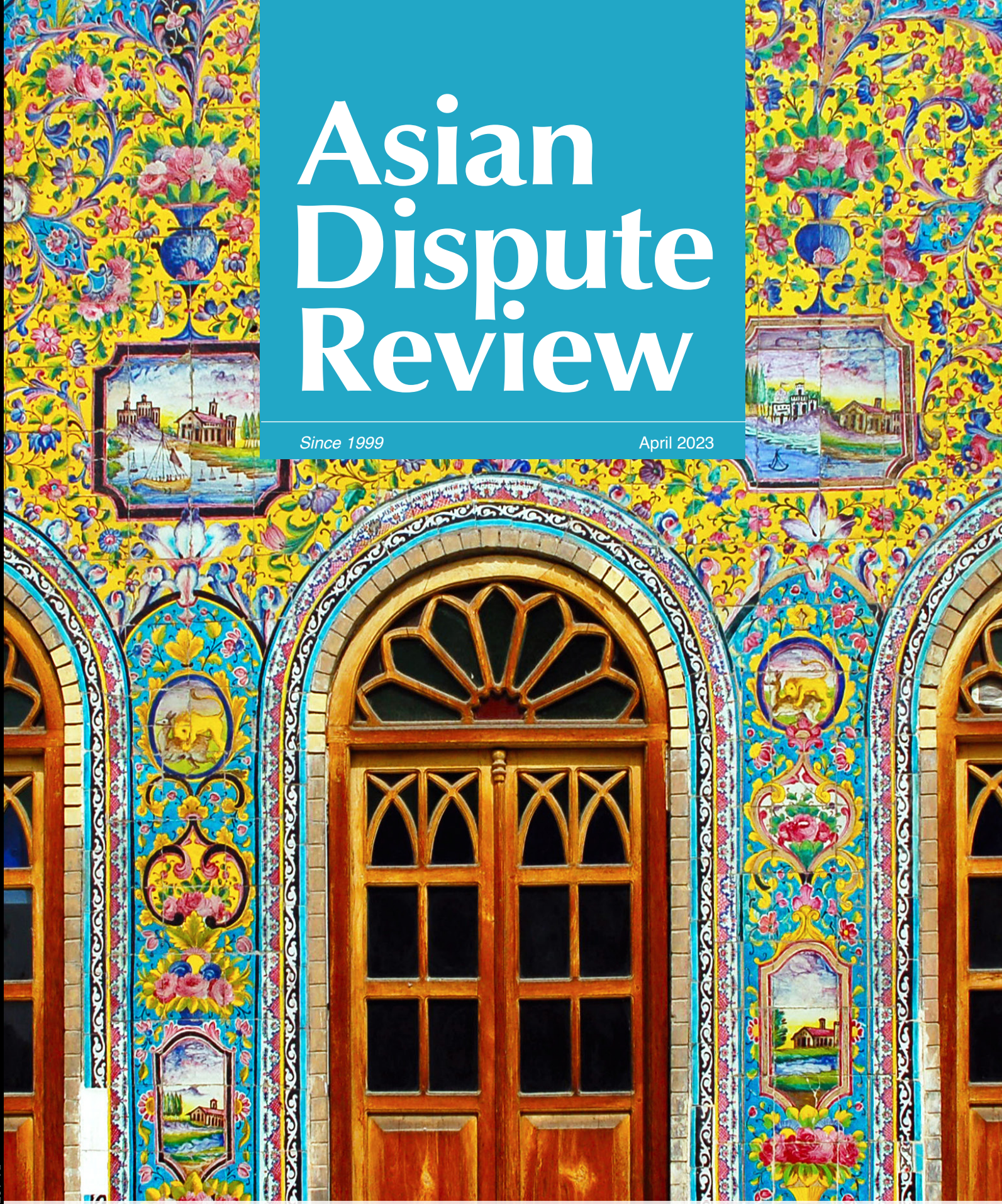
ASIAN DISPUTE REVIEW
APRIL 2023
pp. 51-107

Asian Dispute Review

Since 1999 April 2023



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PUBLISHER

Hong Kong International Arbitration Centre
38/F, Two Exchange Square
8 Connaught Place, Central
Hong Kong
www.hkiac.org

Design
KAC Design

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EDITORIAL

This issue of *Asian Dispute Review* begins with two winning articles from the HK45 Essay Competition 2022 (which were assessed by Matthew Gearing KC, Jern-Fei Ng KC, Kathryn Sanger and Sarah Grimmer). Franklin Koo (winner of the Hong Kong/Global category) discusses how much transparency should be required in international arbitration proceedings. Manyun Li (winner of the Asia Emerging Economies category) then discusses the interaction of blockchain technology and disputes in the context of alternative dispute resolution.

