



The Establishment of Commercial Arbitration Services in Cambodia



Number **24**

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Acknowledgements

Disputes are inevitable in business transactions. One way to resolve disputes is to use a formal dispute resolution mechanism, such as through the courts. In Cambodia resolving commercial disputes through the court system is expensive and time-consuming, so much so that businesses often simply choose not to pursue formal dispute resolution and write off losses. To provide greater options for commercial dispute resolution, an alternative mechanism to the courts is needed. Commercial arbitration offers such an alternative with the prospect of reducing the time and cost of resolving disputes.

The International Finance Corporation prepared this *Discussion Paper* in 2008 and 2009 to assess the demand for alternative dispute resolution in Cambodia and to provide recommendations for the establishment of an effective mechanism for commercial arbitration. This *Discussion Paper* summarizes the type of commercial disputes that occur in Cambodia, how businesses resolve them, and whether a formal alternative to the courts through the establishment of the National Arbitration Center, could contribute to resolving commercial disputes in a more effective manner. Funding for this work was provided by the European Commission - MPDF Trust Fund to support small and medium enterprise development in Cambodia.

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Acronyms

ADR	Alternative Dispute Resolution
BANI	Indonesian National Board of Arbitration
CAMFEBA	Cambodian Federation of Employers and Business Associations
GMAC	Garment Manufacturers Association of Cambodia
IFC	International Finance Corporation
ILO	International Labour Organization
LAC	Labor Arbitration Council
NAC	National Arbitration Center
PDRC	Philippines Dispute Resolution Center
RGK	Royal Government of Cambodia
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

Introduction

As part of its World Trade Organization (WTO) accession negotiations in 2003, Cambodia agreed to put in place a number of new laws in line with its commitment to providing an improved regulatory environment for trade and investment. In acknowledgment of the important role that dispute resolution plays in the development of a modern trading economy, a *Law on Commercial Arbitration* was included as a priority in this package of reforms.

The *Law on Commercial Arbitration* was passed by Cambodia's National Assembly in 2006; establishing a framework for the private arbitration of business disputes that follows international practices. The law also envisages a National Arbitration Center (NAC), established under the auspices of the Ministry of Commerce.

Following consultations with representatives of the business community and development partners, a Sub-Decree on the Organization and Functioning of a National Arbitration Center was passed by the Council of Ministers on July 24, 2009. With this regulatory framework in place, the International Finance Corporation (IFC), with funding support from the European Commission, is planning to provide support for the development of more effective commercial alternative dispute resolution (ADR) in Cambodia. For the purposes of this paper, commercial ADR services are understood to include mediation, conciliation and arbitration, as well as combinations of these practices.

The aim of this paper is to stimulate discussion on the development of commercial ADR services in the context of the impending launch of the NAC by providing:

- a. background on the country context for commercial dispute resolution;
- b. an overview of the issues and risks involved in the establishment of the NAC and what could be done to mitigate these; and
- c. an analysis of the necessary success factors for commercial ADR services in Cambodia, based on international experience.

This paper is based on qualitative research commissioned by IFC and stakeholder consultations conducted as part of various IFC missions to Cambodia. Given that the literature on the development of commercial ADR services in relevant countries in the region is relatively thin, a review of the relevant literature was supplemented by targeted consultations with practitioners from Indonesia, the Philippines and Mongolia in February 2009.

Country Context

Economic and Legal Framework

(a) Economic Context

Cambodia has experienced a period of rapid economic expansion, with growth averaging 9% over the 10 year period from 1998 to 2008. This has translated into major structural changes for the country, its people and the economy. Population growth has slowed, the share of 0-14 year olds in the population has decreased, and the country has become more urbanized. Poverty has been reduced significantly (by about 10 percentage points over the last decade), with improvements in a range of social outcomes. The economy is modernizing from an agricultural base with industry and service sectors emerging. Construction has grown and the emergence of nascent banking and insurance sectors can be observed. The launch of a local stock exchange is planned for 2009/10. Exports have increased from almost nothing to 65 percent of GDP and significant flows of foreign direct investment are making the country less aid-dependent. Although the current global economic crisis is having a significant impact on a range of sectors, including garment and construction, the Royal Government of Cambodia (RGC) continues to focus on the development of a business environment that will encourage both local and international investment.

In these circumstances, a key question for the Cambodian government and its donors is how to support renewed growth once the global economy recovers. Cambodia's commercial regulatory environment presents serious challenges for business. Figure 1 below shows that though rated less seriously in 2007 than in 2003, legal issues including corruption, regulatory policy uncertainty and the lack of reliable dispute resolution are regularly cited as obstacles to doing business in Cambodia. Thus, improving the enabling environment for private sector development is widely acknowledged as a crucial part of such efforts.

(b) Legal and Judicial Framework

Cambodia has a unitary judiciary with courts of first instance at the provincial/municipal level. These courts have jurisdiction over all cases regardless of the nature or magnitude of the dispute.

Appeals are heard by an Appeals Court, which sits in the capital. A further appeal may be made to the Supreme Court, which is the highest appellate court in all except electoral and constitutional matters.

The regulatory framework for commercial dispute resolution in Cambodia is evolving rapidly. A new civil code and a code of civil procedures were promulgated in 2007 and 2006, respectively.

The civil procedures code is now in force and the substantive civil code will enter into force once transitional arrangements have been completed. A proposal for the establishment of a commercial court is currently before the government and further legislation, for example on the enforcement of judgments and commercial contracts, is expected during the mandate of the current government (2008 – 2013).

Recognizing the need for more effective commercial dispute resolution systems, Cambodia enacted the *Law on Commercial Arbitration* in March 2006.¹ This law follows the UNCITRAL model and is generally considered to be of acceptable quality. Although the law does not specifically refer to mediation, it allows for mediation to occur as a way to facilitate the voluntary settlement of disputes (Article 38).

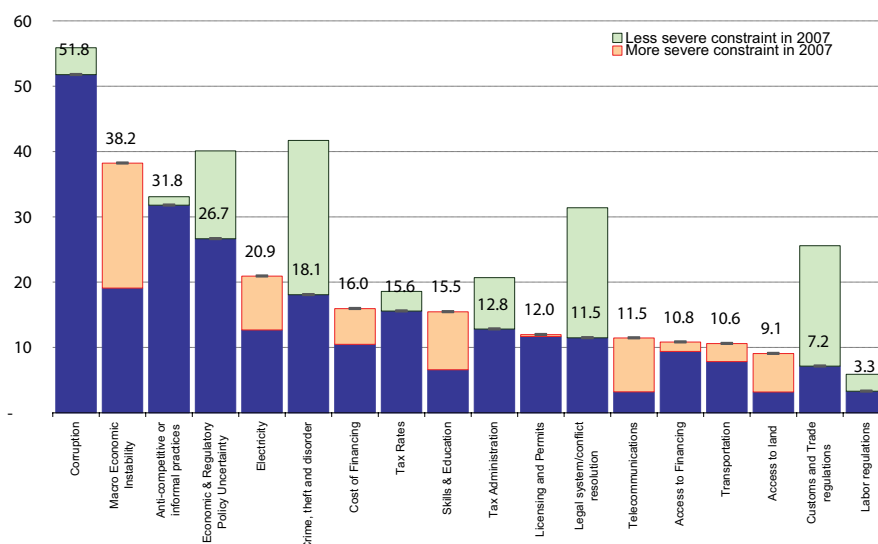
A key concern with regard to the viability of any commercial arbitration service relates to the potential for the courts to interfere in arbitral proceedings and/or fail to enforce awards. This is likely to be of particular concern in Cambodia, given the issues related to the reliability and integrity of the judiciary outlined above.

On the positive side, both the *Law on Commercial Arbitration* and the civil procedures code provide for the standard limitations on the jurisdiction of the court with regard to arbitral proceedings. Thus the Law instructs courts to refer matters which are the subject of an arbitration agreement to arbitration (Article 8); provides the arbitral tribunal with the competence to rule on its own jurisdiction (Article 24); and limits the power of the courts to set aside or refuse to enforce an award in the instances specified in the UNCITRAL model law (Articles 44 & 46).

These provisions are reinforced by Article 353 of the civil procedures code, which restates the requirement to enforce restrictions on courts to hear the merits of cases subject to arbitration.

¹ Available at: <http://www.cambodiacommerciallaws.com/sub/laws/laws.html> (accessed 26 April 2008).

Figure 1: Constraints on the Business Environment in 2003 and 2007



Note: Share of firms that responded “severe or very severe” to the question “how problematic are the following issues to the operation and growth of your business” Source: 2003 and 2007 Cambodia Investment Climate Surveys, World Bank.

On the negative side, an overreliance on the letter of the law is likely to be naïve in the Cambodian context. Given the performance of the courts more generally, one has to expect that judges may be subject to influence and that their application of the law will be inconsistent at times.

Further, there is concern that a decision of the Constitutional Council (N° 103/003/2006) in relation to the *Law on Commercial Arbitration* muddies the waters in relation to the jurisdiction of the courts (see Annex D). This decision was issued as part of a pre-promulgation constitutional review of the *Law on Commercial Arbitration*. Although the Council concludes that the law is constitutional, its decision includes in its reasoning a somewhat confusing passage which states that: “the Law on Commercial Arbitration shall be interpreted as providing that the court may intervene in the case that there is request from a party and that it does not limit the jurisdiction of the court.” The legal implications of this passage are not clear, however, there is some concern that it might be used by the courts as a basis for intervening in arbitral proceedings in a counterproductive manner.

