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Asia Pacific Regional Arbitration Group

# Recent Trends in Institutional Arbitration and Mediation

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## A. Overview of Commercial Arbitration

### 1. Legal Framework

#### a. Commercial Arbitration

Cambodia is one of the 172 State Parties to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). It acceded to the New York Convention on 5 January 1960 and the instrument entered into force in Cambodia on 4 April 1960 in accordance with its Article XII. Cambodia has not made any declaration under Article I (3) of the New York Convention.

The Law on the Adoption and Implementation of the UN Convention on the Recognition of Foreign Arbitral Awards, promulgated on 23 July 2001 (the "Law on Adoption and Implementation"), defines the adoption and implementation of the New York Convention. This law also defines the procedure and jurisdiction of the Cambodian court when there is a question of the recognition and enforcement of a foreign arbitral award pursuant to the New York Convention.

The Law on the Adoption and Implementation is not a general legislative instrument governing commercial arbitration in Cambodia. It instead integrates the New York Convention into the Cambodian legal order to enable relevant domestic institutions to implement the provisions of the New York Convention. For instance, Article 4 of the Law on the Adoption and Implementation provides that "*the Cambodian Court must decide in compliance with the New York Convention in adjudicating on the recognition and enforcement of foreign arbitral awards*". The Law on Adoption and Implementation defines the jurisdiction to the Phnom Penh Appeal Court and the Cambodian Supreme Court (collectively, the "Cambodian Court") when adjudicating over matters concerning the recognition and enforcement of foreign arbitral awards. It also defines a "foreign arbitral award" as an "*award of an arbitration made in a country other than the Kingdom of Cambodia or under the procedures law of a country other than the Kingdom of Cambodia*" (Art. 2 (1)).

Article 15 of the Law on Adoption and Implementation reproduces, *mutatis mutandis*, the terms of Article V of the New York Convention as grounds for refusal of recognition or enforcement of a foreign arbitral award. The same article of the Law on Adoption and Implementation adds a principle to guide the Cambodian Court in interpreting the concept of "*public policy*". It provides that by "*determining the*

*standard of public policy applicable to the refusal of foreign arbitral award, the court shall consider based on the standard of public policy applied by the court of other signatory countries of the New York Convention*".

The Law on Commercial Arbitration was promulgated on 5 May 2006 (the "LCA") and its implementing regulations (Sub-Decree No. 124 on the Organization and Functioning of the National Arbitration Center as amended by Sub-Decree No. 182) constitute the main statutory legal framework governing commercial arbitration in Cambodia. The LCA was modelled after the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").

Article 1 of the LCA sets its purpose as being "*to facilitate the impartial and prompt resolution of commercial disputes arising in Cambodia in accordance with the wishes of the parties, to safeguard the legal rights and interests of the parties, and to promote the sound development of the economy*". Contrary to the Law on Adoption and Implementation, the LCA constitutes a comprehensive regime for commercial arbitration in Cambodia. The LCA governs the form of an arbitration agreement, the role of the courts in supporting arbitral proceeding, the composition and jurisdiction of arbitral tribunals, the conduct of arbitral proceedings, the making of awards, and the termination of arbitral proceedings.

The provisions of the LCA that may conflict with the Law on Adoption and Implementation are those of Chapter VIII of the LCA on the recourse, recognition, and enforcement of arbitral awards. The LCA does not explicitly repeal any provisions of any law, but only provides in Article 47 that "*any provisions in commercial arbitration sector that are contrary to [the LCA] shall be abrogated*". The Chapter VIII of the LCA is based on Article V of the New York Convention and in line with the Chapter VII and VIII of the Model Law. Therefore, the provisions of Chapter VIII of the LCA may serve as legal grounds for actions for setting aside, recognising or enforcing any arbitral award. The LCA also provides that the "*jurisdiction over recourse, recognition, and enforcement of arbitral award shall rest with the Appellate Court of the Kingdom of Cambodia*" and that the Supreme Court of Cambodia shall be the final jurisdiction to try appeals against the decision of the Appellate Court.

The scope of the LCA, being related to disputes of a commercial nature, defines the word "*commercial*" in the same terms as recommended by the Model Law, which provides that:

> "*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 good 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 co-operation; and carriage of goods or passenger by air, sea, rail or road*".

