CAMBODIAN ALTERNATIVE DISPUTE RESOLUTION

Steven AUSTERMILLER

CONTENTS

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I. Introduction

ADR stands for Alternative Dispute Resolution. It refers to the various ways parties can settle disputes outside of the traditional, court-centered adjudication system. ADR encompasses many forms of dispute resolution, some of which are common and some of which are quite new. Arbitration, negotiation and mediation are the most common forms of ADR. In Cambodia, informal ADR has been practiced for centuries. However, until recently, ADR was never formally part of the official dispute resolution regime. Now, with a number of new laws passed, Cambodia has begun to incorporate ADR techniques into its legal system. This article will focus on how these three main forms of ADR have been incorporated into the Cambodian legal system and whether they meet international standards.

II. Negotiation

Negotiation is the process of back and forth communication, whereby parties submit and consider offers until an offer is made and accepted.[1] Negotiation is the most common form of dispute resolution process in the world, found both in civil law and common law jurisdictions.

Many jurisdictions favor negotiated settlement. Because most jurisdictions have significant case backlogs, one way to resolve disputes in a timely manner is to encourage the parties to discuss their disputes among themselves and try to reach an agreement. In the U.S., for instance, 90% of all cases are resolved by ADR,[2] and negotiation is the most popular form of ADR. In Cambodia, a World Bank survey of small firms found that negotiation was the most preferred method of dispute resolution.[3] This should not be surpris-

* This article is a revised version of an earlier article published in Vol. 1 of the Cambodian Yearbook of Comparative Legal Studies.

** Mr. Steven AUSTERMILLER is currently the American Bar Association's Legal Education Advisor in Cambodia.

1 *Gainey v. Brotherhood of Railway and S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 275 F. Supp. 292, 300 (E.D. Pa. 1967).

2 Susan Patterson and Grant Seabolt, Essentials of Alternative Dispute Resolution 5 (2nd ed., 2001).

3 *The Provincial Business Environment Scorecard in Cambodia: A Measure of Economic Governance and Regulatory Policy,* World Bank/IFC-MPDF and AusAid/The Asia Foundation, 40 (2007)[here-

ing to anybody who has spent time in Cambodia. Negotiations are common everywhere, from purchases at the market to resolution of high-level land disputes.

1. Cambodian Negotiation

The new Code of Civil Procedure of the Kingdom of Cambodia (CCP-KC) explicitly emphasizes negotiated settlement throughout the litigation process. Article 97 provides that "the court may attempt to effect a compromise settlement at any stage of the litigation."[4] Article 220 provides for the same, but with the emphasis on the parties.[5] It says "[t]he parties may effect a compromise settlement of the action on a date set for oral argument, preparatory proceedings for argument or compromise."[6] The compromise may even be entered into *outside* the courtroom.[7] Article 104 goes further and requires that "at the preparatory proceedings for oral argument, the court *shall* first seek to effect a compromise settlement..." [emphasis added].[8] Under these articles, the court may encourage the parties to negotiate or may take a more active role, in which case the court intervention would be as a mediator.

If the parties successfully complete their negotiations, the CCP-KC provides that their settlement agreement can be treated as a judgment for enforcement purposes. The negotiated settlement agreement can be converted into a *judicial compromise* that is recorded in the court protocol (court record).[9] Once all required steps are completed, this *judicial compromise* can be enforced like a court judgment.[10] This means that if one party fails to abide by the terms of the parties' agreement (such as making a required payment), the other party may petition the courts to enforce the agreement without having to re-litigate the merits of the dispute. If a party has breached the *compromise*, the aggrieved party should find the enforcement of that agreement expedited by the courts. Without this *judicial compromise* feature, the aggrieved party would have to file a new breach of contract lawsuit in the general civil courts. This should contribute to enforcement efficiency.

However, a *judicial compromise* is not sacred. Under the CCP-KC, a *judicial compromise* can be undone for fraud (and presumably misrepresentation or duress) in connection with either party's declaration of intention in the agreement.[11] Therefore, a party

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inafter Business Environment Scorecard]. The survey found that 92% of Cambodian firms choose negotiation as their top dispute resolution option. In contrast, only 1% of firms cited local courts as their most common dispute resolution method.