Current Dispute Resolution Practices among Cambodian Enterprises

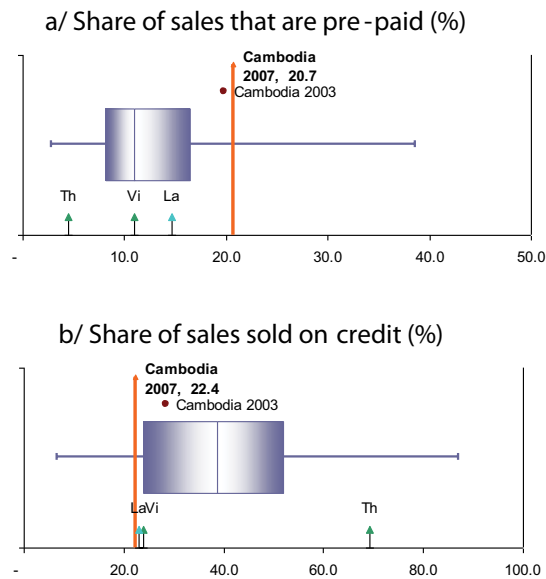
As long as people continue to do business, it is inevitable that disputes will occur. Given the notoriety of Cambodian courts, it is essential to understand how business people resolve their disputes and to assess the effectiveness of such dispute resolution mechanisms. To achieve this, IFC asked representatives of the business community a range of questions with regard to: i) the types of commercial disputes (characteristics of disputes) that exist between private enterprises; ii) the main causes of these disputes; iii) the way they resolve disputes; iv) the effectiveness and efficiency of existing dispute resolution processes and institutions; and v) how the weaknesses of existing dispute resolution practices affect their business.

The following were key findings:

- a. **Types of disputes encountered:** Non-payment for goods and services were reported as the main cause of commercial disputes. Other contractual disputes were also reported. These include issues over insurance, transport, construction and distribution relationships.
- b. **Cambodia's courts are mistrusted by the business community and as such are avoided where possible.** Though a program of reform is underway, both research and expert opinion stress the continued weaknesses of the Cambodian judicial system. Issues including endemic corruption, executive interference, lengthy delays before hearings, and difficulties with the enforcement of judgments are all cited as barriers to the effective resolution of commercial disputes. According to the World Bank's *Doing Business Report* (2009), it takes 401 days, involves 44 procedures, and costs at 102.7% of the value of a debt to enforce a hypothetical commercial contract valued at 200% of per capita GDP. Court and attorney fees command the highest share of the cost.
- c. **Court proceedings may be used by some parties as a strategy to avoid final resolution of a case.** Commencing court proceedings is seen as a step which larger, more influential parties may take because they feel as though they can influence the outcome.

d. In the absence of reliable formal dispute resolution services, businesses operating in Cambodia have a range of alternative dispute resolution and risk mitigation strategies. Many businesses will only engage in large transactions with trusted partners or they will require substantial upfront payments. Businesses also report carrying a great deal of risk and understanding that when disputes arise, it may be more expensive to resolve them than walk away from the relationship with a loss. The World Bank's Investment Climate Assessment (2009) reports that businesses rely heavily on prepaid transactions and do not allow purchases on credit to reduce the risk of contractual and payment disputes (see Fig. 2).

Figure 2 : Mitigating Risks of Commercial Disputes



Note: The box represents the 25th and 75th percentile of the distribution and the middle line, the median. The extremes of the bar represent the minimum and maximum of the distribution. Cambodia's performance in 2003 and 2007, as well as those of Lao PDR, Thailand, and Vietnam are also displayed. Source: Cambodia surveys, and www.enterprisesurvey.org.

- e. **Negotiation is cited as the preferred method of resolving disputes among businesses.** A flexible approach is taken with a view to maintaining relationships with business partners and clients. Sino-Khmer entrepreneurs are known to seek assistance from traditional mediators in their local business community. Larger, more formal enterprises may turn to lawyers to assist in negotiations. Court clerks also act as informal mediators.
- f. **The lack of established alternatives to the court results in some businesspeople turning to representatives of the administration (including the military) to facilitate the resolution of disputes.** This occurs in a range of settings. Insurance companies, for example, may rely on the police to help mediate damage claims following a motor accident. Similarly, provincial level officials of the Ministry of Commerce report assisting local businesses in resolving disputes. Some businesses express concerns about this form of dispute resolution and try to avoid third-party intermediary resolution because they expect the intermediary will demand a cash payment or place the business in a weakened position because a future favor will be required.
- g. **The difficulties associated with enforcing contracts mean many businesses simply chose to ‘walk away’ from a debt.** In a volatile business environment, clients may just ‘disappear’, making dispute resolution impossible. In other cases a lack of confidence in the legal system means that dispute resolution options are quickly exhausted. This is consistent with the local business culture where relationships are highly valued and confrontation is avoided whenever possible.
- h. **A further concern that arises in discussions with local businesspeople is the criminalization of commercial disputes.** Although accurate figures are difficult to obtain, it is not uncommon in Cambodia for a party to a commercial dispute to lodge criminal proceedings in parallel to a contractual dispute. The charge is often ‘Breach of Trust,’ an offence carrying a penalty of up to five years in prison under the criminal code. The use of the criminal law as a negotiating strategy has a long history even in more developed East Asian countries, notably Taiwan (Kaufman Winn (1994)). Nevertheless, concerns over possible criminal charges are seen to deter businesses, particularly foreign companies, from taking on riskier transactions in Cambodia (IFC 2008).

Demand for ADR Services in Cambodia

It is evident that the existing practices of resolving commercial disputes are complex, costly and time-consuming, and full of uncertainties. Other approaches to resolving disputes that are more systematic, less costly, less time consuming and with more certainty, will likely be preferred alternatives for business people. To assess demand for ADR services, IFC researchers asked businesses about their needs for dispute resolution services. Businesses were also asked about their willingness to pay for ADR services. This qualitative research reveals the following:

- a. **A range of businesses expressed support for the development of modern ADR services in Cambodia.** This support is driven by dissatisfaction with current options for the resolution of disputes to which no negotiated outcome can be found (primarily the courts or the use of government intermediaries). Other key stakeholders also endorse the development of commercial ADR services. Discussions with the Bar Association, the Ministries of Justice and Commerce, Chambers of Commerce and representatives of the judiciary reveal widespread support.
- b. **When the range of ADR models is explained, both arbitration and mediation are seen as having potential.** Businesses noted that what they really want is a clear and final resolution of a dispute and, as such, that arbitration may be the preferable process for them. In this case what is really desired may be a well-functioning court system. The question remains to what extent arbitration can fill this gap in the Cambodian context. In some cases the view was expressed that conciliation or mediation is perhaps more suited to the mentality and way of thinking of Cambodian people.
- c. **Particular endorsement for the development of arbitration came from the insurance industry.** Influenced by international practice, insurers are familiar with ADR clauses. ADR clauses currently in use refer cases to international arbitration. A number of the major insurers indicated that they would be willing to try a local ADR facility if it was of a reasonable standard and had appropriate cost structures.

- d. **Legal advisors to international businesses also endorse the development of ADR services.** A concern here is that international clients engaging in joint ventures would be presented with boiler plate contracts with local arbitration clauses by their Cambodian partners, and that these would be difficult to remove through negotiation. Anticipating that their clients will be users of arbitration services in Cambodia, this group of lawyers is keen to ensure that the arbitration body develops with the highest possible level of technical expertise and professional independence. The legal profession has been a major contributor of ideas and suggestions to improve the quality of the Sub-decree to establish the NAC. Continued buy in and support from lawyers is expected as the NAC becomes operational.
- e. **A significant exception to the picture of mistrust of the courts comes from some of the major banks.** One bank reported that its in-house legal department has been able to deal positively with the courts and that debt recovery proceedings can be processed with reasonable efficiency and reliability, if unambiguous contracts are in place. For this reason, the bank representative said that banks may be less unlikely to use arbitration services.

National Arbitration Center

For the purpose of enabling businesses to resolve their disputes through commercial arbitration, the government, as set forth in the *Law on Commercial Arbitration*, issued a Sub-Decree on the Organization and Functioning of a National Arbitration Center. During the dialogue process with the private sector on the Sub-decree, there were concerns that it did not provide an adequate structure for an effective and sustainable NAC. Following discussions with the private sector and donors, however, many of these issues were addressed in the Sub-decree (Annex B).

Importantly, major business groups, including the Cambodian Federation of Business Associations (CAMFEBA), the Garment Manufacturers Association of Cambodia (GMAC) and the Law, Tax and Governance Working Group of the Government-Private Sector Forum were actively involved in the consultation process on the Sub-decree. The participation of the private sector in the preparation of the Sub-decree, as well as in the future process of establishing the NAC, is a key factor for ensuring the NAC meets the needs of the business community. This will increase the likelihood that the private sector chooses to utilize the NAC to resolve commercial disputes.