Moreover, one of the highlights of the LCA is the establishment of a specialized dispute resolution center, the National Commercial Arbitration Center (the "NCAC"). The LCA does not make it mandatory to resolve any dispute of a commercial nature through institutional arbitration. Article 2 of the LCA defines "*arbitration*" as "*any arbitration whether or not administered by a permanent arbitral institution*", thus also including *ad hoc* arbitration.

b. The Establishment of the NCAC

The NCAC is a non-profit organisation established by Chapter V of the LCA, under which the NCAC is described as "*an independent [center] … established under the auspices of the Ministry of Commerce*". Article 10 of the LCA enumerates the NCAC's objectives as follows: (1) to promote the settlement of commercial disputes by means of arbitration in Cambodia; (2) to create the necessary infrastructure and rules for the administration of arbitration cases in Cambodia, where parties agree to refer their disputes to the NCAC; (3) to ensure that high quality standards of arbitration are maintained in Cambodia, including setting standards for the qualification of arbitrators.

The LCA provides that the organization and functioning of the NCAC shall be governed by a Sub-Decree (Sub-Decree No. 124 on the Organization and Functioning of the NCAC, issued on 12 August 2009 ("Sub-Decree No. 124"), as amended by the Sub-Decree No. 182 on the amendment of Article 52 of the Sub-Decree No. 124 on the Organization and Functioning of the NCAC, issued on 31st December 2010). Article 2 of Sub-Decree No. 124 provides that the NCAC has the role of providing "*extra-judicial commercial dispute resolution services*", and "*carrying out others functions as determined by the NAC's General Assembly*". Article 4 of Sub-Decree No. 124 vests the NCAC's General Assembly with the power to consider and approve "*internal regulations and rules concerning the dispute resolution process*". For the implementation of those provisions, the NCAC has subsequently developed its own set of rules as a basis for arbitral proceedings.

For background on arbitration trends in Cambodia, reference can be made to the latest statistics released by the NCAC at its General Assembly on 18 March 2023. As per its Annual Report, a total of 32 cases were submitted to the NCAC between 2015 and the first quarter of 2023 with total sum of around USD 91 million in dispute. Of the 32 cases, 68% are domestic and 32% are international cases. 2018 and 2020 had the highest number of case registrations, 25% and 28% of the total 32 cases respectively. There are 70 arbitrators registered with the NCAC as of 31 December 2022), among which 61 are Cambodian and 9 are foreign nationals.

Even though most cases administered by the NCAC are domestic, around 47% of administered cases were conducted in English and 53% in Khmer. Regardless of being administered in Khmer or English, all administered cases were governed by Cambodian Law and conducted in Cambodia as the seat of arbitration. On the 32 cases administered by NCAC, 53% (17 cases) concluded with an award, of which one was a consent award. While 16% of the total case (5 cases) remain active, there are also cases in which the NCAC was found to have lacked jurisdiction or which were withdrawn by the parties[1].

2. Institutional Framework

The NCAC's first arbitration rules (the "2014 Rules") were adopted by its General Assembly on 11 July 2014 and came into force on 11 July 2014. The 2014 Rules were revised on 28 March 2021. The amended rules (the "2021 Rules") took effect from 28 June 2021. The NCAC promulgated s Code of Conduct for Arbitrators Registered with or Conducting Arbitrations under the Arbitration Rules of the NCAC on 6 April 2015. The Code was amended by the NCAC's General Assembly on 28 March 2021. The revised Code (the "Code of Conduct") took effect from 28 June 2021. Internal Rules were adopted by the NCAC's General Assembly on 11 July 2014, coming into force on the same date. The Internal Rules were revised with effect from 28 March 2021.

In this section, we will focus on provisions and rules that may be construed as facilitating the settlement of disputes through the parties' agreement.

a. The 2021 Rules

Article 35.3. (*Exploring amicable resolution*) of the 2021 Rules provides:

"*Before or at the preliminary meeting, the Tribunal shall confer with the parties for the purpose of exploring whether the possibility of an amicable resolution of the dispute exists, and shall assist the parties in any manner it deems appropriate*."

Article 45 of the 2021 Rules states:

"*If, before the final award is made, the parties agree on a settlement of the dispute, the Tribunal shall either issue an order for the termination of the arbitration proceedings or, if and to the extent requested by both parties and accepted by the Tribunal, record the settlement in the form of an award by consent. The Tribunal is not obliged to give reasons*

[1] NCAC, Management Report 2022-2023.