4 Code of Civil Procedure of the Kingdom of Cambodia, 55 Official Gazette of Kingdom of Cambodia 5296, 5336, art. 97 (2006) [hereinafter CCP-KC].

5 CCP-KC, art 220.

6 *Id.*

7 *Id.*

8 *Id.* art. 104.

9 *Id.* art. 222.

10 *Id.*

11 Textbook on Code of Civil Procedure of Kingdom of Cambodia, Working Group on the Code of Civil Procedure of Cambodia, Book Three, Ch. Four, Section II (V)(3)(a) at 110 (2007) [hereinafter CCP-

can invalidate its *compromise* and block its execution if it can successfully prove fraud[12] (or, presumably, misrepresentation or duress).

If the parties to a dispute are not in a formal lawsuit, they can still settle. However, their settlement agreement cannot become a judicial compromise and does not enjoy any special enforceability characteristics. The parties' settlement agreement is merely a contract that must be enforced with a breach of contract lawsuit in the general civil courts.[13] Of course, a party can void a negotiated settlement if she can prove that the other side engaged in duress or fraud in order to induce her to enter into the settlement.[14]

As a result, these rules create an incentive for parties to file a complaint first and then try to settle the issues, so that the parties can claim a judicial compromise and enjoy the benefits of expedited enforceability. If they settle their disputes too soon, without resort to court action, they risk a more difficult future settlement enforcement process. In other words, there is a pre-litigation dis-incentive to settle.

2. Negotiation Conclusions

In general, these are excellent rules that will serve to encourage private negotiation between disputing parties. Since this is in the Cambodian state's interest as well as the parties' interests, these rules constitute good public policy. In addition, these rules are consistent with Cambodia's tradition of private negotiation of disputes.

These rules are similar to those of developed countries, where the policy is to encourage out of court settlement, where possible. Anecdotal evidence indicates that judges in the US and Europe, however, take a more systematic and proactive approach to settlement, whereas in Cambodia, the judges do not emphasize settlement as much.

III. Mediation

The second major form of ADR is called *mediation*. Mediation can be broadly defined as assisted or facilitated negotiation.[15] Mediation usually involves two or more disputing parties attempting to negotiate a settlement with the assistance of a third party, the mediator, who is neutral towards the parties and the outcome. The mediator does not have

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KC Commentary].

12 *Id*.

13 Civil Code of the Kingdom of Cambodia, art. 724 (2008)[hereinafter CC-KC]; CCP-KC Commentary, *supra* note 11, at Book Three, Ch. Four, Section II (V)(1), p. 108.

14 *See* Decree 38 on Contracts and Other Liabilities, arts. 6 – 10, [hereinafter Decree 38]. Under Article 10, acts of deception, dishonesty, or misrepresentation can constitute a fraudulent act sufficient to void a contract such as a settlement agreement. In general Cambodian contract law, this can be called rescission based on fraud, misrepresentation or duress. *See also*.CC-KC, *supra*, note 13, at arts. 347 – 349.

15 Patterson et al., *supra* note 2, at 53.

authority to impose a settlement. Rather, the parties retain the authority to decide whether or not to settle. In a mediation session, the mediator typically 1) listens to each party, 2) encourages each party to listen and consider compromise, 3) assists in the exploration of creative solutions, 4) helps the parties understand the facts and law as viewed by a neutral, and when appropriate, 5) helps develop the specific items in a settlement agreement.[16]

The term *mediation* and the term *conciliation* have been confused over the years, even by legal and judicial professionals and academics. Today, *mediation* and *conciliation* are often used interchangeably to refer to the same process. Although some have tried to draw a distinction, there is no common international legal authority defining how the terms might differ.[17] Although the term *mediation* is found internationally, *conciliation* is the term most commonly used in international documents. For example, the UNCITRAL Model Law on International Commercial Conciliation (the "UNCITRAL Conciliation Law")[18] uses the term "conciliation" to refer to all types of proceedings where a neutral person or persons assists parties to reach an amicable settlement, including mediation proceedings.[19]

In contrast, mediation is the term most commonly used in the American legal system, with the term conciliation falling out of use. An example would be the American Uniform Mediation Act.[20] Both terms refer to a negotiation process facilitated by a neutral third

16 Steven Austermiller, Alternative Dispute Resolution: Cambodia, A Textbook of Essential Concepts 82 (American Bar Assoc., 2009).