This is followed by a contribution from John Crook, who reviews the enforcement of foreign judgments and arbitral awards from Asia in a number of Caribbean offshore jurisdictions. Seung Chong then considers what an arbitral tribunal can do to improve certainty in the recoverability of liquidated damages and whether it should do so, in circumstances where there is a trend of divergence of decisions in major common law jurisdictions.

Our In-House Counsel Focus article, by Pauline Low, Nicole Lim and Benson Lim, discusses how to tap the potential for arbitrating Islamic finance disputes in the Asia Pacific region.

The Jurisdiction Focus article by Nishant Choudhary, Sophal Yun and Sovanna Sek then provides a useful and timely update on arbitration developments in Cambodia.

Joonhak Choi then provides a detailed review of the book, *ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options*.

Finally, this issue concludes with the News section written by Robert Morgan.

General Editors

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Country Update: Cambodia

Nishant Choudhary, Sophal Yun & Sovanna Sek

This article provides a detailed summary of (1) the law and practice of commercial arbitration in Cambodia under its UNCITRAL Model Law-influenced Law on Commercial Arbitration of 2006, (2) the recognition and enforcement of awards under the New York Convention, pursuant to the Law on the Recognition and Enforcement of Foreign Arbitral Awards of 2001, and (3) institutional support mechanisms for arbitration.

Introduction

Cambodia is a developing country with, in 2022, 17 million inhabitants. It is sub-divided into 25 provinces and its capital, Phnom Penh. It neighbours Thailand, Vietnam and the Lao PDR. Cambodia has a civil law tradition, derived from 90 years of French rule.

Following 30 years of civil war, Cambodia has seen rapid growth and has been rebuilding the institutions previously torn down by strife and conflict. Cambodia has grown to attract significant volumes of foreign direct investment projects and numbers of international companies, leading to a growth in the number of disputes litigated. As a result, demand for alternative legal grievance mechanisms has arisen to assist private parties involved in business and trade matters in resolving their disputes.

The legal framework for arbitration in Cambodia

(1) The judicial framework

Following the collapse of the Khmer Rouge regime in 1979 and the arrival of the United Nations Transitional Authority in Cambodia (UNTAC) in 1992, fundamental changes were made to the judicial system in Cambodia. There are now three levels of court: First Instance Courts (Municipal and Provincial Courts), Appellate Courts and the Supreme Court.

As of 2022, there are 25 First Instance Courts, four Regional Appellate Courts and the Supreme Court. No specialised courts (eg, administrative, commercial, and/or labour courts) have yet been established; the regular civil courts therefore handle all matters relating to specialised subject-matter.

(2) Sources of law concerning arbitration

Cambodia became a signatory to the New York Convention 1958 on 5 January 1960.

The primary source of arbitration is the Law on Commercial Arbitration (the Arbitration Law) 2006, which is based on the 1985 version of the UNCITRAL Model Law. The purpose of the Arbitration Law is to facilitate the impartial and prompt resolution of commercial disputes in accordance with the wishes of the parties, to safeguard their legal rights and interests and to promote the sound development of the economy (art 1).

> "The purpose of the Arbitration Law is to facilitate the impartial and prompt resolution of commercial disputes in accordance with the wishes of the parties, to safeguard their legal rights and interests and to promote the sound development of the economy … [It] provides the framework for the administration of arbitration proceedings, such as the grounds and procedures for setting aside awards, the degree of court assistance, and the recognition and enforcement of awards."

The Arbitration Law provides the framework for the administration of arbitration proceedings, such as procedures for setting aside awards, the degree of court assistance, and the recognition and enforcement of awards. Article 42 of the Arbitration Law provides that the Appellate Court of Cambodia has jurisdiction over recourse against recognition and enforcement of awards. The Supreme Court of Cambodia is the final competent court with jurisdiction to consider recourse by a party that is not satisfied with a decision rendered by the Appellate Court (art 43 of the Arbitration Law).