As set out in the Law and Sub-decree, the NAC is designed to have a leading (though non-exclusive) role in promoting arbitration, training arbitrators and providing commercial arbitration services in Cambodia. The NAC is established under the auspices of the Ministry of Commerce, though in due course it is expected to become a self-governing non-profit institution.²

The provisions for the establishment of the NAC set out in Chapter 3 of the Sub-decree can be summarized as follows:

- a. The Ministry of Commerce appoints an “Inception and Selection Commission” comprising 12 members from various government agencies and private sector representatives, as set out in Article 45 of the Sub-Decree;
- b. This commission, chaired by the representative of the Ministry of Commerce, announces the opportunity to join the NAC as a founding member and shortlists a maximum of 60 applicants (Article 47);

² Sub-Decree on the Organization and Functioning of the NAC; Art. 1

- c. At least 50 of these applicants will be selected to participate in a training course organized by the Ministry of Commerce, the successful completion of which will qualify them to become members of the NAC (Article 49).
- d. Chambers of Commerce and other organizations representing the private sector may appoint additional representatives who have a right to vote in the General Assembly of the NAC (Article 34);
- e. The NAC is established (and the Inception and Selection Commission dissolved) once a meeting of the general assembly of the NAC is held and a seven member Executive Board elected; and
- f. The Executive Board of the NAC then appoints a Secretary General to take responsibility for the day-to-day management of the Center.

One key provision of the Sub-decree is the composition of the ‘Inception and Selection Commission’ that will select the first batch of arbitrators for NAC. While the draft of the Sub-decree submitted to the Council of Ministers provided the private sector with the majority of seats on the Commission to ensure that the selection process is well balanced and to give the private sector a stronger voice in the selection process, the final version provides for an even split between the private sector and the government. While it would be preferred to have a private sector majority in the initial selection process, the private sector’s equal voice, combined with clear criteria for the selection of arbitrators and a transparent selection process should ensure that the first batch of arbitrators is qualified.

Ingredients for the Success of the National Arbitration Center

International best practice shows that certain ingredients are necessary to ensure the success of any arbitration center or service provider. Based on the global experience of the World Bank Group in assisting different countries to establish ADR mechanisms, six key ingredients have been identified that increase the likelihood that an ADR mechanism will be a success and that private sector demand for commercial dispute resolution services will make it sustainable. These ingredients have been communicated with the government several times during the consultation process to prepare the Sub-decree to establish the NAC. Particularly important are the first four ingredients, without which the risk of failure is much higher. However, it has been the experience of other countries that if any of the six ingredients is missing, there is a significant risk that a new institution will not meet the expectations of its founders and may possibly fail.

Ingredient 1: Complete independence and neutrality. A commercial ADR institution must be (and perceived to be) strictly neutral and independent or the business community will lack trust in the institution and simply not use it. In the case of the NAC, it is therefore very important that it never be seen as being influenced by any external authority, including the Government or the Judiciary. Lacking this, the private sector is unlikely to use, or to rely on the NAC.

To ensure the independence and neutrality of the NAC, the legal framework governing arbitration needs to make it very hard for the government and the judiciary to interfere with arbitral proceedings. Currently, the legal framework that governs the provision of ADR services and the enforcement of their outcomes (agreements and awards) sufficiently limits the power of the court. Cambodia's existing laws and international commitments set forth specific constraints on the court making it difficult for it to interfere in arbitration processes. *The Law on Commercial Arbitration* is based on the UNCITRAL model and sets strict parameters under which the court is allowed to review arbitral proceedings. The law prohibits the court from interfering in arbitral proceedings, outside of a list of standard exceptions relating for example to conflicts over the appointment of arbitrators; arbitral tribunals that make decisions outside their competence; and cases in which there has been a failure to give notice to a party.

Similarly, the Code of Civil Procedures also supports the enforcement of privately negotiated/mediated agreements and arbitral awards. Moreover, Cambodia is a member of the International Center for the Settlement of Investment Disputes, the Washington Convention and is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 'New York Convention'. These commitments to abide by international arbitration rules and outcomes should serve as a deterrent for Cambodian courts to intervene in domestic arbitration proceedings.

Nevertheless, there is concern that relates to the decision of the Constitutional Council on the power of courts vis a vis arbitral proceedings (see Annex D). This decision is linked to broader concerns about the integrity and capacity of the Cambodian judiciary. While the power of the courts over arbitral proceedings must be acknowledged as a problem, the experience of commercial arbitration in similar countries, as well as the record of labor arbitration in Cambodia, suggest that a weak court system need not be seen as a barrier to the establishment of a commercial ADR service that adds value for the private sector.

Ingredient 2: Unquestioned reputation and integrity of all who are involved. It is vital that only individuals of good reputation and integrity are involved in creating and maintaining the NAC, whether as individual board members, executive staff members or those who eventually qualify as accredited arbitrators. Agreed prior definitions of the required qualifications are necessary to ensure that only those who are truly qualified are permitted to be involved in the NAC. The rules in respect to the minimum qualifications for arbitrators, and the NAC's executive staff, need to be utterly clear, explicit and transparent, without the possibility of direct or indirect discretion.

The Sub-decree on the Organization and Functioning of the National Arbitration Center sets forth conditions to ensure that the institutional set up of the NAC is free of undue interference from the government and that the selection process will ensure the reputation and integrity of selected arbitrators. The responsibility for the selection of the first group of arbitrators and the subsequent organization of the governing body of the NAC are entrusted to the Inception and Selection Commission. Given the private sector's interest to see a functioning and effective ADR mechanism in place, it has a strong incentive to ensure that the selection process is transparent and that arbitrators are selected based on their merits. As the election of the first governing body of the NAC is also governed by the provisions of the Sub-decree, the independence, neutrality, and integrity of the governing body should not be compromised.

Beyond the selection of the initial group of arbitrators, a range of measures should be taken to ensure the credibility of the NAC. These include:

- (a) the establishment of an advisory board with reputable international members (similar strategies appear to have been used with success by BANI in Indonesia; and the Labour Arbitration Council (LAC) in Cambodia);
- (b) the establishment of a code of conduct for members of the NAC and a credible system for enforcing the same;
- (c) putting in place of rules and procedures that ensure qualified individuals remain able to gain accreditation as arbitrators (rather than the NAC turning into a ‘closed shop’); and
- (d) particularly during the establishment phase of the NAC, ensuring that any inexperienced arbitrators hearing cases are mentored by more senior professionals (drawing on the experience of the LAC).

Ingredient 3: Private sector needs to be directly involved in the design of the center. Given that the NAC is to be an institution specifically for the private sector, it needs to be operated on behalf of, and for the benefit of, the private sector. Unless the private sector is genuinely consulted and is able to give input on the design and operation of the NAC, it is unlikely that the NAC will effectively meet private sector needs. If the NAC is designed and established with limited input from the private sector, there will be no sense of private sector commitment or ‘ownership’ of the Center. This, in turn, will create a high risk that the private sector will lack trust in the NAC and simply not use the Center’s services. Therefore, it is imperative that the private sector is extensively consulted with, and is directly involved in the design and establishment of the NAC.

Recognizing the immense benefits of a strong arbitration mechanism in reducing the time and cost of resolving commercial disputes, the private sector has played an important role in ensuring an international standard legal framework for commercial arbitration. As early as mid 2005, major business organizations, including the Cambodian Chamber of Commerce showed a strong interest in the development of the *Law on Commercial Arbitration*. The private sector, including legal professionals, provided comments to the draft law and followed up on the drafting process until its adoption in March 2006.

Following the adoption of the law, other major business organizations (GMAC, CAMFEBA, and the Bar Association) continued to play a key role in the formulation of the Sub-decree on the establishment and functioning of the NAC. Due to this private sector involvement in the consultation process, the

Sub-decree provides a clear process for selecting arbitrators and ensures that the Commission in charge of selecting the first group of arbitrators has sufficient private sector involvement. With this result, the private sector is a key actor in the selection process, and has expressed a strong willingness to participate in the establishment of the NAC.

Ingredient 4: Key leaders of the judicial system should be supportive of the NAC. For the NAC to be successful, judges will need to appreciate their role in enforcing commercial arbitration awards and the strict limitations upon them regarding the re-opening of any substantive matter. An open dialogue between the Ministry of Justice, the judiciary and the Ministry of Commerce would do a great deal to build judicial support for the NAC.

To ensure that arbitration mechanisms work properly, it will be important for judges to be trained on the judicial procedures related to enforcing arbitral decisions. A lack of understanding on the part of judges could result in ineffective enforcement or improper appeals of NAC decisions. It will also be important for the ministries of Commerce and Justice, the Judiciary and the Council for Legal and Judicial Reform to monitor the courts' activities related to enforcement of arbitral decisions.

Ingredient 5: Start modestly and build step-by-step. It is vital that the Center's initial cases are seen by all involved to have been handled in a fully professional, fair and neutral fashion. The resulting good publicity will help increase the demand for the NAC's services. If the initial quality of the NAC's services is poor, it will inevitably have a very hard time overcoming its negative reputation and will be likely to fail. Publication of legal reasoning would be a highly effective communication device to build initial confidence in the operation of the Center.

Initial demand for commercial arbitration services is likely to be slow until the business community becomes more familiar with the NAC. This presents an opportunity for the NAC to gain experience and build its reputation by providing the best possible results early on, and thus allow the private sector to gain confidence in the new arbitration mechanism. The initial low volume of cases could be a blessing in disguise because existing capacity for the delivery of commercial arbitration services will need strengthening. The slow pace of initial demand will give the NAC time to build capacity of its arbitrators.

The experience of the Cambodian Labor Arbitration Council (LAC) is directly relevant. Starting with a group of legal and other professionals, who had never practiced arbitration in 2003, the ILO supported an ongoing process of training and on-the-job mentoring. A recent study which included a focus on issues of capacity at the LAC found that over "a period of 5 years the arbitral decisions

have become increasingly sophisticated in their approach to resolving disputes,” and that “this success is likely due to the training program and the multifaceted approach to learning, through seminars, mentors, and ongoing legal assistance”. (Leviter 2008:34). A similar program of intensive capacity building for arbitrators, their support staff, relevant civil servants and members of Cambodia’s legal community (judges, prosecutors, court clerks and lawyers) will be essential to the success of any new providers of commercial arbitration services.