17 In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) states that there is considerable confusion in both Australia and elsewhere regarding these terms. *See generally,* NADRAC Terminology Discussion Paper, *available at* http://www.nadrac.gov.au/agd/www/Disputeresolutionhome.nsf/Page/RWP7E251CA71B8E7700CA256BD100135550?OpenDocument (last visited Oct. 19, 2008).

18 UNCITRAL Model Law on International Commercial Conciliation, U.N. GAOR, 57th Sess, Supp. No. 17, U.N. Doc. A/57/17, Annex I, art.9 (2002) *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html (last visited September 28, 2011) [hereinafter UNCITRAL Conciliation Law]. UNCITRAL stands for United Nations Commission on International Trade Law. The UNCITRAL Conciliation Law is the UN's effort at recognizing the growing interest in mediation and in promoting non-contentious methods of dealing with disputes. Luis M. Diaz & Nancy A. Oretskin, *The U.S. Uniform Mediation Act and the Draft UNCITRAL Model Law on International Commercial Conciliation*, in International Business Litigation and Arbitration 2002, at 791, 797 (PLI Litig. & Admin. Practice Course, Handbook Series, Order No. H0-00GP, 2002). It also represents an effort to provide uniform mediation rules across various countries, especially in emerging commercial fields like Internet disputes. Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, ¶ 17 (2002) [hereinafter UNCITRAL Conciliation Guide]. In this author's experience, the UNCITRAL Conciliation Law has gained widespread acceptance and many transitional countries have looked to it as an appropriate model. This may be due to the fact that the UNCITRAL Working Group was composed of representatives from a wide range of countries and legal traditions.

19 UNCITRAL Conciliation Guide, *supra* note 18, at ¶ 7; Diaz & Oretskin, *supra* note 18, at 797.

20 Uniform Mediation Act (amended 2003), *available at* http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.pdf (last visited September 28, 2011) [hereinafter UMA]. This was the result of collaboration between the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and a drafting committee of the American Bar Association. *See* Diaz & Oretskin, *supra* note 18, at 793. It was completed and approved in 2001. The purpose of the

party. In different countries and traditions, there is wide variation in the process and in the level of involvement by the neutral.[21] In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (sometimes called caucuses) and through suggesting specific solutions.[22] In other traditions, the mediator or conciliator takes a more passive approach and allows the parties to control the process. Both approaches are valid and for the purposes of this article, the term *mediation* is used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term will be used.

1. Cambodian Mediation

In Cambodia, mediation has always played an important role in society. According to one report, "Cambodian culture and its legal system has traditionally favored mediation over adversarial conflict and adjudication. Thus compromise solutions are the norm…"[23] For example, family disputes were historically mediated by other family members or respected local leaders. Today, mediation continues to play an important role in Cambodian dispute resolution. A World Bank survey of small firms in Cambodia found that mediation was the most preferred method of dispute resolution after negotiation.[24]

As a result of mediation's importance to Cambodia, the national legal framework has evolved to include many mediation options and parties to a dispute can seek assistance

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UMA is to provide uniformity in mediation laws throughout the United States. The UMA Prefatory Note indicates that legal rules affecting mediation in the United States can be found in more than 2,500 statutes, many of which could be replaced by this Act. UMA, at Prefatory Note, § 3. Ten American states (Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington) and the District of Columbia have already adopted the UMA and the UMA has been introduced as legislation in four others. *See* NCCUSL website *at* http://uniformlaws.org/Default.aspx (last visited September 28, 2011). In 2003, the UMA was amended to incorporate by reference the UNCITRAL Conciliation Law for international proceedings under the UMA. *See* 2003 Amendment to the Uniform Mediation Act, § 11.