The Arbitration Law also provides grounds for the setting aside of an arbitral award by the Appellate Court and Supreme Court.

Other relevant laws include the Law on the Recognition and Enforcement of Foreign Arbitral Awards, which came into force on 23 July 2001 and lays down procedures for the recognition and enforcement of foreign arbitral awards in Cambodia, while the Cambodia Code of Civil Procedure promulgated on 6 July 2006 (Code of Civil Procedure), is the primary law governing court procedures for enforcing domestic and foreign arbitral awards.

Arbitral institutions in Cambodia

(1) The National Commercial Arbitration Centre of Cambodia

There are two arbitral institutions in Cambodia: the Arbitration Council (for labour disputes), which is not featured in this article, and the National Commercial Arbitration Centre of Cambodia (NCAC), the primary arbitral institution dealing with commercial disputes.

Having a mission to facilitate commercial dispute resolution, the NCAC is an independent and not-for-profit organisation. It was established in 2006, following enactment of the Arbitration Law. A Sub-Decree 124 on the Organization and Functioning of the National Commercial

Arbitration Centre (as amended from time to time) was issued on 12 August 2009.

> "… [T]he Law on the Recognition and Enforcement of Foreign Arbitral Awards [2001] … lays down procedures for the recognition and enforcement of foreign arbitral awards in Cambodia, while the Cambodia Code of Civil Procedure promulgated on 6 July 2006 … is the primary law governing court procedures for enforcing domestic and foreign arbitral awards."

(2) The NCAC Arbitration Rules and other relevant legal instruments

In 2014, the NCAC adopted two sets of rules: the NCAC Arbitration Rules (NCAC Rules 2014) and the NCAC Internal Rules (2014 NCAC Internal Rules). These were followed by the Code of Ethics for Arbitrators, which came into force on 6 April 2015. However, to keep pace with the rapidly developing regional and global arbitration landscape, all three sets of provisions were superseded by identically named instruments in 2021.

The NCAC Rules 2021 introduced significant changes, including power for the NCAC to (1) hear arbitration cases in which the parties can choose other governing rules, and (2) by agreement of the parties, reduce the timeline for proceedings to one shorter than that prescribed by those rules. At the same time, the 2021 Rules also provide that arbitration proceedings shall close within 45 days from the last hearing or authorised final submission to the arbitral tribunal. This gives disputants clarity on the issuance of arbitral awards, which in the past has often been delayed in *ad hoc* arbitration proceedings.

The most striking feature of the NCAC Rules 2021 was the introduction of rules on Expedited Procedure and Emergency Arbitration. The Expedited Procedure shall apply to disputes equivalent to or below the value of US$3 million. The final award shall be made within 270 calendar days from the date of constitution of the tribunal. Before the tribunal is constituted, any party may apply for an interim measure from an Emergency Arbitrator, whose decision on the application shall be made within 15 calendar days from the date of appointment of that arbitrator. On 1 February 2022, the NCAC issued its first ever interim award using the Expedited Procedure and Emergency Arbitration provisions, in relation to an application filed on 14 January 2022. The NCAC Rules 2021 provide, however, that parties should voluntarily comply with an interim award; this makes them lack clarity with regard to its execution. Generally, given the existing legal landscape, the enforcement of interim awards is inefficacious in cases where parties do not wish to comply voluntarily as it necessitates their enforcement in the same manner as regular awards.

> "… [T]he National Commercial Arbitration Centre of Cambodia (NCAC) [is] the primary arbitral institution dealing with commercial disputes. … Having a mission to facilitate commercial dispute resolution, … it is an independent and not-for-profit organisation … established in 2006, following enactment of the … [Arbitration Law]."

The NCAC Rules 2021 emphasise the principles of the independence and impartiality of arbitrators. They empower the tribunal to take any necessary measure to avoid conflicts of interest arising from a change in the parties' representatives, even after its constitution. Furthermore, new guidelines to determine the commencement date of the arbitration proceedings and the means of electronic communication have also been introduced.

> "The NCAC Rules 2021 introduced significant changes [to those originally promulgated in 2014] … The most striking feature of the NCAC Rules 2021 was the introduction of rules on Expedited Procedure and Emergency Arbitration."