Ingredient 6: Monitor operations and use financial resources carefully from day one. Given the low level of demand expected initially and the limited knowledge of the private sector regarding commercial arbitration and its benefits, the financial viability of the NAC will be a concern in its early days. It would be wise, therefore, to ensure that the NAC monitors its operations carefully from its inception. The NAC should set clear indicators of success as well as means of gathering all relevant data. The results (whether positive or negative) will then need to be monitored and measured closely on an on-going basis so that appropriate and timely reactions to the flow of cases are taken. Careful use of financial resources demonstrates a commitment to sound operations, protects the financial sustainability of the NAC, and reduces the risk of misuse of funds.

IFC research indicates that existing approaches to dispute resolution, most notably the use of government intermediaries and the courts, have substantial costs (both formal and informal) and that businesses would be willing to pay for a transparent and effective ADR services. The level of acceptable fees has yet to be determined and the fee structure will have to be carefully devised and tested with the private sector.

The demand for arbitration services will grow only if the NAC is able to demonstrate effective and transparent commercial dispute resolution. Hence, it is important that the NAC be supported during the initial period of its operations both financially and technically. Such support should include assisting the NAC to establish a sound monitoring and evaluation system (both at the program level and financial level).

SWOT Analysis

The above discussions on the country context, existing dispute resolution practices, demand for commercial arbitration, and the planned institutional set up of the NAC can be summarized in the form of the following SWOT³ analysis.

Strengths

- Quality of law on commercial arbitration [is in compliance with UNCITRAL model law];
- Sub-decree allows for an independent NAC; and
- Support from lawyers, key ministries (Commerce, Justice), Council for Legal and Judicial Reform, the judiciary and a range of private sector actors for the establishment of an independent ADR center.

Weaknesses

- Constitutional Council decision on commercial arbitration law is somewhat ambiguous; leaves room for courts to intervene.
- Limited experience/capacity of legal and other professionals with regard to formal ADR.

Opportunities

- Expectation of long-term economic growth based on local and international investment;
- Trend towards formalization of economic relationships (in many sectors);
- Perception of a need for ADR services from lawyers, courts, government and larger businesses;
- Private sector actors dissatisfied with and looking for alternatives to the formal legal system;
- Formal legal framework is still evolving (possible opportunity for the establishment of a court referred mediation service).

Threats

- Risk that arbitrator selection process will be tainted (or perceived to be tainted);
- Risk that arbitrators will be subject to influence from wealthy or powerful parties (or perception of the same);
- Risk that courts will hear cases which should be referred to ADR and/or obstruct enforcement;
- Difficulty in assessing demand (or willingness to pay) for and thus sustainability of ADR services;
- Many local enterprises (particularly small and medium enterprises) have well developed coping strategies, which allow them to avoid or resolve disputes in the local context;
- Courts serve certain repeat players (e.g. banks engaging in debt collection) relatively well.

³ Strengths-Weaknesses-Opportunities-Threats

Regional Experience

Introducing Commercial Arbitration in Countries with Similar Legal and Socio-political Contexts

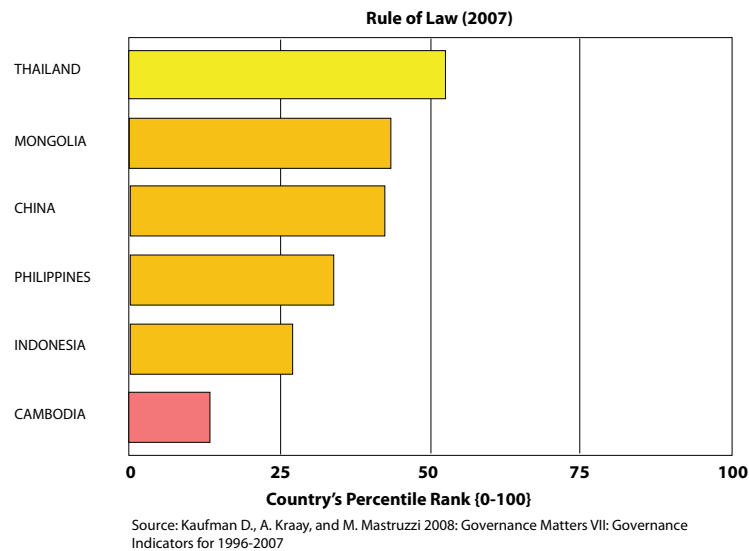
A functioning system of arbitration is based on two key principles regarding the relationship between arbitral proceedings and the courts. Put schematically, these are: (i) that courts have restricted jurisdiction to intervene in disputes that are subject to arbitration; and (ii) that there is a framework for arbitral awards to be enforced expeditiously and without recourse to the courts on the substance of the dispute. In a country like Cambodia, where confidence in the court system is low, even given an adequate legal framework (which Cambodia has) these principles will be threatened. Acknowledging this, the question then becomes: Can a useful system of commercial arbitration be established in a country where the rule of law is weak?

To answer this question, it is imperative to review regional experience of countries with similar socio-political contexts that have also gone through a similar transformation concerning commercial dispute settlement. While acknowledging the vast differences in levels of economic development and other cultural contexts, there are many similarities to Cambodia. To provide such regional context, Figure 3 below reflects World Bank research on the extent to which the ‘rule of law’ is established in a range of countries in the region.⁴ With the exception of Thailand, each of these countries ranks below the 50th percentile internationally. The Philippines and Indonesia are both assessed as being in the bottom third of countries in terms of the extent to which the rule of law is established. To be sure Cambodia lags well behind these countries. Nevertheless, an examination of this group of countries should tell us something about the possibilities for the establishment of commercial arbitration in circumstances where the rule of law is weak.

While conceptually the rule of law underpins the functioning of any system of arbitration, in fact it would appear that the situation is a good deal more complicated than this. This is indicated by (a) the existence of other countries in the region that are home to useful commercial arbitration services even though they rank poorly on measures of the rule of law, and (b) the existence in Cambodia of a functioning system of labor arbitration.

⁴ Defined as: "...perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence" (Kaufmann et al. (2008:7)

Figure 3: Rule of Law in selected Asian countries



Based on a review of the relevant literature and discussions with practitioners in Mongolia, Indonesia and the Philippines, it is clear that systems of commercial arbitration are emerging in a range of countries in the region, despite ongoing concerns about the capacity and integrity of their legal and judicial systems.

For example, in China, arbitration has boomed over the past decade, and with the China International Economic and Trade Arbitration Commission (CIETAC) hearing over 1,000 cases per year (see Annex C), it has been described as “the most popular” way of settling disputes between foreign and local parties in China (Chua Eu Jin 2005:18). Reforms to the law in China seem to be bringing the country closer to international standards. Nevertheless, the growth in arbitration has occurred despite the fact that the country has an uneven history of court intervention in arbitral proceedings (Peerenboom 2001) and that enforcement proceedings are still characterized by “loopholes and deficiencies” (Tao Jingzhou 2008:103).

In Indonesia arbitration plays a minor, but growing, role in commercial dispute resolution with the country’s leading commercial ADR center, the Indonesian National Board of Arbitration (BANI) in Jakarta, currently handling about 25 cases per year. Discussions with the Secretary General of BANI suggest that case numbers have increased as Indonesia’s legal framework for commercial arbitration has come into line with international standards, but that concerns

regarding the role of the courts persist⁵. In these circumstances BANI has taken an innovative approach, promoting a hybrid of mediation and arbitration (med/arb/med) which they describe as a way of promoting the amicable settlement of disputes and thus avoiding interactions with the formal legal system.

A noteworthy local case is that of Cambodia's LAC. While it is important to distinguish between the way that labor arbitration is practiced in Cambodia and commercial arbitration, as it is envisaged under the 2006 Law (see table below), this case does provide a basis for an argument that arbitration has a useful role to play in the Cambodian context, even without an expectation of enforcement.

The LAC was provided for under the *Labor Law* (2001) but did not become operational until arbitrators were appointed on 1 May 2003.⁶ According to its own statistics, the LAC received 433 cases between that date and 31 August 2007, at a rate of 10 to 15 cases per month. Of these cases, 68% were reported as resolved successfully, 36% because the parties reached an agreement prior to the issuance of an award, 23% because the parties fully or substantially implemented an award, and 9% because the parties reached a post-award settlement based on the award (LAC 2007).

Labor Arbitration	Commercial Arbitration
Parties: union v. employer.	Parties: company v. company.
Mandatory (for collective disputes).	Voluntary.
Non-binding (unless otherwise agreed).	Usually binding (by agreement); requires court action to enforce.
LAC established with intensive ILO support & tripartite involvement (government (MoL), unions & employers).	'Independent' NAC established under auspices of MoC. Query long term donor engagement.
Established in the context of US trade negotiations.	Legal framework put in place as a response to WTO obligations.
Legal requirement that cases are heard at no cost. Fully funded by external donors.	User-pays model. More rapid phase out of donor funding expected.
Used successfully, mainly in workplaces with unions & international linkages / compliance pressures (garment industry + major hotels).	

⁵ Interview with Ibu Krisnawenda, General Secretary (6 March 2009). See also Hornick (1991) who argues that the basis for a viable system of arbitration was in place in Indonesia even prior to the passing of the UNCITRAL based arbitration act in (1999).