21 *Id.*; M. Jagannadha Rao, *Concepts of Conciliation and Mediation and Their Differences* (2002) (compares the terms conciliation and mediation as used in India), *available at* http://1.1.1.1/472008168/472002888T080531111635.txt.binXMysM0dapplication/pdfXsysM0dhttp://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf (last visited Oct. 19, 2008).

22 There is authority in some countries to define conciliation as the process where the neutral takes a more active, solution-proposing role, while mediation is defined as the process where the neutral engages in a more passive, facilitative role. *See, e.g.*, *Dispute Resolution Terms*, National Alternative Dispute Resolution Advisory Council (Australia) at 3 (2003), *available at* http://1.1.1.1/467929504/472002888T080531121212.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~1Report8_6Dec.pdf/$file/1Report8_6Dec.pdf (last visited Oct. 19, 2008).

23 United States Department of Commerce, *Country Commercial Guide for Cambodia*, 53 (2006). *See also*, United Nations Conference on Trade and Development (UNCTAD) and International Chamber of Commerce (ICC), *An Investment Guide to Cambodia: Opportunities and Conditions*, 46, UNCTAD/IIE/IIA/2003/6 (Sept. 2003).

24 Business Environment Scorecard, *supra* note 3, at 40. The survey found that local firms choose mediation as their second best option, far ahead of court litigation.

from a variety of sources. In family disputes, parties can seek mediation assistance from the Ministry of Interior's officers or from the local Commune Councils. If a party is considering divorce there is a fifteen day "reconciliation" process that begins at the local commune level before the case is sent to the courts.[25] The Ministry of Labor helps mediate labor disputes between employers and employees.[26] If there is a land dispute, parties can request mediation from the government's Cadastral Commission or from the National Authority for Land Dispute Resolution.[27] Parties to a commercial dispute will soon be able to seek mediation at the new National Arbitration Center, under the auspices of the Ministry of Commerce.[28] Small civil disputes over issues such as debts, contracts, land borders, farms, slander, and violence without injury may be mediated at the local Commune Council level, through the government's Justice Service Center Program.[29]

Cambodian judges are also empowered under the new Civil Procedure Code to mediate between parties in a formal lawsuit.[30] As mentioned in the previous section, CCP-KC Article 97 allows the court to "attempt to effect a compromise settlement at any stage of the litigation." This could mean encouraging the parties to negotiate or it could mean the court actually serving as mediator. CCP-KC art. 104 goes one step further and actually mandates that the court must try to settle the dispute at the preparatory proceedings for oral argument[31] unless it is 1) improper (i.e., rights or obligations at issue are by their nature not disposable by agreement), or 2) inadvisable (i.e., the parties have no intention of compromising).[32]

The Code's Commentary states that in attempting to mediate a compromise, the court may consider holding private caucuses (called *cross-interviewing* in the drafters' commentaries).[33] This is a technique whereby the mediator holds private discussions with one party and (usually) then the other party. Private caucuses allow parties to share private information with the mediator that they might not be comfortable sharing in front of the other side. For example, the party might not want to reveal a particular interest (like the company is short on cash and might have to file for bankruptcy/insolvency). Or, the

25 Law on Marriage and Family of the Kingdom of Cambodia, art. 42 (1989).

26 Labor Law of the Kingdom of Cambodia, arts. 300 – 301, 303 (1997). The Ministry's full name was "Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation." In 2004, the name changed to "Ministry of Labor and Vocational Training."

27 Royal Sub-Decree on Organization and Functioning of the Cadastral Commission, arts. 7 – 11, Royal Government of Cambodia, Sub-Decree #47 (2002); Royal Decree on the Establishment of the National Authority for Land Dispute Resolution, art. 3, 15 Official Gazette of the Kingdom of Cambodia 1190 (2006).

28 Law on Commercial Arbitration of the Kingdom of Cambodia, 37 Official Gazette of the Kingdom of Cambodia 3000, (2006) [hereinafter LCA].