(3) The seat of the arbitration

If parties to a dispute choose Cambodia as the seat of arbitration, the Arbitration Law will apply to the arbitral proceedings. However, the NCAC Rules will be applicable only if the parties have agreed to refer their dispute(s) to arbitration by the NCAC or under the NCAC Rules.

Legal procedures for arbitration

(1) The arbitration agreement and party autonomy

Cambodian commercial arbitration has endorsed the principle of party autonomy, whereby parties may choose the methods for resolving a potential future dispute. This choice may be expressed in the arbitration agreement. Further, parties have autonomy to determine every aspect of the proceedings, such as the number of arbitrator(s), language, the arbitral institution, the seat of the arbitration and the venue for hearings.

An arbitration agreement may take the form of either an arbitration clause in a substantive contract/agreement or a separate arbitration agreement. Article 24(1) of the Arbitration Law provides that an arbitration clause that is part of a contract shall be treated as an agreement independent from the other contractual terms. Any decision by the arbitral tribunal establishing that the contract is null and void does not automatically invalidate the arbitration clause.

Article 7 of the Arbitration Law requires the arbitration agreement to be in writing. An agreement is considered to be in writing if it is contained in (1) a contract; (2) an exchange of written correspondence; (3) an electronic telecommunication providing a record of the agreement; or (4) an exchange of statements of claim and defence which contain a claim of the existence of such an agreement that, per the principle of acquiescence, is not disputed.

> "Cambodian commercial arbitration has endorsed the principle of party autonomy, whereby parties may choose the methods for resolving a potential future dispute."

The arbitral tribunal is empowered to allow necessary parties to intervene in an arbitration, provided that all parties, including any third party, have consented to such a joinder in writing. In such an instance, the arbitral tribunal may issue a single final award or separate awards resolving all disputes between all parties.

Any matter raised before a court of law, being the subject-matter of an arbitration agreement, may be referred to arbitration by the court upon the request of either party to the dispute. However, such a request must be made before submission of the first statement on the substance of the

dispute. The court may refuse to refer such a matter to arbitration if it finds the arbitration agreement null and void, inoperative or incapable of being performed.

A party may also apply to the court requesting a stay of proceedings and referral of the dispute to arbitration on the basis of the parties' agreement.

(2) Jurisdiction and powers of the arbitral tribunal

(i) Appointment of arbitrator(s): In all cases, the tribunal shall comprise a single arbitrator or an odd number of arbitrators. The parties are free to agree on the procedure for appointing arbitrators. Absent party agreement as to the number of arbitrators, the tribunal shall comprise three (3) arbitrators. Each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator. Furthermore, if either party fails to appoint an arbitrator within 30 days of a request to do so, a competent court will make an appointment. Similarly, the courts will appoint a third arbitrator where the party-appointed arbitrators fail to agree on such appointment within 30 days from their appointment. Where the parties cannot agree on the appointment of a sole arbitrator, the court will appoint one.

Under art 22 of the Arbitration Law, if an arbitrator cannot perform his or her functions or fails to act without undue delay, that arbitrator's mandate terminates upon his or her recusal from the proceedings or where the parties agree to such termination. Otherwise, if controversy persists on any relevant grounds, any party may request the competent court or the NCAC to decide whether or not to terminate the mandate. This decision will be final.

(ii) Challenges to and liability of arbitrator(s): Under the Arbitration Law, arbitrators may be challenged if circumstances exist that give rise to justifiable doubts about their impartiality or independence or if they do not possess required qualifications agreed between the parties. However, a party may challenge an arbitrator appointed by it or in whose appointment it has participated only for reasons of which that party becomes aware of after the appointment.

Following appointment and throughout the arbitration proceeding, an arbitrator shall promptly disclose any such circumstances that could lead to his or her disqualification unless the parties have already been so informed.

"Under the Arbitration Law, arbitrators may be challenged if circumstances exist that give rise to justifiable doubts about their impartiality or independence or if they do not possess required qualifications agreed between the parties."

