INTRODUCTORY GUIDE

Commercial Arbitration in Cambodia
* This guide is part of our publication series introducing the development of commercial arbitration in Cambodia. Subsequent publications can be subscribed for at info@bun-associates.com
1. INTRODUCTION

Over the past decade, Cambodia has experienced significant economic growth. The liberal and business-friendly legal regime has made Cambodia one of the most appealing destinations for foreign investors in Southeast Asia. As a result, many different types of transactions and investments are conducted in Cambodia. This economic growth and increase in type and complexity of transactions has led to various types of disputes involving both domestic and foreign investors.

The Cambodian government has enacted commercial arbitration laws and implementing regulations in order to give investors a local option for resolving their disputes outside of the court system. Through these laws and regulations, a modern arbitration system has been implemented whereby foreign arbitral awards may be enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and domestic arbitral awards may be enforced under the local arbitration laws.

This Introductory Guide to Arbitration will first discuss why investors should choose arbitration for resolving their investment disputes, arbitration administered by the National Commercial Arbitration Centre (NCAC), and finally, how to enforce an arbitral award in the courts of Cambodia.
2. **Why Arbitration?**

Arbitration is a method of private, binding dispute resolution which may be chosen as an alternative to litigation before national courts. In order to choose arbitration as the method for dispute resolution, the parties must enter into an agreement stipulating that they will resolve their disputes through arbitration. Such agreement can be done prior to or after the dispute has occurred.

### 2.1 Party Autonomy

Because arbitration is private, the parties have autonomy, which allows the parties to choose or alter nearly every aspect of the proceedings, including but not limited to the law, the language, the institution, the seat of the arbitration as well as the venue of the hearings. This makes arbitration ideal for resolving all types of disputes, whether complex or simple, or domestic or international. As such, all investors should seriously consider the merits of arbitration when entering into any commercial agreement.

Consider some of the benefits of party autonomy:

- **Choice of Arbitrators**
  In arbitration, the parties may select the arbitrator of their choice. Parties may also set certain criteria or relevant qualifications for the arbitrators to be appointed and request that a third party appoint the arbitrators on their behalf. This is particularly useful in multi-party cases where the parties may have difficulty agreeing on the appointment of arbitrators.

- **Seat and Venue of Arbitration**
  The parties must choose the seat of the arbitration. The seat of the arbitration is important because the law of the seat is the procedural law (*lex arbitri*) that will apply to the arbitration proceedings. This can have a dramatic effect on the arbitration. Therefore, the parties should always choose a country with arbitration-friendly laws as the seat. It is important to note that the seat of arbitration is not necessarily the venue of the arbitration, which is the physical location that the proceedings are held. Parties are free to choose one country with arbitration-friendly laws as the seat of arbitration, while the venue may be a more geographically convenient location.

- **Substantive Law**
  The parties may choose the substantive law to govern their commercial relationship. If the parties fail to choose a substantive law, the tribunal will determine the substantive law it deems appropriate. Unlike the procedural law (*lex arbitri*), the substantive law is the legal basis based on which the merit of the dispute will be decided.
• Language of the Arbitration
The parties are free to choose the language (or languages) of the arbitration proceedings. When choosing a language, the parties must be aware that evidence submitted in other languages must be accompanied by a translation into the language of the proceedings.

2.2 Confidentiality
The arbitration proceedings, and all evidence submitted therein, are confidential. This allows the parties to a dispute to avoid negative publicity or social pressures when resolving their dispute. Unless the parties agree otherwise, the content of an arbitral award is also confidential. However, in case of non-voluntary execution by the parties, the arbitral award will lose its confidential status during the enforcement phase.

2.3 Neutrality
For international disputes, parties often prefer arbitration because of its neutrality. Choosing a neutral forum for the arbitration proceedings will avoid one party receiving a “home” advantage.

2.4 Timely Resolution
Arbitration can be generally seen as shorter than court proceedings because of its flexibility and finality. The arbitration award is final and binding and therefore the parties cannot appeal on the merit of the decision. In addition, should the parties agree, the tribunal may hold a “documents only” arbitration whereby the parties submit documents, but hold no physical hearings. The tribunal then resolves the disputes based solely on the documents submitted, thereby saving significant time.
3. How To Refer A Dispute To Arbitration

Under the Law on Commercial Arbitration (Arbitration Law), the parties to a dispute must refer their dispute to arbitration through an arbitration agreement. An arbitration agreement may take the form of an arbitration clause in the underlying contract or a separate agreement known as a submission agreement. When an arbitration agreement takes the form of a clause in a contract, that clause is considered to be a separate contract, independent of the underlying contract it is found in (Arbitration Law Article 24(1)). This means that a decision by the tribunal that the underlying contract is null and void does not render the arbitration clause *Ipso jure* (by operation of law) invalid.