⁶ Parts of this section are adapted from Adler (2007) in which a fuller treatment of the issues surrounding the establishment and operation of the LAC can be found.

Although arbitration is a mandatory part of the process for the resolution of collective labor disputes under Cambodian law, decisions or awards of the LAC are generally non-binding. As such, a party who does not wish to be bound by an award, may file an opposition within eight days of receiving notification of the award, the result of which the award will not have legal effect. If, on the other hand, neither party files an opposition to the award within the time permitted, the award becomes enforceable. Technically, enforcement would require one party to commence court proceedings, in which case the court should issue an order for the execution of the award unless there were clear reasons to set the award aside. To date, however, this has not occurred.

As a body that generally issues non-binding and practically unenforceable awards, the LAC is something of a hybrid between an institution of the rule of law and a forum for social dialogue between organized labor and management. Yet it would appear from the Cambodian experience that this sort of institution can be used as a tool for focusing and legitimating collective action with a view to the development of more harmonious and law based industrial relations. The LAC has received praise from the unions, employers and government for its contributions in this respect (Adler 2007).

When considering the issue of the relationship between arbitral proceedings and the courts, the question appears to be not whether arbitration will work perfectly but whether it provides added value in a particular context. The cases of China and Indonesia cited above suggest a role for arbitration even in contexts where the legal system falls short of international standards.

Conclusion

This *Discussion Paper* and many others on the state of the judicial system in Cambodia clearly demonstrate that resolving commercial disputes is a great burden for businesses. It is very expensive and time consuming to resolve disputes through the courts. In fact many businesses avoid the court altogether and choose to use alternative and informal approaches for dispute resolution. The most common of these is relying on third parties of high status and influence to broker settlements. These alternative approaches, however, come at a cost, both financially and socially to parties, as they are expected to return the favor in the future. These informal approaches to dispute resolution do not guarantee that commercial disputes will be settled in a just manner because the outcomes depend on the influence, power, and social status of the third parties.

It is, therefore, not surprising that when the idea of formal dispute resolution through commercial arbitration and/or mediation was introduced, there was widespread support from the business community. In particular, the insurance sector has been particularly supportive of the establishment of a commercial arbitration mechanism in the country and has expressed readiness to use the services of the NAC. Other business groups, including legal and investment advisors of foreign businesses, have also stated that they would advise their clients to use the services of the NAC. Despite this initial interest, there should be no illusions about the initial demand for NAC's services. Building demand will require significant outreach to increase awareness of NAC's services. More importantly, the quality and integrity of its services will need to be established to encourage demand for NAC's services.

Even with the private sector's dissatisfaction with the current system of commercial dispute resolution, and the fact that demand for an alternative clearly exists, future success of the NAC cannot be taken for granted. Commercial arbitration is a new concept for the business community in Cambodia and the introduction of a new institution such as the NAC will have its skeptics. Building the institutional capacity of the NAC to ensure that the private sector sees the benefits of commercial arbitration will require diligence and support. Above all, it will be necessary for the NAC to get off to a good start in order to build a strong reputation that will attract others to utilize its services.

As things stand now, Cambodia meets at least four of the six key prerequisites discussed in this report for a successful and functioning commercial arbitration

body. For example, the legal framework currently in place supports the independence and neutrality of the NAC when it is set up. Similarly, the institutional arrangement and process for selection of arbitrators appears to be transparent and should ensure that the arbitrators selected are of high integrity, with unquestioned reputation. The private sector has indicated its initial support for the legal and institutional framework for the NAC and fully supports the MOC's efforts to set up this ADR body. The private sector has been actively involved in these areas from the outset. While full support from the judiciary still needs to be confirmed, initial discussions with a senior judge of the Supreme Court has shown a certain level of support from the highest level in the judiciary. The precedent of the Labor Arbitration Council's success, functioning well even though its decisions are not binding, bodes well for the NAC. Given the supportive legal framework and institutional arrangement, there is a good chance that the NAC will function well and will enable the private sector to resolve their disputes in a more just manner that is less costly and less time consuming.

Moreover, experience from other countries in the region with similar socio-political settings, shows that even in jurisdictions where the judiciary is not reputed to be independent (China and Indonesia) arbitration is reported to be working reasonably well. In these two countries, arbitration serves as a more acceptable alternative mechanism to resolving disputes.

Given the demand for alternative dispute resolution in Cambodia, the strong legal and institutional framework and experience through labor arbitration, there should be considerable optimism regarding the potential for the success of the NAC and for commercial arbitration. It is for this reason that development partners should devote considerable resources to ensure that the NAC is able to deliver concrete results and provide a viable alternative to the courts. This will save time and money for the private sector, while at the same time providing decisions which allow for funds tied up in commercial disputes to get back into the economy and contribute to the economic growth and development goals of Cambodia.

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Annex A

Towards the Establishment of the National Arbitration Center (NAC): A Conceptual Framework

November 2008

Overall objective:

To establish an NAC that enables businesses to resolve their disputes quickly, inexpensively and with certainty.

Sub-objective #1: *[Institutional Development]*

To develop the institution of the NAC so that it can deliver commercial ADR services in a professional and sustainable manner.

Sub-objective #2 *[Arbitrator Selection & Training]*

To ensure that members of the NAC have appropriate skills and technical expertise to carry out their work as arbitrators and mediators.

Sub-objective #3: *[Stakeholder Awareness & Capacity]*

To ensure that relevant stakeholders including government officials, judges, lawyers and the business community have appropriate levels of understanding about the services of the NAC and the legal framework within which it operates.

Sub-Objective #4: *[Enabling Environment]*

To promote ongoing regulatory and policy reforms that support the delivery of business friendly ADR services.

Stage Sub-Objective	Stage 1: Inception	Stage 2: Establishment	Stage 3: Ongoing support
Sub-objective: #1: <i>[Institutional Development]</i>	<p><i>[1.1.A]</i> Inception committee has a plan of action, operational procedures and a time-line for execution of its duties including:</p> <ul style="list-style-type: none"> Organizational aspects for the commission and meeting schedules. Designation of representatives for each of the members. Activities, deliverables and timeframe (action plan). Clear statement of responsibilities and obligations of the members with regard to the activities and deliverables. <p><i>Required inputs:</i> Secretarial and advisory services.</p>	<p><i>[2.1.A]</i> The NAC convenes a General Assembly meeting at which an executive board is elected as required by Part II of the Sub-decree.</p> <p><i>Required inputs:</i> Advisory and facilitation services.</p>	<p><i>[3.1.A]</i> NAC is financially sustainable with:</p> <ul style="list-style-type: none"> A medium/long term business plan including financial projections; Increasing income from case handling, membership and training fees; and An appropriate staff development / training program. <p><i>Required inputs:</i> Budget support (to be phased out after three years); Full time operational/business advisor who will work closely with the Secretary General.</p>
	<p><i>[1.1.B]</i> Required preparation is undertaken to support the rapid establishment of the NAC once the inception phase is complete including:</p> <ul style="list-style-type: none"> The preparation of draft rules and procedures mentioned in 2.1.B and 2.1.C adjacent. The preparation of draft TORs for NAC staff as required for 2.1.D adjacent; The preparation of a draft monitoring and evaluation framework as required for 2.1.F adjacent. <p><i>Required inputs:</i> Advisory services.</p>	<p><i>[2.1.B]</i> NAC has rules passed by its General Assembly which relate to the matters including:</p> <ul style="list-style-type: none"> The governance of the NAC (financial and administrative); Procedures for the management of arbitration proceedings at the NAC; The administration of the Registry of Arbitrators A code of conduct for members of the NAC and a credible system for enforcing the same. <p><i>Required inputs:</i> Advisory services.</p>	<p><i>[3.1.B]</i> NAC monitors and evaluates its performance using a range of methods including:</p> <ul style="list-style-type: none"> Systems for parties to evaluate the performance of arbitrators (feedback forms); Performance benchmarks related to case load and case management. Perception surveys of potential clients. <p><i>Required inputs:</i> Advisory services; Contractual services (periodic M&E studies).</p>
		<p><i>[2.1.C]</i> NAC has appropriate operational procedures relating to:</p> <ul style="list-style-type: none"> Fees & charges: A fee structure for the provision of arbitration, mediation, training and membership related services]. The management of cases: Forms required for the conduct of cases and the issuance of awards. The management of its internal affairs: Financial & human resources management policies etc. <p><i>Required inputs:</i> Advisory services.</p>	

Stage Sub-Objective	Stage 1: Inception	Stage 2: Establishment	Stage 3: Ongoing support
Sub-objective: #1: <i>[Institutional Development]</i>		<p><i>[2.1.D]</i> The NAC recruits appropriate staff including:</p> <ul style="list-style-type: none"> • A Secretary General • Administrative & financial staff <p><i>Required inputs:</i> Advisory services (development of TORs); Budget for advertisement etc of positions.</p> <p><i>[2.1.E]</i> The NAC has appropriate office space with required equipment including furnishings, computers, financial and case management software. <i>Required inputs:</i> Capital budget.</p> <p><i>[2.1.F]</i> The NAC puts in place and monitoring and evaluation system and collects relevant baseline data. <i>Required inputs:</i> Advisory services (design). Contractual services (baseline study).</p>	
Sub-objective: #2: <i>[Arbitrator Selection & Training]</i>	<p><i>[1.2.A]</i> Arbitrators selected through a competitive, transparent, and objective process with a recognized international ADR training provider responsible for the provision of inception training and the assessment of competence.</p> <p><i>Required inputs:</i> Advisory services (design of TOR); Contractual services (training and assessment).</p>		<p><i>[3.2.A]</i> Existing arbitrators develop & maintain appropriate levels of skills through:</p> <ul style="list-style-type: none"> • Periodic professional development training; • On the job training [case by case mentoring]; • Opportunities to observe and learn from ADR practitioners in other countries. <p><i>Required inputs:</i> Contractual services (training); Long term or contracted inputs for professional mentoring; Training and development budget.</p>