(iii) Power to grant interim relief: The Arbitration Law and the NCAC Rules 2021 empower the tribunal to grant interim relief at any time prior to the date of the final award, at the request of a party and by means of a reasoned award or order. Interim measures cannot prejudice the tribunal's final award with regard to the merits of the case. Examples of interim measures include orders:

(a) to maintain or restore the *status quo* pending resolution of the dispute;
(b) to take action that would prevent or to refrain from taking action that would likely cause current or imminent harm or prejudice to the arbitration process itself;
(c) to provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) to preserve evidence that may be relevant and material to resolving the dispute.

By virtue of the Arbitration Law and the NCAC Rules 2021, an application for an interim measure may also be filed before a court of law before or during the arbitral proceedings. Such an application would not be deemed incompatible with or as a waiver of the arbitration agreement. It would also not affect the relevant powers of the arbitral tribunal. Moreover, a party who requests interim measures from a court must, as soon as possible, notify the arbitral tribunal of such application and any decision thereon.

> "The Arbitration Law and the NCAC Rules 2021 empower the tribunal to grant interim relief at any time prior to the date of the final award, at the request of a party and by means of a reasoned award or order."

(iv) *The Emergency Arbitrator:* An Emergency Arbitrator shall be appointed when an application for an interim measure has been made. Once the interim order/award has been issued, the Emergency Arbitrator becomes *functus officio*. Rule 15 of the NCAC Rules 2021 provides that the Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute unless agreed by the parties.

In the interim proceedings, the Emergency Arbitrator shall, in any event, within two (2) calendar days of the appointment, establish a schedule for considering the application for the interim measure(s). The Emergency Arbitrator shall have the powers vested in the tribunal pursuant to the NCAC Rules, including without limitation the authority to rule on his or her own jurisdiction, without prejudice to the tribunal's determination (Rule 16).

An interim order or award issued by the Emergency Arbitrator is binding on the parties from the date it is made. The parties undertake to carry out that order or award immediately and without delay. However, if there is no amicable acceptance of the interim award, they shall proceed with the ordinary award enforcement process in accordance with art 42 of the Arbitration Law.

(v) *The doctrine of Kompetenz-Kompetenz:* The Arbitration Law and the NCAC Rules 2021 empower the arbitral tribunal to rule on its own jurisdiction, including any objections concerning the existence, validity, or scope of the arbitration agreement. The tribunal applies the doctrine of *Kompetenz-Kompetenz* if a party challenges the jurisdiction of the tribunal in the arbitral proceedings.

> "An interim order or award issued by the Emergency Arbitrator is binding on the parties from the date it is made. The parties undertake to carry out that order or award immediately and without delay. However, if there is no amicable acceptance of the interim award, they shall proceed with the ordinary award enforcement process in accordance with art 42 of the Arbitration Law."

The arbitration proceedings

(1) Commencement: The NCAC Rules 2021 state that, unless otherwise agreed by the parties, the arbitration proceedings with respect to a particular dispute shall be deemed to commence on the date of receipt of a complete Notice of Arbitration by the General Secretariat. The Notice

of Arbitration is considered complete when all applicable requirements under the Rules are fulfilled or when the General Secretariat determines that there has been substantial compliance with them. The listed requirements for a Notice of Arbitration are:

- a statement that the dispute be referred to arbitration;
- the name(s), address(es), telephone number(s), facsimile number(s), email address(es), and other address(es) for electronic means of communication, if known, of the parties to the arbitration and their representative(s), if any;
- the nationalities or, as applicable, the corporate identities, if known, of the parties;
- a reference to the arbitration clause or the separate arbitration agreement that is invoked and a copy of it;
- a reference to the contract or other relationship out of which or in connection with which the dispute arises and, where possible, a copy of it;
- a brief statement describing the nature and circumstances of the dispute, the relief or remedy sought and, where possible, an initial quantification of the claim(s) that the Claimant intends to submit;
- the agreed number of arbitrators or, in the absence of such agreement, a proposed number of arbitrators, which shall be either one (1) or three (3); and
- further statements or proposals, if any, concerning the conduct of the arbitration, including as to the applicable laws, the language of the arbitration proceedings and the agreed or desired qualifications and nationalities of the arbitrators.

(2) Hearings: Before the hearing, the tribunal may conduct a preliminary meeting with the parties, in person or by any other means, to organise and schedule the subsequent steps in the arbitration and/or to discuss the procedures that will be most appropriate and cost-effective for the case. In addition to a preliminary meeting, the tribunal may also convene additional meetings: for example, to inspect any concerned site, objects or documents as referred to in inquiries, orders and examination of evidence, or to review the progress of the arbitration.

