

RESOLUTIONS OF COMMERCIAL DISPUTES

1. Commercial Arbitration

Cambodia is one of the 159 contracting States to the International Centre for Settlement of Investment Disputes Convention (“ICSID Convention”). Since Cambodia signed the ICSID Convention in 2005 there was only one ICSID case brought to the tribunal against Cambodia. Cambodia is a member of the Multilateral Investment Guarantee Agency (MIGA) of the World Bank Group, which offers political-risk insurance to foreign investors. Cambodia has enacted the Law on Commercial Arbitration (LCA) on 5 May 2006, which establishes a framework for the private arbitration of business disputes that follows international practices. The implementing sub-decree was subsequently adopted in 12 August 2009 along with another sub-decree to enable the creation of a commercial arbitration body, the National Commercial Arbitration Centre (NCAC). The NCAC was established on 4 March 2013 and became fully operational in 2015.

2. Law on Commercial Arbitration (LCA)

The provisions of the LCA were drafted to comply with international arbitration standards and treaties, in particular the guidelines of the United Nation’s New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). It governs only commercial disputes and largely follows the UNCITRAL Model Law on International Commercial Arbitration and covers arbitration matters including: arbitration agreements, composition and jurisdiction of the tribunal, conduct of the proceedings, recognition and enforcement of awards.

The LCA applies to both domestic and international arbitrations. An arbitration is international if it meets the following criteria:

- (i) the parties to an arbitration agreement have their places of business in different states at the time of the conclusion of that agreement; or
- (ii) one of the following places is situated outside the state in which the parties have their places of business:
 - (a) the place of arbitration, if determined in, or pursuant to, the arbitration agreement;
 - (b) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- (iii) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

3. Extent of Court Intervention

The LCA sets strict parameters in limiting court intervention in arbitration proceedings. Article 5 of the LCA stipulates the role of the Cambodian courts with regard to arbitrations, and states that a court cannot intervene or interfere with any arbitration proceedings outside of a list of standard exceptions relating for example to conflicts over the appointment of arbitrators, arbitral tribunals that make decisions

outside their competence, and cases in which there has been a failure to give notice to a party.

4. Power of the Arbitral Tribunal to Order Interim Measures

The LCA provides that it is “not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court, an interim measure of protection and for a Court to grant such measure.” Thus a party may seek interim relief from the Cambodian court and the latter has the power to order the direction, preservation, storage, sale, or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration. The LCA grants also the arbitral tribunal the power to award these interim measures. Unless otherwise agreed by the parties, upon the request of a party the arbitral tribunal has the power to order any party to provide security for all or part of the amount in dispute. This can be done by way of deposit, bank guarantee, or in any other manner and upon such terms as the tribunal considers appropriate. The tribunal also has the power to take similar measures to secure arbitration and/or legal costs involved in resolving the specific dispute. Any interim measure order by the arbitral tribunal will be enforced by the Court in the same manner and effect as if it was order by the Court itself. Nevertheless, as a matter of court formalities, the party requesting the interim measures must proceed to request the Court to issue an enforcement of preservative relief.

5. Recognition and Enforcement of Awards

Cambodia ratified the New York Convention in 2001, which essentially enabled Cambodia’s participation in the worldwide enforcement regime. The effect of the ratification of the New York Convention is that Cambodian courts are bound to honor all foreign arbitral awards. Article 45 states, “an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and . . . shall be enforced . . .” In term of domestic regulations, the 2006 Code of Civil Procedures contains specific provisions regarding the recognition and enforcement of foreign arbitral awards.

6. Recourse against Arbitral Awards

The LCA provides only very limited grounds for the setting aside (nullification) of an arbitration award. None of these grounds involve a review of the merits of the evidence and decision. However, the Cambodian courts may set aside an arbitration award if:

- (i) A party to the arbitration agreement was incapacitated at the time of the agreement, or the agreement is not valid under the governing law; or
- (ii) A party was not given proper notice of the appointment of arbitrators or of the arbitral proceedings, or was otherwise unable to effectively present his case; or
- (iii) The award deals with a dispute not falling within the terms of the arbitration agreement; or

- (iv) The composition of the tribunal or the procedure was not in accordance with the arbitration agreement; or
- (v) The subject matter of the dispute is not capable of settlement by arbitration under the law of Cambodia; or
- (vi) The recognition of the award would be contrary to public policy of Cambodia.

The first four grounds must be raised and proved by a party. The reviewing court may consider the last two grounds, *sua sponte* (on its own accord). Note that the LCA states that Cambodian Courts *may* set aside an award under these grounds but it is not *required* that they do so. The party seeking to set aside an award must file an application to the Appellate Court within Thirty days of notice of the award. Appeals from the Appellate Court to the Supreme Court must be made within Fifteen days of the Appellate Court's decision. In appropriate circumstances, the Cambodian court may suspend court proceedings to allow the arbitration tribunal to resume proceedings or otherwise take such action to eliminate the grounds for setting aside so that it can complete the process in accordance with the law.

7. Conciliation and Mediation

The Cambodian Code of Civil Procedure stipulates that negotiated settlements between two parties are to be encouraged. The court may attempt to effect a compromise settlement at any stage of the litigation. At the preparatory oral hearing, the court is required to first seek to effect a compromise settlement. The court may encourage the parties to negotiate or may take a more active role, in which case the intervention would be as a mediator.

Mediation can take place either as a private mediation or a court-annexed mediation. In private mediation, the parties agree among themselves to engage in mediation. Where the contract contains no such provision, the parties may agree to engage in mediation after a dispute arises. Private mediation can take place in the absence of litigation or it can take place during litigation. If the mediation results in a settlement, then the lawsuit is dismissed and a judicial compromise is entered by the judge. If the mediation does not result in a settlement, then the lawsuit proceeds in the court system with no prejudice to any party.

The LCA also provides for the possibility of mediation. Parties to a commercial dispute can also seek mediation under the auspices of the Ministry of Commerce or at the newly established NCAC. It allows the arbitral tribunal to explore a mediated settlement, but only if both parties request it. The idea of pursuing mediation first and followed by arbitration is sometimes called "*med-arb*."

Article 38 of the LCA stipulates that: "Upon request by both parties, prior to commencement of formal arbitration proceedings, the arbitral tribunal may confer with the parties for the purpose of exploring whether the possibility exists of a voluntary settlement of the parties' dispute if the parties determines that it does, the arbitral tribunal shall assist the parties in any manner it deems appropriate. . ."

The LCA further provides that a mediated settlement made therein can be recorded as an arbitral award, which will enjoy the same expedited judicial enforcement that any other arbitral award enjoys.

** Article courtesy of Dr. Sok Siphana, Advisor to the Royal Government of Cambodia*

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