Stage Sub-Objective	Stage 1: Inception	Stage 2: Establishment	Stage 3: Ongoing support
<p><i>Sub-objective #3:</i> <i>[Stakeholder Awareness & Capacity]</i></p>	<p><i>[1.3.A]</i> General approach to stakeholder awareness raising and capacity developed and preparation of training materials (drafts) for various stakeholders commenced.</p> <p><i>Required inputs:</i> Advisory services (design of approach and TOR); Contractual services (preparation of training materials).</p>	<p><i>[1.2.A]</i> NAC initiates communications activities:</p> <ul style="list-style-type: none"> • Preparation of an initial brochure on the services of the NAC; • Initial awareness raising activities for representatives of the business community. <p><i>Required inputs:</i> Advisory services (design of information materials and preparation of awareness raising activities).</p>	<p><i>[1.3.A]</i> NAC adopts information and communications strategy including:</p> <ul style="list-style-type: none"> • Regular updates to the business community on the achievements of the NAC; • Targeted awareness campaigns using appropriate media channels. <p><i>Required inputs:</i> Advisory services (design of information materials and preparation of awareness raising activities).</p> <hr/> <p><i>[1.3.B]</i> Periodic training and awareness raising activities are carried out for relevant professional groups including:</p> <ul style="list-style-type: none"> • Judges (through the Royal School of Judicial Professions); • Government officials (MoJ, MoC etc) • Lawyers and law students; • Etc <p><i>Required inputs:</i> Advisory services (design training materials and preparation of activities).</p>
<p><i>Sub-Objective #4:</i> <i>[Enabling Environment]</i></p>	<p><i>Outcome [1.4.A]</i> Analysis of regulatory environment and opportunities to engage with policy reforms which support the delivery of business friendly ADR services.</p> <p><i>Required inputs:</i> Advisory services</p>		<p><i>Outcome [3.4.A]</i> Technical inputs into regulatory and policy reforms which impact on the delivery of business friendly ADR services for example in relation to:</p> <ul style="list-style-type: none"> • the establishment of the commercial court and its procedures; • the enforcement of awards; • etc <p><i>Required inputs:</i> Advisory services</p>

Annex B

Sub-Decree on the Organization and Functioning of the NAC

[Unofficial Translation]

**Kingdom of Cambodia
Nation Religion King**

Royal Government of Cambodia

No: 124 G>n>Rk>b>k>

**SUB-DECREE
on
Organization and Functioning of the National Arbitration Center**

The Royal Government of Cambodia

- Having seen the Constitution of the Kingdom of Cambodia;
- Having seen Royal Decree No. NS/RKM/0908/1055 dated September 25, 2008 on nomination of the Royal Government of Cambodia;
- Having seen Royal Kram No. 02/NS/94 date July 20, 1994 promulgating the Law on organization and functioning of the Council of Ministers;
- Having seen Royal Kram No. NS/RKM/0196/16 dated January 24, 1996 promulgating the Law on Establishment of the Ministry of Commerce;
- Having seen Royal Kram No. NS/RKM/0506/010 dated May 5, 2006 promulgating the Law on Commercial Arbitration;
- Having seen Sub-decree No. 91 dated August 01, 2007 on organization and functioning of Ministry of Commerce;
- With the approval of the Council of Ministers in the plenary session of July 24, 2009;

IT IS HEREBY DECIDED

CHAPTER I

GENERAL PROVISIONS

Article 1.-

This Sub-decree determines the organization and functioning of the National Arbitration Center.

The National Arbitration Center, known by its acronym (the “NAC”), is a non-profit entity and has its business office in Phnom Penh.

CHAPTER II

ROLES AND FUNCIONS

Article 2.-

NAC has the following roles and functions:

- promoting the commercial arbitration industry in the Kingdom of Cambodia;
- providing education and training for those who are practising and those who wish to practice arbitration in order to ensure a high quality of commercial arbitration services in the Kingdom of Cambodia;
- setting qualification criteria for those who wish to be members of the NAC;
- providing extra-judicial commercial dispute resolution services;
- organizing national and international conferences to promote commercial arbitration industry;
- organizing and participating in workshops and training sessions on topics related to commercial arbitration;
- collecting, printing and publishing articles, books, and audio-visual documentation or phonograph concerning commercial arbitration;
- controlling and managing the NAC’s properties;
- establishing a library and rooms for providing commercial arbitration services;
- entering into agreements necessary for performing its functions; and
- carrying out other functions as determined by the NAC’s General Assembly.

CHAPTER III STRUCTURE

PART I GENERAL ASSEMBLY

Article 3.-

The supreme authority of the NAC is vested with the General Assembly.

An annual General Assembly shall be held on the date set by the Executive Board. If necessary, the chairman of the Executive Board or a majority of its members can submit a proposal to hold an extra-ordinary General Assembly, together with the proposed agenda at least 15 (fifteen) days prior to the meeting. The extra-ordinary General Assembly shall consider only matters which have not been raised or which are outstanding from the previous meeting of the annual General Assembly.

Article 4.-

The following matters will be considered and approved at the annual General Assembly:

- Annual financial statement and annual report of the Executive Board;
- Annual budget plan of the NAC;
- Election and revocation of members of the Executive Board;
- Internal regulations and rules concerning the dispute resolution process;
- Amendment to any provisions concerning the functioning of the NAC;
- Financial and administrative formalities for management of the NAC;
- Listing procedures for arbitrators;
- Additional qualifications or criteria to become an arbitrator at the NAC; and
- Code of ethics for arbitrators.

Article 5.-

The notice of annual General Assembly shall be given at least 30 (thirty) days prior to the meeting date. The notice shall state the date, place and agenda.

Article 6.-

The meeting of General Assembly requires a quorum of 2/3 (two third) of the total members, including proxies and any matters for discussion shall be approved by an absolute majority.

In the event that the quorum has not been met, the meeting shall be adjourned for a further fourteen (14) days and the quorum for the first adjourned meeting shall then be one-half (1/2) of all members, including proxies.

In the event that there is still no quorum at the first adjourned meeting, the meeting shall be adjourned for a further period of fourteen (14) days. If it still has no quorum necessary for the meeting, those who are present at the second adjourned meeting shall form a quorum.

Vote by proxy is permitted. However, one member can hold only one proxy. The proxy shall be made in writing and noted in the minutes of meeting.

Article 7.-

The extraordinary General Assembly shall be convened by the chairman of the Executive Board at the time determined by the Executive Board.

If the chairman does not convoke within three (3) consecutive months after the date of the receipt of the written request, the members who call for the extraordinary General Assembly may hold the extraordinary General Assembly by giving thirty (30) days' notice to all members setting forth the business to be discussed and simultaneously posting the agenda on the information board of the NAC.

PART II

THE EXECUTIVE BOARD

Article 8.-

The NAC shall be directed by an ("Executive Board") which shall hold a meeting every month. The Executive Board shall consist of not more than seven (7) persons.

The Executive Board shall comprise of:

- One Chairman;
- One Vice-Chairman;
- One treasurer;
- A number of members.

Article 9.-

The Executive Board administers and decides day-to-day work. The decisions of the Executive Board shall be final unless they are rejected by General Assembly.

Article 10.-

The Executive Board shall have other roles such as:

- recruitment of staff for the NAC's secretariat;
- determination of the number of staff, workers, working conditions, salary, commission fees or other conditions;
- termination or taking disciplinary action against staff pursuant to their employment contracts.

Article 11.-

The Executive Board shall produce annual financial statements, annual budget plans, and reports on annual activities of the NAC for the General Assembly.

Article 12.-

The members of the Executive Board shall be elected at the annual General Assembly.

Membership of the Executive Board shall be for a term of three (3) years and each member cannot serve more than two (2) terms. All members of the Executive Board, except the treasurer, may be re-elected for two consecutive terms.

Article 13.-

The chairman, the vice-chairman and the treasurer shall be elected amongst the members by the Executive Board.

Article 14.-

The chairman of the Executive Board shall be elected at its first meeting. The election shall be conducted in two (2) rounds, if in the first round there is no member receives an absolute majority of votes. For the second round, only two candidates who have received the most votes in the first round can stand for election.

The vice-chairman and treasurer are elected by a vote of a simple majority, in the event of equality of votes, the eldest is elected.

The majority of members of the Executive Board shall be Cambodian nationals. In particular, the chairman and the treasurer must be Cambodian nationals.

The chairman shall be the president of the NAC.

The vice-chairman shall assist the chairman and replace him during his absence.

The treasurer shall manage all funds, collect revenues and arrange for expenditures on behalf of the NAC, keep a current account and be responsible for its correctness.

Executive Board members shall assist in the administration of the NAC and fulfill duties assigned by the Executive Board.

Article 15.-

If any vacancy in respect of the office of chairman, vice-chairman or treasurer of the Executive Board, the Executive Board shall elect one of its members to fill the vacancy, at its next meeting or any short meeting after the resignation of such person.