29 Ministry of Justice and Interior Prakas #85, art. 3-4 (2006). This program may be terminated because of lack of outside funding.

30 CCP-KC, *supra* note 4, art. 97 and art. 104.

31 "At the preparatory proceedings for oral argument, the court shall first seek to effect a compromise settlement . . ." *Id*. art. 104.

32 *Id*. art. 104; CCP-KC Commentary, *supra* note 11, at Book Three, Ch. Two, Section II (II)(3), p. 51.

33 *Id*. *at* 52.

party might want to further explore a settlement option that it was uncomfortable taking seriously in front of the other side, for fear of showing weakness.[34]

In commercial disputes, under the new Law on Commercial Arbitration (LCA), which will be discussed in the next section, an arbitration forum may engage in mediation. The LCA provides liberal settlement provisions: prior to the commencement of formal proceedings, the tribunal 1) *may confer with the parties for the purpose of exploring whether the possibility exists of a voluntary settlement . . .* and 2) *assist the parties in any manner it deems appropriate.*[35] Any settlement made hereunder can have the force and effect of a court judgment.[36] As a result, arbitrators at the new National Arbitration Center, currently being established under the auspices of the Ministry of Commerce, will have the opportunity to mediate cases.

Finally, parties can always resort to mediation outside the formal Cambodian legal framework. In fact, this probably remains a more popular way to resolve disputes than through the formal system. One Cambodian legal expert found:

> *"In rural areas where the court is perceived as remote and alien from the village point of view, the Wat (Buddhist temple) is more familiar and it is used by local people for resolving their differences with the assistance of a monk or Achar. Frequently such a settlement is conducted in daily life."* [37]

2. International Comparisons in Mediation

Private mediation enforcement rules vary widely throughout the world. In most Australian states, agreements reached through mediation outside the sphere of court-annexed mediation schemes cannot be registered with the court unless court proceedings are underway.[38] The rules are similar in the U.S. However, if there is a U.S. court proceeding underway, the court can usually decide to enter an order that incorporates the parties' settlement agreement into the judgment and this will be enforceable like a court order.[39] If the court does not incorporate the agreement into the order, the mediated agreement is merely a contract, enforceable through a breach of contract lawsuit. One exception is family law cases (divorce, child custody, visitation and support), where mediated agree-

34 Austermiller, *supra* note 16, at 116-117.
35 LCA, *supra* note 28, art. 38 (2006).
36 *Id*. art. 38 (3).
37 Kong Phallack, *Shaping Alternative Dispute Resolution System in Cambodia*, Master Thesis, Nagoya University Graduate School of Law, 47 (2001). Phallack also describes an interesting Cambodian ADR tradition called the *Preah Reach Savnakar* (Royal Hearing), whereby the Cambodian King hears disputes and provides a non-binding opinion. This was applied before 1970, reinstated for a short period in 1994 and then suspended for unknown reasons. *Id*. at 54-55.
38 UNCITRAL Conciliation Guide, supra note 18, at ¶ 90.
39 *See, e.g.,* Tex. Civ. Prac. & Rem. Code Ann. § 154.071(a)(b) (West. Supp. 1997).

ments are almost always considered court judgments.[40] In contrast, the new Law on Mediation for Bosnia and Herzegovina appears to make all mediated settlements, whether private or court-annexed, enforceable like court orders.[41]

In some jurisdictions, such as Germany, India, Bermuda, Hong Kong and China, a private, mediated settlement can be converted into an arbitral award, thereby enjoying the same enforceability as a court judgment.[42] It is likely that mediation in Cambodia will have similar enforcement rules as these states.

3. Mediation Conclusions

The Cambodian legal regime for mediation is helpful and encourages mediation in various ways. The CPP-KC provides some clarity on the judges' potential to mediate settlements, however, as with negotiation, there is anecdotal evidence that these rules are often ignored. Judges need administrative guidance on how and when to mediate, otherwise, they might not feel confident enough to mediate. In addition, mediation training would be helpful. The CPP-KC is an effective first step, but more is needed before mediation can begin to have an effect on the judicial culture.