There are two types of hearing: documentary-based hearings and oral hearings. Both parties shall agree on either type of hearing. For documentary-based hearings, there is no virtual/physical hearing; the arbitrator(s) will conduct the proceedings based on documents and other materials only.

Oral hearings will be conducted with physical attendance by the parties or remotely by means of videoconference, telephone or other telecommunications technology with participants in one or more geographical places (or in a combined or hybrid form), as agreed with the parties.

Unless otherwise agreed by the parties, the tribunal may decide that additional hearings be held at any stage before the final award if the circumstances of the arbitration so require.

“For documentary-based hearings, there is no virtual/physical hearing; the arbitrator(s) will conduct the proceedings based on documents and other materials only. Oral hearings will be conducted with physical attendance by the parties or remotely by means of videoconference, telephone or other telecommunications technology with participants in one or more geographical places (or in a combined or hybrid form), as agreed with the parties.”

(3) Issuance of the award: Arbitral awards may be classified into three categories: final, interim and partial. A final award resolves all or remaining issues, whereas partial and interim awards are made on different issues at different times. Once the award (in whatever form) is issued, the parties undertake to execute it without delay. They acknowledge that they do not have any right of appeal other than pursuant to mandatory provisions of law, and they irrevocably waive their rights to any appeal insofar as such waiver may be validly made.

Per the NCAC Rules 2021, the form and content of the award must conform with the following requirements:

- it must be in writing;
- it must state the reasons on which it is based, unless the parties have agreed otherwise. However, if, before the final award is made, the parties agree on settlement of the dispute, the arbitral tribunal must either issue an order terminating the proceedings or, to the extent requested by both parties and accepted by the tribunal, record the settlement in the form of a consent award. The arbitral tribunal is not obliged to detail reasons in such an award;
- it must state the date on which it was made and the seat of arbitration;
- the arbitrator(s) must sign the award. In the case of a multi-member tribunal, the signatures of the majority of all members of the tribunal will suffice, provided that the reasons for any arbitrator's missing signature are stated;
- no award shall be issued by the tribunal until it has been scrutinised and approved as to its form by the General Secretariat of the NCAC; and
- the award shall allocate the arbitration costs between the parties, including the fees of the arbitrator(s) and incidental expenses, in the manner agreed by the parties or, in the absence of such agreement, as the arbitrators deem appropriate. If the parties have so agreed, or the arbitrator(s) deem(s) it appropriate, the award may also provide for recovery by the prevailing party of its reasonable counsel fees. After the award is made, a copy signed by the arbitrator(s) shall be affixed with the NCAC seal and delivered to each party, provided that any requisite advance has been paid to the NCAC or, in the case of a final award, the total costs of arbitration have been fully paid to the NCAC.

> "… [T]he form and content of the award must conform with the … requirements [of the NCAC Rules 2021]."

Arbitral awards: (1) Recognition and enforcement; (2) challenges

(1) Foreign arbitral awards: As stated previously, Cambodia is a signatory to the New York Convention. All signatories to the New York Convention are obligated to recognise and enforce arbitral awards issued in other signatory States. Foreign arbitral awards can therefore be executed in Cambodia. The Arbitration Law provides that jurisdiction over the recognition and enforcement of foreign arbitral awards rests with the Appellate Court.

(2) Challenges to awards: A party may apply to the court to set aside an award made in Cambodia. There is no right of appeal regarding the substance of the dispute. The grounds for setting aside are set out in art 44 of the Arbitration Law. These replicate the grounds for setting aside awards contained in art 34 of the UNCITRAL Model Law. An award may also be set aside if the subject-matter of the dispute cannot be arbitrated pursuant to the applicable laws of Cambodia or if the award is contrary to the public policy of Cambodia. A party to the arbitration has 30 days from receipt of a final award to apply for the award to be set aside. The Appellate Court and Supreme Court may, when asked to set aside an award and, where appropriate and so requested by a party, suspend the setting aside proceedings for a period determined by such court to allow the arbitral tribunal to resume the arbitral proceedings or to take such other action as, in the tribunal's opinion, will eliminate the grounds for setting aside.