal shall be confidential.

In addition, Rule No 66.3 provides that "all persons involved, directly or indirectly, in the arbitration are bound by secrecy and shall not, without the prior written consent of all the parties, disclose facts related to, or learned through, the arbitration case, except as follows:

(a) for the purpose of making an application to any competent court of any state to enforce or challenge the award;
(b) pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
(c) for the purpose of pursuing or enforcing a legal right or claim;
(d) in compliance with the provisions of the laws of any state which are binding on the party making the disclosure; or
(e) pursuant to an order by the Tribunal on application by a party with proper notice to the other parties."

Rule No 67 adds regarding publication that "the NCAC may publish on its website or otherwise, either in its entirety or in the form of excerpts or a summary, any award under the following conditions:

(a) all references to the parties' names and, if so requested and specified by a party, other details that are likely to enable the public to identify the parties, are deleted; and
(b) no party has objected to such publication within 90 (ninety) calendar days after issuance of the award."

10. THE AWARD

10.1 Legal Requirements

According to Rule No 52, "an award shall be final and binding on the parties from the date it is issued and sealed". To be issued and sealed, the Rules 2021 state some conditions precedent as follows:

- the award shall be in writing;
- the award shall contain the date on which and the place where the award was made;
- the award shall be signed by the arbitrator(s);
- the award shall be submitted in draft form to the General Secretariat for scrutiny;
- the total costs of the arbitration must have been totally paid to the NCAC; and
- the General Secretariat has affixed the NCAC seal.

Commercial arbitration is commenced voluntarily but an arbitral award is binding upon parties. In the absence of voluntary compliance with the arbitral award, a party can enforce such arbitral

award through the compulsory execution proceeding provided for under the CCP.

10.2 Types of Remedies

Both the LCA and the Rules 2021 are silent about the types of remedies that an arbitral tribunal may award.

10.3 Recovering Interest and Legal Costs

Pursuant to Rule No 64.5, the parties are not entitled to recover interest that accrued from advances or security deposits. The interest shall be kept by the NCAC.

Rule No 56.3 provides that the tribunal shall state specifically in its award the total amount of the arbitration costs and the responsibility of each party for the total arbitration cost unless otherwise agreed upon by parties. It is further emphasised in Rule No 56.4 that parties shall jointly and severally be responsible for the payment of the total arbitration cost.

With regard to legal costs or other costs for parties, if there is no separate agreement between the parties, the arbitral tribunal can award that one party is responsible for a part of or all the legal costs or other costs of another party, says Rule No 63. In following these rules, the NCAC seems to adopt the "costs follow the event" approach.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

In accordance with Rule No 52, an award shall be final and binding on the parties from the date it is issued and sealed. The parties are not entitled to appeal other than their rights in accordance with mandatory provisions of law, and the parties irrevocably waive their rights to any appeal insofar as such waiver may be validly made. The appeal in this Rule is believed to refer to the recourse specified under Article 44 of the LCA.

Article 44 of the LCA provides that a party is entitled to apply for setting aside the arbitral award to the Court of Appeal within 30 days upon the receipt of the arbitral award based on the following grounds.

- The applicant proves that:
  - (a) a party to the arbitration agreement was incapable of entering the agreement, or the arbitration agreement is invalid pursuant to the applicable law or Cambodian law if no applicable law is specified;
  - (b) the applicant was not properly informed of the appointment of an arbitrator(s) or of the arbitral proceedings, or that party was not able to present the case effectively;
  - (c) the arbitral award deals with disputes which are outside the terms of the arbitration agreement or contains decisions on matters outside the scope of the arbitration agreement; or
  - (d) the arbitral tribunal or procedure was not composed in compliance with parties' agreement or the arbitration law in case of absence of an agreement.
- The Court of Appeal and the Supreme Court are of the opinion that:
  - (a) the subject matter of the dispute cannot be settled by an arbitration under Cambodian law; or
  - (b) the recognition of the arbitral award will be contradictory to the public policy of Cambodia.

If the applicant is not satisfied with the decision of the Court of Appeal, the applicant can appeal against such decision to the Supreme Court within 15 days.

11.2 Excluding/Expanding the Scope of Appeal

The LCA is silent on whether parties can exclude or expand the scope of appeal or challenge.

11.3 Standard of Judicial Review

There is no specific standard of judicial review mentioned in the LCA. However, as a matter of practice, the court would not review de novo the merits of a case decided by the arbitral tribunal.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

Cambodia acceded to the 1958 New York Convention in 1960 and ratified it in 2001 without any reservations.