A new, specific law on mediation would also represent a significant improvement. It would more effectively encourage mediation and provide enhanced protection in areas like confidentiality[43] and enforcement[44] that are currently lacking.

IV. Arbitration

Arbitration is the third major ADR method to be discussed. In arbitration, the parties submit their dispute to a neutral third party (usually called the "arbitrator" or if more than one, then called the "arbitration panel" or "tribunal"). This third party considers the evidence the disputing parties have submitted and renders a decision called an "award."

40 Patterson et al., *supra* note 2, at 108.

41 Zakon o Postupku Medijacije Bosne i Hercegovine [BiH Law on Mediation Procedure], art. 25 (2004).

42 *See, e.g.,* Arbitration Act (1986) (Bermuda); Arbitration and Conciliation Ordinance, arts. 73 – 74 (1996) (India); Zivilprozessordnung [German Code of civil procedure], Tenth Book, § 1053 (Germany); Arbitration Ordinance, § 2C, Cap. 341 (1997) (Hong Kong); Arbitration Law of the People's Republic of China, art. 51 (1995) (China).

43 Most mediation laws provide guarantees of confidentiality. *See* UNCITRAL Conciliation Law, *supra* note 18, at art. 9.

44 Under the current regime, mediated settlements must be resolved within the framework of an arbitration institution in order for them to be enforceable like a court order. Settlements mediated outside a recognized arbitration forum do not have this enforcement feature.

1. Cambodian Arbitration

In 2006, Cambodia passed its second ADR law, the Law on Commercial Arbitration (LCA).[45] Cambodia was obligated to enact the LCA when it joined the World Trade Organization ("WTO") in 2004.[46] The LCA largely follows the UNCITRAL Model Law on International Commercial Arbitration[47] ("UNCITRAL Arbitration Law"), with a few interesting departures. As a result, Cambodia's arbitration laws are now largely harmonized with over 60 nations, including important trading partners such as Japan, South Korea, Singapore, Thailand and Australia.[48]

Under the LCA, a commercial dispute is subject to arbitration if the parties' contract has a written arbitration clause or if they agreed to arbitration in a separate written arbitration agreement.[49] This agreement to submit to arbitration must be in writing, but this requirement can be fulfilled by a written exchange of communications that demonstrates

45 LCA, *supra* note 28. The LCA can be considered the second ADR law after the law creating the Arbitration Council. There are other laws with ADR components in them, but this is only the second Cambodian law specifically related to ADR.

46 Key commercial laws cited by the WTO that may be enacted in the future include, the Secured Transactions Law, Commercial Leasing Law, Law on the Issuance and Trade of Non-Government Securities, Insolvency Law, Commercial Contracts Law, Competition Law, and Law Establishing a Commercial Court.

47 UNCITRAL Model Law on International Commercial Arbitration (2006), UNCITRAL website, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (last visited September 28, 2011)[hereinafter UNCITRAL Arbitration Law]. According to UNCITRAL: the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration . . . It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. UNCITRAL website, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited September 28, 2011).

48 States that have adopted the UNCITRAL Arbitration Law include: Armenia (2006), Australia (1991), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Brunei (2010), Bulgaria (2002), Cambodia (2006), Canada (1986), Chile (2004), China (the Hong Kong Special Administrative Region (1996) and the Macao Special Administrative Region (1998)), Costa Rica (2011), Croatia (2001), Cyprus, Denmark (2005), Dominican Republic (2008), Egypt (1996), Estonia (2006), Germany (1998), Greece (1999), Guatemala (1995), Hungary (1994), India (1996), Iran (Islamic Republic of) (1997), Ireland (1998), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008), Mexico (1993), New Zealand (1996, 2007), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay (2002), Peru (1996, 2008), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Serbia (2006), Singapore (2010), Slovenia (2008), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda, an overseas territory of the United Kingdom), the United States of America (the States of California (1996), Connecticut (2000), Illinois (1998), Louisiana (2006), Oregon and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000) and Zimbabwe (1996). UNCITRAL website, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited September 28, 2011).

