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Alternative Dispute Resolution: What it is, and why it is relevant to Cambodia

In early March 2006, the National Assembly passed a “Commercial Arbitration” law that will enable parties in a business dispute to work out their differences without having to go to court. Arbitration is just one of several forms of Alternative Dispute Resolution (ADR), a group of methods by which disagreements are settled outside the formal and full-scale judicial process. Compared to court proceedings, ADR’s chief advantages are that it is more flexible, simpler, cheaper and quicker than conventional court proceedings. While the new law focuses solely on commercial arbitration – used to address business disputes such as breach of contracts – this Business Issues Bulletin discusses both mediation and arbitration, as they are the two ADR techniques that are most relevant to the Cambodian business context. The Bulletin also includes the opinions of a number of key stakeholders.

Mediation

Mediation refers to a process in which a neutral and experienced third party, or mediator, assists disputants to reach a voluntary, negotiated settlement. While the mediator helps direct both parties towards an agreement, he or she does not make binding decisions. Although western notions of mediation may be unfamiliar to Cambodians, local forms of informal dispute resolution, known as *psah psar* and *somrob somruel* are, in fact, widely practiced throughout the country. Local authorities often play an important role in dispute resolution. Normally, the village chief or elders settle everyday and/or family conflicts through processes which could be described as mediation. Parties bring local disputes before commune coun-

cils, each of which resolves, on average, around 25 cases per year. Thus in total some 40,000 disputes are settled this way each year throughout the country.¹ If a commune council lacks the capacity to help settle a particular case, it usually sends it on to the district and/or provincial governor.

Arbitration

Like mediation, arbitration involves a neutral third party (the arbitrator) who is responsible for managing the dispute resolution process. However, arbitration also allows the third party, or arbitrator, to make the decisions that are necessary to resolve a disagreement. In arbitration the disputants must follow the decision of the arbitrator, even if one or both of them disagree with it. Unlike the court process, arbitration gives both parties in a dispute the flexibility to choose both the arbitrator as well as the rules that will be followed in deciding the case. Arbitration is often also advantageous because it allows for simpler and more efficient procedures than pursuing a case in court.²

Although arbitration is a popular approach for dealing with disputes in many countries, its practice in Cambodia has been limited, occurring only since 2002 and solely in labor disputes. These cases have been



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The statements and opinions presented here are only meant to provide additional reference material and do not reflect the official opinion of the Mekong Private Sector Development Facility or of IFC.

¹ Raquel Yringoyen Fajardo, Kong Davy, and Phan Sin, *Pathway to Justice*, UNDP and Ministry of Justice, 2005.

² Peter Newman, *The New Palgrave Dictionary of Economics and the Law*. Vol. 1, 1998.

handled by the Arbitration Council, which received 182 cases between May 2003 and June 2005.³

Advantages of ADR

ADR can have several advantages over the formal judicial system. In Cambodia, its primary benefits are likely to include: (i) it is cheaper and less time-consuming than pursuing a case in court; and (ii) it allows parties to avoid a court system which they may perceive as unreliable and unresponsive.

The formal court process in Cambodia is expensive and full of delays. It takes a court on average 401 days to enforce a contract in Cambodia, while in Singapore it takes only 69 days and in China, 241 days. Court and attorneys' fees can represent approximately 121.3 percent of the amount in dispute.⁴ This finding indicates that for most businesses going to court to enforce a contract just does not make business sense. Given the inefficiency of Cambodian courts, ADR can play a crucial role in resolving disagreements, as it has in many countries in the world. In Argentina, Colombia, and Peru, for example, commercial arbitration has enabled cases to settle more quickly and cheaply than they might have been if taken to court.⁵

Another benefit of ADR is that it can improve people's access to justice. In Cambodia, the court system is currently overwhelmed by a high caseload. Also, courts are unable to serve a large part of the population for the most part, because each province only has one court located in its main town, while most people live in the rural areas. By allowing less complex disputes to be resolved outside the court system, ADR can help people to take control of their own disputes rather than having to rely on an overburdened court system. Ultimately, this can reduce the overall backlog of cases and allow more people throughout the country to achieve settlements.

Alternative Dispute Resolution, especially mediation, will benefit Cambodian society. ADR requires less time and money to settle disputes than the courts. Passing the commercial arbitration law and establishing a national arbitration center will contribute significantly to the resolution of business disputes outside the court

process and, ultimately, promote business people's confidence in Cambodia. It will also be necessary to strengthen the courts, and, in particular, to establish commercial courts, as business people have requested. However, it will take a long time to strengthen the courts, so we will need ADR at least until the courts are strong enough to fulfill their mission."