12.2 Enforcement Procedure

A foreign arbitral award is an execution title under Article 350(h) of the CCP if it is recognised by a competent court in Cambodia through a court ruling. In order to apply for the recognition of a foreign arbitral award, the party granted the award is required to file a motion to the Court of Appeal pursuant to Article 353(6) of the CCP.

Pursuant to Article 353(2) of the CCP, an award holder that wants to apply for the recognition and enforcement of an arbitral award, be it a local or foreign arbitral award, shall submit a motion with the following two documents:

- an original copy or a certified copy of the arbitral award; and
- an original copy or a certified copy of the arbitration clause.

A ruling issued by the Court of Appeal that recognises and enforces the arbitral award together with the arbitral award itself constitute an execution title under Article 350(h) of the CCP.

The Court of Appeal does not have to take into consideration whether or not the arbitral award was fair and just while deciding on the recognition of the arbitral award (Article 353(7) of the CCP).

Cambodian regulations are silent about the award being set aside. However, the fact that an award has been cancelled by the court where the award was made or by the court of the country whose legal regulation has been used as basis in the arbitral award is a ground for rejection of recognition and enforcement stated in Article 353(3e) of the CCP. In addition, a court may refuse to execute an award if the court finds that the recognition or execution of the award would be contrary to Cambodian public order.

Regarding state sovereign immunity, the Court of Appeal might not enforce an arbitral award (local or foreign) in which state sovereign immunity has not been waived expressly.

12.3 Approach of the Courts

The courts would not be reluctant to recognise and enforce arbitral awards which are issued in compliance with laws of the Kingdom of Cambodia for domestic awards and with the New York Convention for foreign arbitral awards. In our experience, there are no different standards applying for domestic awards and foreign awards with regard to public policy grounds.

13. MISCELLANEOUS

13.1 Class-Action or Group Arbitration

Both the LCA and the Rules 2021 are silent about class-action arbitration and group arbitration. It should be noted that class action is not a typical action in the civil law tradition which Cambodia has adopted.

13.2 Ethical Codes

Arbitrators must abide by the NCAC Code of Conduct for Arbitrators dated 6 May 2015, while counsel are bound by the code of ethics for lawyers.

13.3 Third-Party Funding

The Rules 2021 are silent about third-party funders.

13.4 Consolidation

Pursuant to Rule No 36.1, the General Secretariat may decide to consolidate two or more cases commenced under the Rules 2021 into one upon request of a party and with consent of all parties. The General Secretariat shall take into consideration all circumstances below (Rule 36.2):

- whether all of the claims in the arbitrations are made under the same arbitration agreement;
- whether, if the claims are made under different arbitration agreements, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the arbitration agreements are deemed compatible; and
- whether arbitrators have already been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed.

13.5 Third Parties

Paragraph 2 of Rule No 52 states that starting from the date an award is issued and sealed, the award shall be final and binding on parties.

Rule No 35.5 states that a third party may become a party of the arbitration proceeding if the tribunal allows such participation followed by the consent in written form from the third party and other parties. In such a case, the tribunal may issue a final single arbitral award or a separate award to resolve all disputes of the parties.

As a general principle in a civil case, a court decision may bind a third party if the third party has been acted upon by a plaintiff or defendant of the case. However, it is not clear whether such a principle is applicable to arbitrations, as the law is silent on this.

HBS Law is a leading law firm registered with the Bar Association of the Kingdom of Cambodia. It has been providing legal services of the highest quality to many of the world's leading companies, governments, financial institutions and other organisations since 2005. Its service covers both corporate transaction advice and dispute resolution, including local and international arbitration. In association with its notary public and tax consultancy, it offers a truly one-stop shop experience for its clients. HBS Law understands that its clients are not simply looking for correct advice but also for excellent service delivery. In this regard, it prides itself on being the only registered law firm in Cambodia built on a genuine partnership with and working relationship between its Cambodian and foreign lawyers. This enables it to offer a level of service commensurate with the level of service that its clients expect from lawyers in their own jurisdictions.

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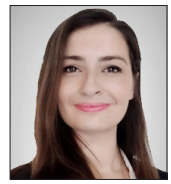

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Trends and Developments

Contributed by:
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HBS Law see p.21

Arbitration and, in particular, commercial arbitration is gaining importance and trust among local and foreign investors in Cambodia. In March 2021, the National Commercial Arbitration Centre (NCAC) introduced its new arbitration rules ("Rules 2021") to replace its previous rules introduced in 2014 ("Rules 2014"). The Rules 2021 introduced some key features to align with international standards, notably:

- permitting the NCAC to provide services under arbitration rules other than the Rules 2021;
- allowing the parties to shorten the time limits applicable to arbitral proceedings if they agree to do so;
- providing the arbitral tribunal with powers to take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation after the constitution of the arbitral tribunal;
- granting official recognition of the use of videoconferencing or any similar communications technology in the arbitration proceedings; and
- providing for expedited procedures and the use of an emergency arbitrator.