*in such an award. Any such settlement shall include a settlement regarding the payment of the costs of the arbitration.*"

Those rules are in line with the Articles 38 and 39 of the LCA. Article 38 of the LCA stipulates: "*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:*

*(1) if the parties determines that it does, the arbitral tribunal shall assist the parties in any manner it deems appropriate.*

*(2) If the parties settle the dispute prior to commencement of the formal arbitral proceedings, or in the course thereof, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, may record the settlement in the form of an arbitral award on agreed terms.*

*(3) An award on agreed terms shall be made in accordance with the provisions of Article 39 of this Law, and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.*"

If the parties reach a settlement agreement as per the provisions and rules, then the award (the "consent award") recording such settlement shall comply with the form and content requirements stipulated in Article 39 of the LCA and Article 49 of the 2021 Rules.

As mentioned in the LCA, a consent award is an arbitral award and thus cannot be deemed a mere settlement agreement. However, under Article 39 (2) of the LCA, it is not required that the arbitral tribunal state the reasons on which it is based. Article 45 of the 2021 Rules instead provides that the "*[t]he Tribunal is not obliged to give reasons in such an award*". Furthermore, whereas in the normal case Article 50.1 (a) of the 2021 Rules the arbitral tribunal must submit its draft award to the NCAC General Secretariat for scrutiny, Article 50.1 (b) of the 2021 Rules stipulates that scrutiny of a consent award is not needed. Article 45 of the 2021 Rules, however, requires that "*[a]ny such settlement shall include a settlement regarding the payment of the costs of the arbitration*". Indeed, it is likely that the parties when reaching a settlement on the subject matter of a dispute may also reach an agreement over the payment of the costs of the arbitration. There may be instances where that is not the case. If so, Article 39 (3) of the LCA may be considered. That provides:

"*The award shall allocate among the parties the costs of the arbitration, including the arbitrator(s) fee(s) and incidental expenses, in the manner agreed by the parties, or in the absence of such agreement, as the arbitrators deem appropriate. If the parties have so*

*agreed, or the arbitrators deem it appropriate, the award may also provide for recovery by the prevailing party of reasonable counsel fees.*"

Article 56.3 of the 2021 Rules on the apportionment of costs of the arbitration may also serve as a basis for the arbitral tribunal to determine who should bear the costs of the arbitration and in what amount. Thereafter, in accordance with Article 56.4 of the 2021 Rules, "*[t]he parties shall be jointly and severally liable for payment of the total costs of the arbitration to NCAC*".

b. The Code of Conduct

We have identified several provisions that empower the arbitral tribunal to assist the parties in reaching an amicable settlement of their dispute. However, in acting as facilitators, the members of the arbitral tribunal may compromise their ability to determine (and be seen to determine) the parties' dispute impartially if the parties do not reach a settlement.

Article 6.5 of the Code of Conduct cautions:

"*An arbitrator may assist the parties in reaching a settlement of the dispute in accordance with the NCAC Arbitration Rules. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties shall remain bound by their waiver.*"

## B. Development of Commercial Mediation Services

1. Legal framework for the Development of Commercial Mediation Services

The question whether the NCAC is entitled to offer services other than arbitration to resolve disputes has been raised among legal practitioners and ADR professionals in Cambodia. Laws are always subject to interpretation and, in order to analyse the effect of the LCA and its implementing regulations on the foregoing question, we will discuss three potential approaches below. These are the restrictive interpretation, the liberal interpretation, and the intermediate interpretation.

a. Mediation services as a stand-alone mechanism

A restrictive interpretation of the LCA would be that it LCA only concerns the settlement of commercial disputes through arbitration. It should be recalled that the NCAC was established by the provisions of the LCA, which provides that the role and functions of the NCAC is to enable the settlement of commercial disputes through arbitration in Cambodia. Considering only these provisions, a strict interpretation would result in excluding any possibility for the NCAC to develop other services for dispute resolution, for example mediation.

As mentioned earlier, the ultimate purpose of the relevant legislation is to establish a framework for parties to resolve their commercial disputes in a way that is beneficial to the development of the Cambodian economy. The LCA deals with commercial arbitration, whether ad hoc or institutional. It establishes the NCAC and its provisions govern the roles and functions of the NCAC. The LCA may not explicitly deal with resolving commercial dispute through mediation. But at the same time it does not prohibit any institution from offering services that contribute to accomplish such purpose, as long as there is compliance with the Article 1, paragraph 2, which stipulates that:

> "*[the LCA] shall not affect any other law of the Kingdom of Cambodia by virtue of which certain dispute may be submitted to arbitration or other dispute resolution procedures, or by virtue of which certain disputes may not be submitted to arbitration*".