Article 16.-

All members of the NAC, being natural persons or appointed representatives of provincial or municipal chambers of commerce of the Kingdom of Cambodia, Chamber of Profession and Micro-Enterprises, the Bar Association of the Kingdom of Cambodia, and associations of merchants, industrialists, traders and service-providers can stand for election by the General Assembly to serve as members of the Executive Board if they are registered in the list of arbitrators of the NAC.

Article 17.-

Within sixty (60) days prior to the date set for the annual General Assembly, the Executive Board shall determine and announce:

- the date of selection;
- the election date which shall not be less than three (3) weeks after the date of selection; and
- a convenient place in the NAC's premise or elsewhere where the secret ballot shall take place.

Article 18.-

The election of a member or members of the Executive Board shall take place in secret poll each member represents one vote in the annual General Assembly or extra-ordinary General Assembly in accordance with the rules adopted by the General Assembly.

The newly elected members of the Executive Board shall take office after the annual General Assembly.

Article 19.-

The arbitrators who stand for election to be members of the Executive Board shall fulfill the following criteria:

- Two NAC's members can propose to appoint only one candidate;
- The proposal for appointment must be consented by the proposed candidate; and
- The proposal shall be made in writing and signed.

Article 20.-

If the number of candidates is less than or equal to the number of the places of members of the Executive Board, the election shall be adjourned for a further 15 (fifteen) days. After the adjournment, if the number of candidates remains less than or equal, the candidates are deemed to be automatically elected. In event that there are not sufficient members, the General Assembly may appoint more candidates pursuant to the same procedure. In case where there are more candidates than the places available, the General Assembly shall vote to elect the candidates.

Article 21.-

Any member of the Board shall vacate office:

- If he/she becomes physically or mentally incapable of exercising his/her functions;
- If he/she is convicted of any misdemeanor or felony ;
- If he/she is absent from three (3) consecutive meetings without a reason;
- If he/she is declared bankrupt by the court;
- If he/she resigns in writing from the Executive Board;
- If he/she ceased to be a member of the NAC;
- If he/she is no longer an appointed representative of organization member; or
- if he/she dies.

Article 22.-

In addition to the monthly meeting, the chairman of the Executive Board may at anytime call for a meeting by giving seven (7) days' notice to its members. At least 2/3 (two thirds) of the members must be present in order for the meeting to be valid.

Any questions raised during the meeting shall be decided by a majority of votes. In case of an equality of votes, the vote of chairman shall be a casting vote.

Article 23.-

In the event that any member of the Executive Board loses his or her membership, the chairman of the NAC shall convene an extra-ordinary General Assembly to elect a new member. The term of a newly elected member shall be the term of the outgoing member.

Article 24.-

The Executive Board may establish Committees or Sub-committees composed of one or more members of the Executive Board to lead the work. The organization of any such Committee or Sub-committee shall be determined by the internal regulations of the NAC.

PART III

THE GENERAL SECRETARIAT

Article 25.-

The General Secretariat of the NAC shall be administered by a secretary general who is assisted by deputy secretaries general, who are appointed by the Executive Board.

The organization and functioning of the NAC's General Secretariat shall be prescribed by internal regulations.

Article 26.-

The General Secretariat is a supporting agent of the Executive Board and has the following roles:

- managing day-to-day work and activities of the NAC;
- implementing policies laid down by the Executive Board;
- organizing the meetings of the Executive Board, General Assembly and other meetings;
- filing documents;
- collecting relevant information related to arbitration which may be useful for the service of members of the NAC;
- initiating new work and organizing activities and projects in support of the NAC;
- providing secretarial services to members by charging fees in accordance with terms and conditions approved by the Executive Board;
- supporting any publication work of the NAC and maintaining the website of NAC;
- organizing training courses; and
- performing other work assigned by the Executive Board.

Article 27:

The NAC shall have the right to use its own seal.

PART IV

MEMBERS OF THE NAC

Article 28.-

Anyone who wishes to become a member of the NAC shall register him or herself as an arbitrator on the list of arbitrators at the NAC.

All applications shall be submitted to the NAC's Executive Board by enclosing other documents as required by the Board and the applicant must pay the subscription at the rate set by the NAC.

Article 29.-

An individual being a Cambodian national or a foreigner may apply for registration with the NAC if he/she fulfills the following criteria:

- being thirty (30) years old or more;
- holding a bachelor's degree specialized in any field of study after completion of study at university in the Kingdom of Cambodia or overseas; and
- having attended training courses on arbitration organized by the NAC; or
- training courses organized by any international arbitration center recognized by NAC.

Failing to fulfill the above criteria, such individual being Cambodian national or foreigner must have acted as:

- member of professional commercial arbitration institution recognized by the NAC; or
- arbitrator or representative in arbitration proceedings on three (3) or more occasions or have written at least three (3) arbitral awards when acting as arbitrator.

Notwithstanding the preceding provisions and after the approval of the General Assembly, the Executive Board may determine more selection criteria as it thinks appropriate and beneficial for the NAC.

Article 30.-

As an arbitrator, the person shall not:

- be an officer of executive, legislative or judiciary branch
- have been convicted of any misdemeanor or felony .

Article 31.-

NAC shall prepare a list of its members which contains the following information:

- name and address;
- date of registration;
- qualifications; and
- other necessary information specified by the Executive Board.

Article 32.-

The Executive Board shall reject the registration of an applicant who does not fulfill the criteria stated in Article 29 and Article 30 of this Sub-decree.

Article 33.-

The certificate of registration shall be renewed upon request every year upon payment of annual subscription.

The NAC shall publicly announce the annual list of arbitrators.

The NAC's members shall inform the NAC in writing of any change of business address or personal address within one (1) month from the date of change.

Article 34.-

Provincial-municipal chambers of commerce in the Kingdom of Cambodia, the Chamber of Professions and Micro-Enterprises, the Bar Association of the Kingdom of Cambodia and other associations in the Kingdom of Cambodia whose members are merchants, industrialists, traders, and service providers may appoint a representative to vote in the General Assembly of the NAC. In cases where the appointed representative resigns or stops working for his/her organization, he/she shall automatically cease to be a representative of the member organization. The Executive Board shall have the right to refuse any representative appointed by any member organization on the grounds of insufficient qualifications.

Article 35.-

A member shall lose his/her membership in any of the following events:

- if the member is not registered as an arbitrator with the NAC within a given time;
- if the member becomes physically and mentally incapable of performing his or her roles;
- If the member is declared bankrupt or placed under liquidation proceeding;
- if the member submitted his or her resignation in writing to the NAC;
- if the member is convicted of a misdemeanor or felony;
- if the member breaches the code of ethics or internal regulations;
- if the member is deceased;
- if the member fails to pay subscriptions within a given time.

The termination of membership shall be decided by the Executive Board.

Article 36.-

No termination of membership shall be made unless the member concerned has been given an opportunity to give an explanation in writing but has failed to do so within a given time. The Executive Board shall provide written reasons if the membership is to be terminated. The terminated member is entitled to appeal against the decision of the Board to the Appeal Court.

Article 37.-

The NAC's members shall receive at least once in every two (2) years continuing training organised by the NAC or by other national or international institutions recognised by the NAC.

In the renewal of membership with the NAC, Executive Board can refuse to renew the membership of any member if he or she fails to satisfy the requirement for continuing training.

Article 38.-

The Executive Board may, in special circumstances as it determines, grant a renewal of membership with the NAC even though a member has failed to fulfil any requirements specified in Article 37.

PART V

AUDIT

Article 39.-

An auditing firm approved by the General Assembly shall be appointed as Auditors of the NAC at each annual General Assembly for a term of one (1) year and shall be eligible for reappointment.

Article 40.-

The Auditors have the following roles and functions:

- undertaking an annual audit and presenting its auditing reports to the annual General Assembly; and
- undertaking audits as requested by the president of the NAC for a specific period and at any time during the contract period and producing a report to the Executive Board.

All members and staff of the NAC are obliged to provide information and explanations may be required by auditors.

PART VI
BRANCHES OF THE NAC

Article 41.-

NAC may establish its branches in provinces in the Kingdom of Cambodia. The establishment, organisation and functioning of each branch shall be decided by the NAC.

CHAPTER 4
FUNDING RESOURCES

Article 42.-

Funding resources of the NAC may come from:

- Membership subscriptions;
- Donations and contributions from other sources;
- Administrative service fees of the NAC.

Article 43.-

Members shall pay annual subscriptions determined by the General Assembly, from time to time, on proposals of the Executive Board.

Annual subscriptions are payable in advance within the first month of the year. If a member fails to pay the subscription or other dues on time, the treasurer shall promptly remind him or her thereof.

If a member falls into arrears for more than three (3) months, he or she will automatically cease to be a member with effect from the second month.

Any additional funds required by the NAC for particular purposes may only be raised from members with the approval of the General Assembly in which more than fifty (50) percent of the members present voted in favor.

Article 44.-

The NAC shall bear all expenses and losses incurred by NAC's staff and members of the Executive Board in relation to the appropriate performance of their functions.

CHAPTER 5

FIRST SELECTION OF ARBITRATORS

Article 45.-

The Ministry of Commerce shall establish a Commission consisting of not more than twelve (12) members to organize and select the first arbitrators of the NAC.