Expedited Procedures

The introduction of expedited procedures is a particularly important development. A long-contemplated issue related to the NCAC is the length of the proceedings. Since 2015, 28% of the cases administered were concluded with final awards, and 60% of cases are still active. This number indicates that the resolution process is relatively slow. However, since arbitral awards are not appealable, arbitration is still considered one of the fastest modes of dispute resolution compared with litigation.

According to Article 9 of the Rules 2021, expedited procedures may be implemented where:

- the sum in dispute does not exceed USD3 million;
- the parties agree to implement expedited procedures; or
- there is a state of exceptional urgency.

Should any one or more of the above criteria be fulfilled, a party must then file an application to the General Secretariat of the NCAC. The Appointment and Proceedings Committee (APC) has to decide whether the expedited procedure is appropriate to the case after considering the views of the parties and the circumstances of the case.

If the APC agrees on the implementation of expedited procedures:

- the General Secretariat may shorten any time limits provided for by the Rules 2021;
- the arbitral tribunal will be composed of one arbitrator, unless stated otherwise in the arbitration agreement, and if a three-arbitrator tribunal is agreed to by the parties to the arbitration agreement, the General Secretariat will invite the parties to agree to a single-member tribunal; however, the parties are always free to decide whether they wish to do so;
- the arbitral tribunal, after consultation with the parties, can decide whether the dispute will be adjudicated solely on the basis of the

documents provided by the parties or whether a hearing is required; and
- the final award must be made within 270 calendar days from the date when the arbitral tribunal was constituted. The proceedings can be extended in exceptional circumstances by the APC.

Expedited procedures may be discontinued by the arbitral tribunal upon application by a party and after comments from the parties and consultation with the APC (Article 9.4 of the Rules 2021).

Interim Measures and Emergency Arbitrator

The parties to a commercial arbitration have, as of now, the possibility to seek emergency interim measures issued by an emergency arbitrator, before the constitution of the arbitral tribunal itself.

For the emergency arbitrator to be appointed, an application must be filed with the General Secretariat which must include the following information, according to Article 10 of the Rules 2021:

- the nature of the measure sought;
- the reasons why the party making the application is entitled to such measure; and
- a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties.

In addition, the application should be paired with the payment of the costs associated with the procedure, namely the application fee, the emergency arbitrator fees and expenses for proceedings pursuant to the fee schedule attached as Annex 1 to the Rules 2021. The application for interim measures may be accepted by the APC which, if it approves the measures, has then to appoint the emergency arbitrator within three calendar days of the receipt of the application and payment.

Emphasis is placed on maintaining the impartiality of the emergency arbitrator. According to Articles 14 and 15 of the Rules 2021, the emergency arbitrator has two calendar days from his or her appointment to disclose to the General Secretariat any circumstances which could affect his or her impartiality or independence in the matter at hand. Normally, “the emergency arbitrator cannot act as an arbitrator in any future arbitration relating to the dispute”. However, if the parties so agree, an emergency arbitrator may become an arbitrator in a later arbitration.

The emergency arbitrator has a wide range of powers, notably to “order or award any interim measure that she/he deems necessary, including preliminary orders that may be made pending any hearing or any proceedings by videoconference, telephone or documents and other materials by the parties”. He or she also can modify or terminate the preliminary order, interim order or award for good cause.

The interim order or award must be made within 15 days from the date of the appointment of the emergency arbitrator but can only be issued after being scrutinised and approved by the General Secretariat within two calendar days. An order or award is binding on the parties from the date it is made and should be carried out without delay.

Once the arbitral tribunal is constituted, the emergency arbitrator has no more power to act, except if he or she is chosen by the parties as an arbitrator in future proceedings. The arbitral tribunal can modify, suspend or terminate the decision of the emergency arbitrator and is not bound by the decision of the emergency arbitrator.

Additional New Measures

Officialisation of electronic modes of communication in proceedings

With the outbreak of COVID-19 in Cambodia since February 2020, the Royal Government of Cambodia has been implementing stringent administrative and health measures, including remote working and avoidance of face-to-face contact.