There are examples of jurisdictions in which the national arbitration centers or other institutions offer mediation services pursuant to a statute regulating mediation or an act authorizing such institutions to offer mediation services. For instance, the Thailand Act of Arbitration Center 2007 provides that "*the [Thailand Arbitration Center] shall have the following objectives: (1) to promote and develop procedures on conciliation and arbitration...*". However, the governance of the Thailand Arbitration Center ("THAC") and the NCAC are different. In Malaysia mediation is governed by the Mediation Act 2012. But the statute does not create any specific institution but only establishes a general framework for the conduct of mediation.

In Cambodia, Article 2 of Sub-Decree No. 124 implementing the LCA merely states that the NCAC's role is (among others) to provide "*extra-judicial commercial dispute resolution services*". There is no restriction on developing other alternative dispute resolution services to resolve commercial dispute. Sub-Decree No. 124 also describes the NCAC's role as "*carrying out other functions as determined by the NCAC's General Assembly*". Article 4 of Sub-Decree No. 124 then vests the NCAC's General Assembly with the power to consider and approve "*internal regulations and rules concerning the dispute resolution process*". This may be construed as a basis for expanding the NCAC's roles and functions into the provision of mediation services.

### b. Mediation Services as a Necessary Infrastructure for the Administration of Arbitration Cases

Even if one remains skeptical about the application of a strict interpretation of the provisions of the LCA, a moderate interpretation of the provisions of the LCA would seem to reconcile the two approaches. Based on Article 1 of the LCA, mediation services could be developed by the NCAC. Mediation services may also be considered as a part of the "*necessary infrastructure and rules for the administration of arbitration cases in the Kingdom of Cambodia*" (LCA, Art. 10 (2)). Furthermore, Article 2 mentioned above, as well as the Article 4 of Sub-Decree No. 124 providing that the General Assembly may consider and approve rules concerning dispute resolution process and amend any provision related to the functioning of the NCAC, may be construed as grounds for developing mediation services in support of arbitral proceedings. Under such interpretation, the mediation services could still be developed as a support mechanism to arbitration, not only as a stand-alone mechanism.

Nevertheless, we submit that the restrictive and moderate interpretations are both unnecessarily narrow. It is unclear why a more liberal intepretation would run contrary to the fuflfillment by the NCAC of its functions. Therefore, we will analyse in this paper how commercial mediation services be develop at the institutional level.

## 2. Institutional Commercial Mediation Framework

On 16 February 2023, the NCAC initiated a public consultation on draft Rules and a Code of Conduct for mediation services. For this purpose, it conducted a public consultation workshop on 22 February 2023 among ADR professionals, members of the public, and representatives of business associations. On 18 March 2023 the NCAC's Executive Board submitted draft Rules on Mediation and a draft Code of Conduct for Mediators to its General Assembly. The General Assembly approved the Rules on Mediation (the "Mediation Rules") and the Code of Conduct for Mediators on that day.

### a. The Mediation Rules

The Mediation Rules provide the institutional framework for conducting mediation under NCAC administration.

Key definitions are in Article 1 of the Mediation Rules. The definition of "mediator" and "mediation" is in line with Article 2 (3) of the UN Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"). Article 1 of the Mediation Rules states:

> "'*Mediator' means a third person(s) who assists the parties in reaching amicable settlement to their dispute, whether in whole or in part, through Mediation. The Mediator does not have authority to impose a solution to the dispute on the parties*", and by defining the mediation as "*a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of the Mediator*".

"Mediation Clause" means "*a contractual provision requiring parties to resort to mediation to resolve their disputes. The Mediation Clause may take the form of an electronic record*".

The Mediation Rules are "*designed for the mediation of commercial disputes, whether local or international*". "*Commercial disputes*" are defined by the Mediation Rules in similar terms as in the LCA and the 2021 Rules[2]. It will be seen that the Mediation Rules do not explicitly exclude other types of disputes since, although "*designed for the mediation of commercial disputes,"* the parties *"may at any time agree to exclude or vary any provision of the Rules*" (Mediation Rules, Art. 2.3). Nonetheless, the Mediation Rules must be read in the context of the hierarchy of legal norms and "*the need to comply with the national legal framework*"[3]. Thus, a settlement agreement will need to be drafted with any applicable relevant legislation in mind. Similarly, a dispute of a commercial nature may also be prevented from being resolved through mediation administered under the Mediation Rules if any mandatory law provides otherwise. To emphasize such constraint, Article 2.4 of the Mediation Rules provides that "*mandatory legal and regulatory provisions governing mediation supersede any provision in these Rules that may contradict therewith*".