49 LCA, *supra* note 28, art. 7.

an agreement to arbitrate.[50] For instance, parties may send emails or letters to each other stating that they agree to arbitrate any disputes between them but fail to actually include such a clause in their agreement. Under LCA Article 7, this might suffice as an agreement to arbitrate.

The LCA covers the landscape of arbitration matters including: arbitration agreements, composition and jurisdiction of the tribunal, conduct of the proceedings, recognition and enforcement of the award and a section entitled "National Center of Commercial Arbitration." The law governs only commercial disputes but that term is given the same wide interpretation in the definitions section as can be found in the UNCITRAL Arbitration Law.[51]

It is important to note that the LCA is an arbitration law that provides for arbitration standards. The parties can deviate from these standards, especially with regard to the specific arbitration rules of procedure. For example, if the parties chose the AAA (American Arbitration Association) or ICC (International Chamber of Commerce) as the arbitration administrator, they will likely also choose the AAA or ICC arbitration rules. Those rules are slightly different from the LCA rules, but the LCA allows for this deviation.

The LCA follows the UNCITRAL Arbitration Law in limiting court intervention in arbitration proceedings.[52] However, there is some confusion regarding the supervisory role of the courts. Article 6 of the LCA indicates that a range of supervisory functions (such as arbitrator appointment, challenge, termination, failure to act and tribunal jurisdiction) is to be "performed by the Court (Commercial, or Appeal, or Supreme) or the National Arbitration Center."[53] This language could be read to indicate that a party can appeal directly to *any* of these four bodies for supervisory assistance.[54] Or it could indicate that there are only two appeal choices: 1) the "Court," which means the court system generally, or 2) the National Arbitration Center. Since the language is unclear, there may be some confusion and inconsistent practices. Given the current situation, the best practice may be to petition the Cambodian Court of Appeals[55] when seeking supervisory assistance from the courts. Future revisions to the LCA should perhaps address this matter.

While LCA rules governing arbitrator composition and jurisdiction are consistent with the UNCITRAL Arbitration Law, the 'interim measures' section follows the 1985 version of the UNCITRAL Arbitration Law and omits the extensive framework found in the new

50 *Id*. art. 7 (2).

51 LCA Article 2(i) states "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 of the supply or exchange of good [sic] or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passenger by air, sea, rail or road." LCA, *supra* note 28, art. 2(i).

52 *Id*. art. 5.

53 *Id*. arts. 6, 19(3), 19(4), 19(5), 21(3), 22 and 24(3).

54 The Commercial Court referenced has not yet been established.

55 The Court of Appeals is the lowest national court currently in operation that is listed in Article 6.

UNCITRAL Arbitration Law relating to preliminary orders and recognition and enforcement of interim measures.[56] Because of this, preliminary orders and interim measures may be an uncertain area in Cambodian arbitration.

The conduct of arbitral proceedings follows the Model Law without any significant deviation—freedom to design all aspects of procedure, including location and language but with reasonable default provisions in the absence of party agreement.[57]

As with the UNCITRAL Arbitration Law, unless otherwise agreed, awards must be in writing and state the reasons.[58] Applications to set aside arbitral awards must be made within 30 days instead of UNCITRAL's more generous 90-day period.[59]

The LCA's most significant departure from the UNCITRAL Arbitration Law is the inclusion of a chapter that establishes a National Arbitration Center ("NAC") inside the Ministry of Commerce (MOC).[60] The NAC has potentially conflicting responsibilities as an arbitration forum and as a licensing and supervisory authority for all arbitrators in Cambodia, possibly even those who might serve at other forums.[61] Competition is limited as only the Chamber of Commerce and other professional associations are allowed to establish arbitration forums.[62]

Nonetheless, this chapter creates specific guidelines for the establishment of a quasi-official forum that may serve as the principal center for commercial arbitration and mediation in Cambodia. It may help jumpstart the use of arbitration in the local business community. If all relevant stakeholders are satisfied with its structure, the NAC could become a very successful alternative to the Cambodian courts. The Ministry of Commerce, with help from international organizations, completed a Sub-Decree that sets forth the governance rules for the NAC.[63] The first group of arbitrators has now been trained and have passed an entrance exam. NAC operations should begin in 2012.