While the Rules 2014 were silent about the use of electronic means of communication, the Rules 2021 officially permit the use of electronic means of communication such as video/telephone conference during oral hearings (Article 39 of the Rules 2021) as well as during proceedings with the emergency arbitrator (Article 16 of the Rules 2021).

Since 28 June 2021, the arbitral tribunal or emergency arbitrator has been able to conduct proceedings by "videoconference, telephone or using other communications technology with participants in one or more geographical places or in a combined form or on the basis of documents and other materials only as alternatives to a hearing in person".

The delivery and receipt of communications during the proceedings, if by electronic means, can be made at the address, fax number or other addresses of electronic means of communication designated by the parties (Article 4.3(c) of the Rules 2021). The term "communication" is defined widely in the Rules 2021 as "including any notice, notification, statement, request, proposal, document submission, order or direction".

To be able to use electronic means of communication is a major step forward for international arbitration in Cambodia. It will allow parties who are abroad to settle their disputes in the Kingdom of Cambodia without having to be physically present, while being fully protected by clear and precise rules during the proceedings and being assured of obtaining a result in a shorter timeframe and more efficient manner.

Change of representation and impartiality

Article 3 of the Rules 2021 allows a party to choose any person to represent it during the arbitration proceedings, subject to a proof of authority which might be requested by the General Secretariat and the arbitral tribunal.

However, once the proceedings have commenced and after a delay of 15 calendar days to receive the parties' comments, the arbitral tribunal can exclude any new representative(s) of the parties from participating, in whole or in part, in the arbitration proceedings. This new rule was implemented to avoid any conflict of interest between the arbitrator already chosen and approved and the new representative(s), which could slow down the proceedings further.

Modification of time limits

An ability to modify the time limits included in the Rules 2021 is included in Article 5.2 as follows.

- The General Secretariat may, if found appropriate and after notifying the parties, modify:
  - (a) any time limits included in Chapter 2 of the Rules 2021 (commencement of arbitration);
  - (b) any time limits included in Chapter 4 of the Rules 2021 (constitution of the tribunal);
  - (c) any time limits included in Chapter 7 of the Rules 2021 (costs);
  - (d) any time limits included in Chapter 9 of the Rules 2021 (other rules containing notably publication of the award, waiver of rights); and
  - (e) any time limits that the General Secretariat has power or is empowered to set.
- The arbitral tribunal itself may, if found appropriate and after notifying the parties, modify:

(a) any time limits included in Chapter 3 of the Rules 2021 (arbitration proceedings);
(b) any time limits included in Chapter 53.2 of the Rules 2021 (decision on correction, amplification, interpretation and additional award); and
(c) any time limits that it has set.

- Finally, the parties themselves may also agree to shorten the time limits specified in the Rules 2021.
- By "modifying", Article 5.2 of the Rules 2021 is not specifying whether the time limits with regard to the General Secretariat and the arbitral tribunal may be shortened or extended. However, regarding the parties, it is specified in Article 5.2 that the parties may only agree to "shorten the various time limits".

Conclusion

Particularly through the redesign of the arbitration rules and developments in the capacity for arbitration, we note that the NCAC has made impressive efforts to be on a par with international and regional arbitration standards and to create the perception of Cambodia as an efficient and safe place to do business and arbitrate disputes. By seriously tackling the issues faced by arbitration, notably the time-consuming aspect and absence of digitalisation, the NCAC has shown its commitment to creating a favourable business environment for local and foreign investors to thrive and its steadfast dedication to improving its dispute resolution mechanisms.

Only time will tell whether Cambodian arbitration will become a more attractive option for dispute settlement, but it is undeniable that Cambodia is readjusting its standards and conforming with international norms with the aim of becoming an international centre of arbitration.

Contributed by: *Tayseng Ly, Patrick Smith, Te Muykim and Marine Bussat,* ***HBS Law***

HBS Law is a leading law firm registered with the Bar Association of the Kingdom of Cambodia. It has been providing legal services of the highest quality to many of the world's leading companies, governments, financial institutions and other organisations since 2005. Its service covers both corporate transaction advice and dispute resolution, including local and international arbitration. In association with its notary public and tax consultancy, it offers a truly one-stop shop experience for its clients. HBS Law understands that its clients are not simply looking for correct advice but also for excellent service delivery. In this regard, it prides itself on being the only registered law firm in Cambodia built on a genuine partnership with and working relationship between its Cambodian and foreign lawyers. This enables it to offer a level of service commensurate with the level of service that its clients expect from lawyers in their own jurisdictions.

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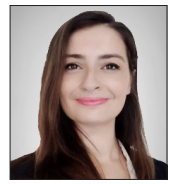

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