The Mediation Rules stipulate that "the *NCAC is the only body authorized to administer mediation proceedings under the Rules*" (Art. 2.5). In the same manner, the Mediation Rules provide that "*the Rules shall apply to all mediations administered by NCAC*" (Art. 2.2). Nevertheless, since mediation is a voluntary process, the Mediation Rules state that "*the Parties may at any time agree to exclude or vary any provision of the Rules, through the conclusion of Terms of Reference, with the written agreement of the*

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[2] Mediation Rules, Art. 2, "*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 good 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 co-operation; and carriage of goods or passenger by air, sea, rail or road*.".

[3] Official Records of the General Assembly, Seventy-seventh session, Supplement No. 17 (A/77/17), Annex III, par 6.

*General Secretariat and the Mediator, provided that any such exclusion or variation does not contradict with the spirit of the Rules and/or contradict with any mandatory applicable legal provision*" (Art 2.3). The flexible nature of the mediation process is also reflected in Article 2.6 of the Mediation Rules to the effect that "*[i]n all matters not expressly provided for in the Rules, Mediator and the Parties shall act in the spirit of the Rules*".

The Mediation Rules regulate the mediation process, including the commencement of a mediation, the appointment or replacement of a mediator, the duties of the mediator, the conduct of mediation, and the termination of mediation.

The Mediation Rules also state that the conduct of mediation does not preclude the parties from initiating parallel proceedings. Thus, Article 17 acknowledges that:

> "*mediation may take place under the Rules at any time regardless of whether arbitral, judicial, or other dispute resolution proceedings have been already initiated. Initiation of such proceedings is not of itself to be regarded as waiver of any agreement triggering the use of Mediation or as a termination of the Mediation*".

The parties may resort to mediation "*at any time*" regardless of any other proceedings already initiated, including adjudicative proceedings, such as arbitration. Such provision is in line with the Article 10 (1) of the UNCITRAL Mediation Rules and partially reproduces Article 10 (2) of the UNCITRAL Mediation Rules (2021). Thus, Article 17 of the Mediation Rules read in conjunction with the Articles 38 and 39 of the LCA and Articles 35.3 and 45 of the NCAC Arbitration Rules opens the door to the parties agreeing on resolving their commercial dispute through Arbitration-Mediation-Arbitration (Arb-Med-Arb).

b. The Code of Conduct

The Code of Conduct applies to "*all persons appointed by the General Secretariat to act as Mediators in Mediation administered by NCAC, including those not registered in NCAC's list of mediators*" (Article I).

The Code of Conduct does not specifically deal with Arb-Med-Arb procedure, but it addresses aspects of the implementation of such procedure. Those aspects are impartiality, independence, and the prevention of conflicts of interest, as well as the conditions for termination of the mediation by the mediator.

Impartiality is defined by Article III of the Code of Conduct as "*freedom from favoritism, bias or prejudice for or against any party either by word or by action. Impartiality is a commitment to serve all mediation Participants as opposed to a single party, and to avoid any conduct that gives any appearance of partiality or prejudice*". Being impartial, the mediator has a duty "*to provide a procedurally fair process in which each party is given an adequate opportunity to participate*".

The independence of the mediator and the prevention of conflict of interest are handled together in Article IV of the Code of Conduct, where it is provided that "*mediators must conduct reasonable inquiries to check the presence of any existing or perceived conflict of interest that might raise doubts in the parties' perception*". Subsequently, a non-exhaustive list of behaviours is provided concerning circumstances that may raise a reasonable doubt as to the mediator's independence. Examples are a direct or indirect financial interest in any party or the outcome of the mediation or the receipt of confidential information about the parties or their dispute from sources outside the mediation (excluding confidential information that any party may disclose to the mediator during the mediation proceedings).

Further, Article VII of the Code of Conduct stipulates that the mediator shall terminate the mediation upon of the occurrence of some events, including "*(d) if it is unlikely for the parties to reach settlement*". Thereafter, upon any event triggering the termination of the mediation process, the mediator "*may assist the parties in assessing further process options for dealing with their dispute*".