H.E. Mrs. Ky Lum Ang, Chairperson of 9th Commission of National Assembly

Commercial arbitration is important for businesses. It allows parties to a conflict to control the dispute resolution process. Unlike litigation, arbitration allows disputing parties to choose their own arbitrators and agree on the procedures for resolving their disagreements. Furthermore, arbitration does not require the services of lawyers or experts, which can be particularly helpful for disputes that are not very complicated. Another advantage of commercial arbitration is time. Normally the arbitration process takes about six months. If a case is not settled within this timeframe, parties may consider the arbitrator incapable and look for new arbitrators. Finally, commercial arbitration results in confidential decisions, whereas judicial decisions are public. Hence, arbitration is better for firms that wish to keep their disputes private and continue doing business as usual.

H.E. Mr. Mao Thora, Under Secretary of State, Ministry of Commerce

Commercial dispute resolution outside the courts is important for businesspeople because it is a cheaper and faster process than going through court proceedings. We believe that businesspeople will welcome the establishment of commercial arbitration. Since we recognize arbitration's importance, we are preparing to establish a national arbitration center with the support of government, donors, and businesspeople, among others.

Mr. Diep Leng, Deputy Director General, Phnom Penh Chamber of Commerce

Because Cambodia still lacks specialized courts, there is clearly a need for commercial arbitration, which, if implemented properly, will help the business community. The institution of commercial arbitration can work hand-in-hand with labor arbitration to promote a stable investment environment in this country.

Mr. Men Nimmith, Executive Director, Arbitration Council Foundation

Limitations of ADR

It should be noted that ADR is not a substitute for, but rather a complement to, formal court proceedings. Because it relies on the disputing parties' willingness to resolve their issues, ADR has some limitations and thus cannot resolve all disagreements.

³ Raquel Yringoyen Fajardo, Kong Davy, and Phan Sin, *Pathway to Justice*, UNDP and Ministry of Justice, 2005.

⁴ Mekong Private Sector Development Facility, *Doing Business in 2005: Comparing the Cambodian Business Environment with the World*, Business Issues Bulletin, No. 7, 2005.

⁵ The World Bank, *Alternative Dispute Resolution – when it works, when it doesn't*, PREM notes No. 99, Sept 2005.

To begin with, ADR is not always as effective in resolving disputes. This is because both mediation and arbitration are, to a degree, consensus-based processes. In mediation, there will be no resolution unless the parties can come to an agreement. Although arbitration allows for an arbitrator to decide a dispute, it relies upon parties to implement the decision themselves. If one party refuses to implement a decision it can be enforced, but this requires a decision from a court. So operating in country where the courts are unreliable, slow or corrupt, can undermine the effectiveness of ADR.

Also, ADR as a mechanism is more suitable to resolve disagreements between parties that have relatively equal power, because in practice, parties with more power tend to be favored by ADR systems. In Cambodia, for example, many land disputes occur between parties with very different levels of power and influence, and as a result, decisions are usually made in favor of the party with more influence.

The disadvantage of mediation is that some mediators are not yet well trained enough to do the job. They need to have proper training. When it comes to arbitration, the disadvantage is that sometimes, the arbitrator may decide the award subjectively, rather than basing it on the law and the facts of the case.

**Mr. Michel Horn, Vice President,
Cambodian Federation of Employers &
Business Associations (CAMFEBA)**

In the past, there have been many cases in which one disputant was more influential than the other, and the authorities tended to favor the more powerful party. This suggests that local officials who act as mediators can resolve only those cases in which both parties are relatively equal. If the authorities have any bias towards the stronger party, it will prevent them from settling the dispute properly.

**Ms. Noun Sokchea, Lawyer at ADHOC
(Cambodian Human Rights NGO)**

Potential Impacts of ADR in Cambodia

ADR works most effectively when the parties voluntarily agree to use it as a method for settling disputes. Ultimately, the choice to participate in ADR depends on the availability of adequate incentives; without sufficient motivation, parties will not agree to follow it. For example, in Argentina, Columbia, and Peru, firms that do not arbitrate disputes or that refuse to pay the resulting award after having agreed to do so may be considered unreliable partners. This negative image can cost them future business opportunities. The need

to maintain a good reputation gives firms an incentive to ensure that ADR is successful.⁶

Commercial arbitration in Cambodia will work well only if the commercial arbitration law and other relevant laws are implemented properly. If this does not happen, then investors will not trust the system. Also, arbitrators will have to be competent and neutral when dealing with disputes.

**H.E. Mrs. Ky Lum Ang, Chairperson of 9th
Commission of National Assembly**

The success of commercial arbitration depends on the quality of arbitration decisions, i.e., the arbitrators' quality of work and integrity. If the arbitrators have good skills and knowledge about the laws and business, and if they make decisions fairly, then the settlements will be reliable. This will encourage businesspeople to trust arbitration and ultimately lead to a sustainable system.