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56 *Id*. art. 25. *See also*, UNCITRAL Arbitration Law, *supra* note 47, arts. 17 – 17(j). "Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order." Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, Para. 26 (2006), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited September 28, 2011).

57 *Id*. art. 26-35. Article 26 adds to the UNCITRAL Arbitration Law when it states that each party shall be given a full opportunity to present his case, "including representation by any party of his choice." This seems to underscore the freedom to choose any legal counsel.

58 *Id*. art. 39.

59 *Id*. art. 44 (3). Otherwise, the LCA is consistent with the UNCITRAL Arbitration Law and the New York Convention (*infra*) in relation to recognition and challenges to enforcement.

60 *Id*. arts. 10 – 17.

61 *Id*. However, under Article 11, parties to arbitration outside of the NAC are still allowed to choose arbitrators outside the official NAC list.

62 *Id*. art. 13. These forums would only be available if one or more of the parties to the dispute were a member of that forum organization.

63 The Sub-Decree on the Organization and Functioning of the National Arbitration Center [NAC Sub-Decree], Royal Government of Cambodia, #124, 62 Official Gazette of the Kingdom of Cambodia 6001 (2009). Those organizations involved in this effort include the Asian Development Bank (ADB), the United States Agency for International Development (USAID), which funds the American Bar

2. International Arbitration

The passage of the LCA has brought Cambodia into full compliance with the requirements of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"). The New York Convention provides the main international framework for the recognition and enforcement of foreign arbitral awards and awards of an international character. It was passed under the auspices of the United Nations, prior to the creation of UNCITRAL. Cambodia signed the New York Convention in 1960 and it entered into force in Cambodia in 2001.[64] Over 142 countries have ratified the agreement, including all of Cambodia's main trading partners.[65]

Under the New York Convention, Cambodia was required to enforce foreign arbitral awards. However, until the LCA was passed, there was no clear method of enforcement. Now that the LCA is entered into law, there is a clear Cambodian legal framework for this enforcement process. As LCA Article 45 states, "an arbitral award, *irrespective of the country in which it was made,* shall be recognized as binding and . . . shall be enforced . . . "[66] [emphasis added] Unless one of the limited grounds for refusal are present, the Cambodian Court must enforce the award. So, not only does the LCA provide for the enforcement of Cambodian arbitration awards, but it also provides for the enforcement of international arbitration awards.

3. Arbitration Conclusions

The LCA is very similar to the UNCITRAL Arbitration Law. This means that Cambodia has an arbitration law that, in most respects, meets international standards. The Cambodian courts' supervisory roles and the manner in which supervision is invoked need to be clarified. In addition, this author hopes that the NAC, which represents an ambitious and potentially successful project, does not crowd out other potential arbitration forums.

The LCA also brings Cambodia into compliance with its New York Convention and WTO obligations, at least with regard to commercial arbitration. This is a welcome development. Now, arbitration awards from any New York Convention country can be en-

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Association (ABA) and East West Management Institute (EWMI), the World Bank's International Finance Corporation--Mekong Private Sector Development Facility (IFC-MPDF) and the United Nations Development Programme (UNDP). In addition, the Cambodia Chamber of Commerce was also involved in the process.

64 *See* UNCITRAL website, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited September 28, 2011) In 2001, Cambodia passed the Law on the Implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, which essentially ratifies Cambodia's participation in the worldwide enforcement regime. However, to date, there has been no reported case of a Cambodian court ruling on the enforceability of a foreign arbitration award. *See* United States Department of Commerce, *Country Commercial Guide for Cambodia*, 54 (2006).

65 *Id*.

66 LCA, *supra* note 28, art. 45.

forced in Cambodia. And, under the law, local arbitration awards are to be respected and enforced. The LCA is a much-needed step forward for Cambodia's commercial law framework. It provides new, additional options for the resolution of commercial and other disputes and will hopefully encourage foreign investment in its fast-growing economy. If the NAC is properly implemented, commercial arbitration will be off to an excellent start in Cambodia.