## 2. Prospects of Institutional Commercial Mediation Services in Cambodia

### A. Cambodia and the UNCITRAL Framework on Commercial Mediation

1. The Singapore Convention

Unlike some other ASEAN states (Singapore, Malaysia, Brunei, Philippines, Laos, Myanmar), Cambodia (much as Thailand, Viet Nam, and Indonesia) is not a signatory to the Singapore Convention. However, among ASEAN states, only Singapore has ratified the Singapore Convention on Mediation[4].

Article 1 of the Singapore Convention on Mediation provides that the instrument applies:

"*to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: (a) At least two parties to the settlement agreement have their places of business in different States; or, (b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a*

[4] *United Nations Convention on International Settlement Agreements Resulting from Mediation*, United Nations Commission on International Trade Law, <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 16 April 2023.

*substantial part of the obligations under the settlement agreement is performed; or, (ii) The State with which the subject matter of the settlement agreement is most closely connected*".

The Singapore Convention excludes from its scope of application settlement agreements involving consumers or relating to family, inheritance, or employment law, as well as judicial settlement agreements, or settlement agreements that have been recorded and are enforceable as an arbitral award. But the *travaux préparatoires,* reflecting the principle of the *more-favourable-right provision*,[5] mention that:

"*States would have the flexibility to enact domestic legislation, which would include in its scope such settlement agreements and that such an inclusion would not be a breach of their international obligations under the instrument*".

The Mediation Rules may be used to mediate international commercial disputes. Upon the termination of the mediation after the reaching of a settlement agreement, the question for the parties will be how to enforce such settlement in the absence of voluntary compliance. In the words of Gary Born, the "*Singapore Convention streamlines enforcement of such settlement agreements in different jurisdictions, in a manner broadly similar to the New York Convention's treatment of arbitration agreements and awards*"[6]. Indeed, Article 3 (1) of the Singapore Convention provides that "*each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention*". In the same manner that the New York Convention has been enforced upon the Law on Adoption and Implementation and the LCA, ratification of the Singapore Convention could help the authorities to develop procedures to streamline enforcement of mediated settlement agreements in Cambodia.

A question that could arise is whether a settlement agreement resulting from a mediation administered by the NCAC would be enforceable under the Singapore Convention if acceded to by Cambodia. For that, it may be necessary to assess the international nature of the settlement agreement in accordance with Article 1 of the Singapore Convention.

### 2. UNCITRAL Model Law on Mediation

As indicated earlier, there is no specific Cambodian legislative instrument governing mediation or the enforcement of mediated settlement agreements.[7] To develop a comprehensive regime on mediation, Cambodia may consider adopting the UNCITRAL Model Law on Mediation.

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[5] United Nations Commission on International Trade Law, Fifty-first session (A/CN.9/929), par. 19.

[6] Gary Born, *International Commercial Arbitration,* Kluwer Law International, 3rd edn, 2020, p. 303.

[7] The Code of Civil Procedure of the Kingdom of Cambodia provides for the possibility to conclude a judicial action by way of a judicial settlement protocol. See Articles 217-222. A title of execution for compulsory execution

### B. Med-Arb Approaches

As a med-arb mechanism, the arbitration and mediation institutional framework of NCAC may be enhanced by considering best practices ASEAN. A med-arb mechanism can be defined as "*a multi-tier dispute resolution method combining mediation and arbitration*".[8]

1. Settlement Agreement and Consent Award

Med-arb proceedings may comprise two or more stages whereby the parties "*attempt to reach a settlement through mediation*" and ultimately "*If parties reach a settlement, the proceedings will come to an end and the parties' settlement agreement will be embodied in an arbitral award*".[9]

The THAC has adopted such an approach by developing the *Rules of the Thailand Arbitration Center on Arbitration from a Mediation Settlement Agreement through Mediation of the Dispute* (2014) (the "THAC Rules"). The THAC Rules state:

> "*[A]t present, disputing parties have preferred the use of mediation for dispute resolution between them. Nevertheless, there are concerns that once the mediation resolves the dispute through a settlement agreement and one of the parties fails to comply with the agreed terms, there is a new dispute that arises pursuant to the settlement agreement. In order to support mediation through enforcement as an arbitral award, the Thailand Arbitration Center has therefore issued these Rules.*"