**H.E. Mr. Mao Thora, Under Secretary of
State, Ministry of Commerce**

Although we are going to have a national arbitration center, it alone will not guarantee the success of commercial arbitration. Independent and neutral arbitrators will also be required; corruption should not exist in the arbitration process.

**Mr. Diep Leng, Deputy Director General,
Phnom Penh Chamber of Commerce**

In order for commercial arbitration to work well, I would like to suggest that: (i) the nomination process for commercial arbitrators be transparent and fair; (ii) the arbitrators be independent, professional, and capable; and (iii) the future commercial arbitration institution be empowered and treated as a judicial body.

**Mr. Men Nimmith, Executive Director,
Arbitration Council Foundation**

ADR can resolve many types of cases, except for criminal ones. However, ADR does not currently work well in Cambodia, especially when law enforcement is weak. In the case of land disputes, the more influential disputants can buy better proof of ownership, which in turn can result in unfair decisions by the arbitrators. Respect for and proper enforcement of the laws are prerequisites for the success of ADR.

**Mr. Ouk Vandeth, Director,
Legal Aid of Cambodia**

In order to make ADR work in Cambodia, there are two main factors. First, the public must have confidence in the media-

⁶ Ibid

tors and arbitrators, particularly when it comes to their neutrality. Second, there should be greater public awareness of ADR's benefits. Once these conditions exist, people will opt for ADR when addressing disputes.

Ms. Noun Sokchea, Lawyer at ADHOC

Arbitration already contributes to more stable business-labor relations in Cambodia. Labor strife is one of the main problems for Cambodian businesses; when disputes occur, they generally involve workplace strikes. The Arbitration Council, which handles labor issues, has the authority to issue return-to-work orders that stop walkouts. In practice, most of these orders have been followed, which has significantly reduced the number of strikes. More generally, the Council has resolved 70% of the labor cases that have come before it for arbitration.⁷

Although there is no specific research that evaluates the impact of arbitration on business, the high success rate for labor dispute settlement suggests that the process makes it easier for enterprises to operate. Currently over 50% of private enterprises in Cambodia rank the legal system and conflict resolution as one of the top ten major constraints to their operation and growth.⁸ A well-functioning ADR framework can improve the country's business environment and boost investor sentiment.

Status of Commercial Arbitration in Cambodia

As mentioned earlier, the National Assembly recently passed a law on commercial arbitration. The law follows most of the principles of the Model Law on International Commercial Arbitration, with one main exception; it provides for the establishment of a "National Arbitration Center" (NAC), which has the authority to administer arbitration, register arbitrators and set standards regarding the qualifications of arbitrators. However, both the business and donor communities have expressed concern that the role of the NAC as defined in the law is unclear and does not ensure that parties have the freedom to choose their own arbitrator – one of the key concepts in commercial arbitration.

⁷ IFC-MPDF, Interview with Mr. Men Nimmith, Executive Director of Arbitration Council Foundation, February 2006.

⁸ The World Bank, *Seizing the Global Opportunity: Investment Climate Assessment and Reform Strategy for Cambodia*, August 2004.

The business and donor communities expressed and communicated two concerns about the law to the Government. The first one relates to the role which the NAC has in registering arbitrators in Cambodia. This is not clear because Article 11 of the law states that "a Khmer natural person or foreigner who is arbitrator **shall** register" with the NAC while also stating that parties can choose an arbitrator who is not registered.

Further Article 13 of the law allows business and professional associations to establish their own "arbitration institutions" but only for disputes between their members or between their members and third parties. While the Chamber of Commerce has the right to establish a separate arbitration center, this can only be in Phnom Penh. These provisions are uncommon. In other countries like Hong Kong or Singapore, for example, arbitration is based on the principle that parties to a dispute are free to choose both who will arbitrate their disputes and how this will be done. Thus, any business or organization can set up an arbitration center, and individuals are allowed to practice arbitration without being required to register with a center. The Cambodian system does not allow for this freedom and thus raises concerns whether the process will be genuinely independent.

Daniel Adler, Legal Specialist, World Bank,
Cambodia

Conclusion

ADR can serve as a catalyst for economic growth in Cambodia because it could enable parties to settle their differences more quickly and cheaply than is possible in the conventional judicial system. The establishment of a trusted commercial dispute resolution system is likely to encourage investment and promote economic growth.

Though the commercial arbitration law has been passed, it will be some time before it is implemented because sub-decrees providing implementing guidelines still have to be drafted.

It is essential that when the Government develops the relevant sub-decrees, it takes the concerns of the private sector seriously and address them to ensure that independence of commercial arbitrations in Cambodia is guaranteed.

While guaranteeing the independence of commercial arbitrations is a crucial prerequisite, a successful system will also depend on the capacity and quality of the arbitrators. The way forward should include building the capacity of arbitrators through training about commercial arbitration and relevant international best practices.