The Commission shall be led by a representative of the Ministry of Commerce with the participation of representatives of the following ministries and institutions:

- Office of the Council of Ministers;
- Ministry of Justice;
- Ministry of Economy and Finance;
- Cambodian Federation of Employers;
- Cambodian Chamber of Commerce;
- Bar Association of the Kingdom of Cambodia;
- International Business Club of Cambodia;
- Garment Manufacturers' Association of Cambodia;
- Chamber of Professions and Micro-Enterprises;
- Other individuals who are considered suitable by the Ministry of Commerce and the Ministry of Justice.

Article 46.-

The Ministry of Commerce shall issue a declaration (Prakas) appointing the members of the Commission for organizing and selecting the first arbitrators. Each member shall personally participate in the meetings of commission upon convocation by the head of the Commission.

Article 47.-

The Commission shall from the list of applications received select not more than sixty (60) applications to be members of the first arbitrators of the NAC.

Article 48.-

The announcements of the Commission shall be communicated through news media and sent to all organizations, ministries, institutions and persons directly concerned.

Article 49.-

Applicants shall provide detailed personal information and qualifications as provided in this Sub-decree and as may be required by the Commission.

The Commission shall hold the meeting as and when necessary to consider applications and decide on the selection of not less than fifty (50) individuals.

Article 50.-

The quorum for a meeting of the Commission is more than fifty (50) percent of the members. The decision of the Commission is made by a majority of members present and voting at the meeting. In case of an equality of votes, the vote of the Chairman is a casting vote.

Article 51.-

The names of the first selected applicants shall be announced within fourteen (14) days after the final decision. The selected individuals shall attend training courses on commercial arbitration organized by the Ministry of Commerce.

Article 52.-

The first batch of not less than fifty (50) persons shall apply for registration as arbitrators with the NAC after having finished the training courses on commercial arbitration.

Article 53.-

The Ministry of Commerce shall be responsible for establishing the registration office for of the first arbitrators and administer such office until the NAC commences its operation and after election of the Executive Board.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 54.-

Upon the selection of members and election of the Executive Board, the Ministry of Commerce shall cooperate with the NAC to transfer the list of arbitrators to the holder of the registry of the NAC, including funds and property owned or to become the property of the NAC.

The roles of Commission shall end upon the Executive Board taking office.

CHAPTER VII

FINAL PROVISIONS

Article 55.-

Any provisions that are contrary to this Sub-decree shall be abrogated.

Article 56.-

The Minister in charge of the office of the Council of Ministers, Minister of Economy and Finance, Minister of Commerce, Ministers, Secretaries of State of all other relevant ministries and institutions shall be respectively responsible for implementing this Sub-decree from the signing date onward.

Phnom Penh, Date: August 12, 2009

Prime Minister

Samdech Akka Moha Sena Padei Techo Hun Sen

Recipients:

- Ministry of Royal Palace
- General Secretariat of the Constitutional Council
- General Secretariat of the Senate
- General Secretariat of the National Assembly
- General Secretariat of the Royal Government of Cambodia
- The Cabinet of the Prime Minister
- The Cabinets of the Deputy Prime Ministers
- As stipulated in Article 56
- Royal gazette
- File-Archive

Annex C

Statistics and Performance of Regional ADR Centers

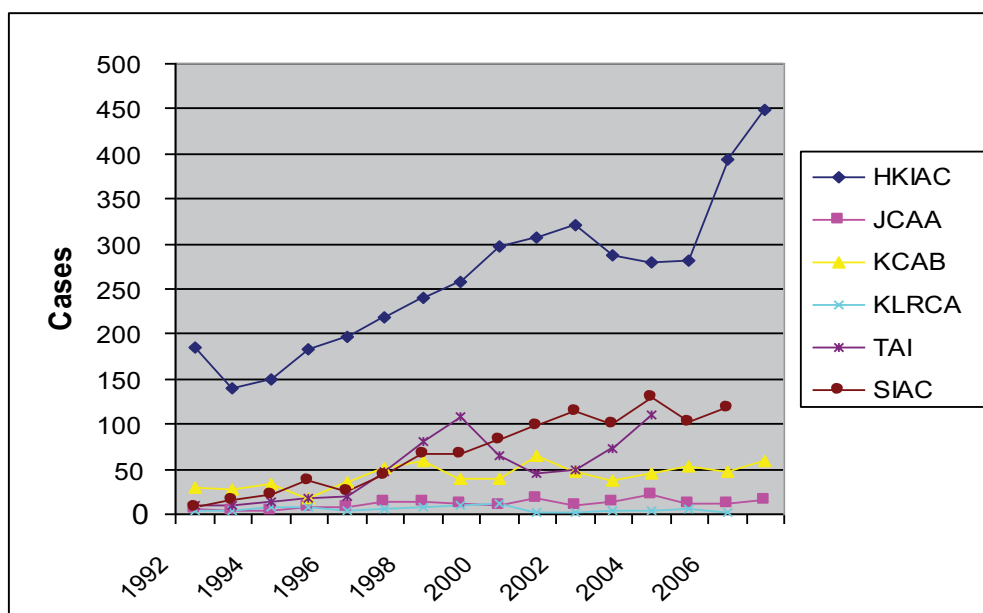
The following Table and Figure provides an illustration of the performance and evolution of commercial arbitration centers in the Southeast Asia region with regard to the number of cases held at each center. It indicates a significant increase in demand for commercial arbitration across the region. Notably though, case trends are flat (at levels that are likely to be unsustainable) at the KLRCA and the JCAA.

Table 1: Evolution of ADR Cases Held in Different Southeast Asian ADR Centers

ADR CENTER	NUMBER OF CASES PER YEAR															
	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07
HKIAC ¹	185	139	150	184	197	218	240	257	298	307	320	287	280	281	394	448
JCAA ²	5	3	4	7	8	13	14	12	10	17	9	14	21	11	11	15
KCAB ³	30	28	33	18	36	51	59	40	40	65	47	38	46	53	47	59
KLRCA ⁴	4	3	8	7	3	5	7	10	11	1	2	4	3	6	1	
TAI ⁵	10	10	13	17	20	48	80	109	64	46	49	72	110			
SIAC ⁶	7	15	22	37	25	43	67	67	83	99	114	100	129	103	119	
CIETAC ⁷							645	609	543	731	684	709	850	979	981	1,118

Sources: www.abanet.org/intlaw/calendar/spring2005/papers/19.06B.doc
http://www.hkiac.org/HKIAC/HKIAC_English/main.html

Figure 1: Number of ADR Cases Held in Different Southeast Asian ADR Centers



¹ Hong Kong International Arbitration Centre
² Japan Commercial Arbitration Association
³ The Korean Commercial Arbitration Board
⁴ Kuala Lumpur Regional Centre for Arbitration
⁵ Thai Arbitration Institute
⁶ Singapore International Arbitration Centre
⁷ China International Economic and Trade Arbitration Commission

Annex D

Constitutional Council Decision (#103/003/2006)

[Unofficial translation]

KINGDOM OF CAMBODIA

Nation Religion King

The Constitutional Council

CASE

N° 103/003/2006
Of March 21, 2006

Decision

N° 075/002/2006 CC.D
Of April 07, 2006

The Constitutional Council, having seen

- The Constitution of the Kingdom of Cambodia;
- Preah Reach Kram N° CS/RKM/0498/06 of April 8, 1998 on the Organization and the Functioning of the Constitutional Council;
- Preah Reach Kram N° NS/RKM/0701/10 of July 23, 2001 promulgating the Law on the Agreement and the Application of the United Nations Convention on the Recognition and the Enforcement of Foreign Arbitral Awards;
- The request N°300 NA of March 21, 2006 of Samdech HENG SAMRIN, President of the National Assembly, asking the Constitutional Council to examine the Constitutionality of the law on Commercial Arbitration, adopted by the National Assembly on March 06, 2006 in the 4th session of its 3rd legislature and for which the Senate, by its letter N°017/0306/SN/LD of March 17, 2006, agreed to let the National Assembly to proceed further. The Secretariat General of the Constitutional Council received this request on March 21, 2006 at 10:40 A.M;

and having heard:

- the rapporteur;
- The report of the representative of the Ministry of Commerce

Having deliberated in compliance with the Law;

- Whereas the National Assembly has duly implemented the procedure provided for in the Article 140N, paragraph 2 of the Constitution, by submitting this law to the Constitutional Council for the review before its promulgation;

- Whereas the National Assembly and the Senate have duly implemented the procedure provided for in the Article 113N of the Constitution, concerning the examination and the adoption of this law;
- Whereas the Article 5 of the law on Commercial Arbitration shall be interpreted that the court can intervene upon the request from the parties and that the judicial power shall not be limited;
- Whereas the Article 42 of the Law on Commercial Arbitration gives to the Court of Appeal to decide on the opposition, the recognition and the enforcement of the award as long as the Commercial court has not been created;
- Whereas the substance of the law on Commercial Arbitration is not contrary to the Constitution while the Articles 5 and 42 must be interpreted as in the above mentioned motives;

Decides:

Article 1: The law on Commercial Arbitration adopted by the National Assembly of March 06, 2006 in the 4th session of its 3rd legislature and for which the Senate, by its letter N° 017/0306/SN/LD of March 17, 2006, agreed to let the National Assembly to proceed further, is declared constitutional.

Article 2: This decision made in the plenary session of the Constitutional Council in Phnom Penh on April 07, 2006 shall be final without recourse, shall have authority over all the instituted powers as stipulated in the Constitution, and shall be published in the “Journal Officiel.”

Phnom Penh, April 07, 2006

**For the Constitutional Council
The President**

Signed and Sealed

BIN CHHIN



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