Issues that may arise from the med-arb mechanism are well identified, it may "*result in questions about the impartiality of the arbitrator if an unsuccessful mediator is subsequently appointed to serve as arbitrator*,"[10] or "*there is a high risk of conflict of interest in med-arb proceedings where the same individual is to act as mediator and arbitrator*".[11] Such concerns may not invalidate the validity of multi-tier agreements, but instead raise the necessity to establish safeguards on how med-arb is conducted.[12]

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may be also obtained, the Article 350 of the Code of Civil Procedure of the Kingdom of Cambodia provides that "2. *A title of execution refers to the following: (…) (f) a notarized document prepared by a notary concerning a claim for a fixed amount of money. This shall only apply to a notarized document that contains a statement that the debtor shall be immediately subject to compulsory execution*".

[8] Anselmo Reyes, *Practice of International Commercial Arbitration: A Handbook for Hong Kong Arbitrators*, Routledge, 2021, p. 31.

[9] ibid 31–32.

[10] Born (fn 6), p.307.

[11] Reyes (fn 8), p. 32.

[12] Born (fn 6), p.307.

Safeguards may be provided by institutional rules. For instance, the THAC Rules provide in Article 5:

> "*In the event that all the disputing parties agree to have an arbitral award according to the mediation settlement agreement by the arbitrator, the arbitration shall proceed with the Registrar preparing for both parties the request for arbitration and appoint the sole arbitrator, who shall not have been the mediator, to constitute the Arbitral Tribunal*."

Such rule potentially resolves any objection that may be raised by a party as to a conflict of interest. Likewise, Article 34 of the THAC Rules stipulate:

> "*[T]he Mediator is prohibited from performing as an arbitrator, a representative, or an advisor in the proceedings of arbitration or court deliberating the dispute previously mediated by him.*"

Under such Rules, the arbitral tribunal does not have jurisdiction to start a new proceeding, but as provided by Article 8 of the THAC Rules:

> "*[W]here the Arbitral Tribunal considers and finds the mediation settlement agreement as not contrary to the law, the Arbitral Tribunal shall make the arbitral award according to that mediation settlement agreement without necessarily having to state the reasons on which it is based*."

Those rules are similar to the International Chamber of Commerce (ICC) Arbitration Rules (2021) which provide in Article 33 that a settlement "*shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so*". Even though, the ICC Arbitration Rules do not mention compliance with any law, they provide discretion to the arbitral tribunal to refuse to make a consent award ordering the performance of an unlawful act.[13]

The Asian International Arbitration Center (AIAC) also offers the possibility of a *med-arb* approach. The AIAC Mediation Rules (2018) recommends use of the following model clause:

> "*The Parties further agree that any settlement reached in the course of mediation commenced under the AIAC Mediation Rules shall be referred to the arbitral tribunal appointed by the AIAC and may be made in a form of an award made by the consent of the Parties*."[14]

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[13] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (7th ed, Oxford University Press 2022) para 9.40.

[14] It is to be noted that this approach is similar to the SIAC-SIMC Arb-Med-Arb Model Clause: "*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ('SIAC') in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference in this*

Article 8 (3) of the AIAC Mediation Rules is similar to Article 12 of the UNCITRAL Mediation Rules (2021) which state: "*Unless the Parties have otherwise agreed in writing, the mediator and/or co-mediator shall not act as an arbitrator in any arbitral proceedings between the Parties*".

2. A Multi-tiered Clause Approach

The UNCITRAL Mediation Rules suggest a model mediation clause the first limb of which specifies that "[a]ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules". But, given that the parties may not succeed in resolving their dispute through mediation, the model clause has a second limb as follows: "*If the dispute, or any part thereof, is not settled within [(60) days] of the request to mediate under these Rules, the parties agree to resolve any remaining matters by arbitration in accordance with the UNCITRAL Arbitration Rules*". This approach differs from those described above as the aim of the second limb is not to enable the parties to record a settlement agreement in a consent award for enforcement purpose. The second limb is instead an "*escalation clause*" or "*step clause*".[15] It is essentially an arbitration agreement and provides for a different mode of dispute resolution if mediation within the specified period fails.[16]

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*clause. ... The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ('SIMC'), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms*".

[15] Born (n 6), p.305.

[16] ibid 306. See also the Notes on UNCITRAL Mediation Rules (2021), par. 19-22.