4. Arbitration In Cambodia

In Cambodia, arbitration may be administered by the local arbitration institution, which is the NCAC, or the parties may hold an ad hoc arbitration. If the parties choose to submit their dispute to the NCAC, then the particular rules and procedures of the NCAC shall apply to the arbitration proceedings. If the parties choose ad hoc arbitration, then the parties are responsible for organizing all aspects of their arbitration (including, but not limited to, time limits and submission deadlines).

4.1 What is the NCAC?

Established in 2006 by the Arbitration Law and officially launched in January 2013, the purpose of the NCAC is to help resolve commercial disputes among investors. As is indicated by the name, the NCAC may resolve commercial disputes only. The Arbitration Law provides a very broad definition to the term ‘commercial’, so the NCAC may resolve every type of commercial dispute between all parties, whether a physical person or legal entity, Cambodian or foreign.


4.2 Proceedings administered by NCAC

The proceedings administered by the NCAC will proceed according to the Arbitration Rules of the NCAC (NCAC Rules) and the Arbitration Law. The Arbitration Law was adopted on 5 May 2006, and is modeled after the UNCITRAL Model Law on International Commercial Arbitration (original 1985 version) but does not include the features existing under the 2006 amendments.

The NCAC Rules were developed by taking into consideration the rules of the most well respected international arbitration centers. Below is a brief description of the arbitration proceedings under the NCAC.
• Commencement of Proceedings
In order to commence arbitration proceedings, the claimant must submit a notice of arbitration to the NCAC (Rule 7). The General Secretariat of the NCAC will then send notice to the respondent. The arbitration proceedings commence on the date that the respondent receives the notice from the General Secretariat (Rule 7.7).

• Appointment of Tribunal
After the commencement of the arbitration proceedings, the tribunal must be appointed. The tribunal must be composed of an odd number of arbitrators, typically one or three. If the parties fail to agree on the number of arbitrators to be appointed, then three arbitrators will be appointed under the NCAC Rules (Rule 10).

• Preliminary Hearing
Once the tribunal has been appointed, it will hold a preliminary hearing in which it will set a timetable for the proceedings (Rule 20.2). The tribunal will also determine whether or not the proceedings should be conducted through the submission of documents only, or oral hearings should be held (Rule 24.1).

• Interim Measures
At any point during the arbitration proceedings, a party may seek protective relief from the tribunal through interim measures. Interim measures are necessary and urgent measures which do not prejudice the final judgment of the tribunal with regard to the merits of the case. According to Rule 28.2, interim measures include, for example and without limitation, 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 is likely to cause (i) current or imminent harm or (ii) 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 the resolution of the dispute.

• Closure of Proceedings and Scrutiny of Award
Once the parties have presented all of their evidence, the tribunal will declare the proceedings closed. From that point, the tribunal has forty-five days to submit a draft award to the NCAC General Secretariat for scrutiny (Rule 35.1). The NCAC will review the draft award and make suggested revisions regarding the form of the award, but will not review the merits of the case or the reasoning of the award. The purpose of submitting the draft award to the NCAC for scrutiny is to ensure that the form of the award meets the minimum requirements required for it to be enforceable in the event it is challenged in a court. Ultimately, the tribunal will decide whether or not to implement any of the suggested revisions.
• Issuance of Award
Subsequent to the NCAC scrutiny of the award, the tribunal will issue the award to the parties, and the parties have thirty days to request any modification, correction, amplification, or interpretation of the award (Rule 38). If the tribunal considers the request to be warranted, it will execute the request. Thereafter, the arbitral award becomes final and binding on the parties. The parties should be aware that under the NCAC Rules, after consultation with the parties, awards may only be issued in English or Khmer, regardless of the language(s) of the arbitration proceedings (Rule 18.3).

4.3 Fee Associated with Arbitration
If the parties choose to submit their dispute to arbitration under the NCAC for final resolution, the parties will be required to pay certain fees to the NCAC. Pursuant to the Fee Schedule of the NCAC adopted on 11 July 2014, these fees include i) a Registration Fee fixed at two hundred and fifty United States Dollars per claim or counterclaim; ii) an Arbitrator Appointment Fee fixed at three hundred United States Dollars per appointment, such fee applies to the appointment of an arbitrator required to be made by the Appointment Committee due to the failure of any party to appoint an arbitrator as required by the NCAC Rules; iii) an Administration Fee is charged based on a sliding fee depending on the sum in dispute, said Administration Fee is charged by the NCAC for the service it renders for the administration of the case; and iv) a Tribunal Fee which is charged based on a sliding fee depending on the sum in dispute and the number of arbitrators.
5. Setting Aside The Arbitral Award

Setting aside an arbitral award refers to challenging the arbitral award at the seat of arbitration, before enforcement proceedings have begun. The grounds for setting aside an award are defined by the law of the seat of the arbitration. In case Cambodia is chosen, the Arbitration Law will apply. Under the Arbitration Law (Article 44(2)), an arbitral award may be set aside only if the party making the application furnishes proof that:

- A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing, any indication by the parties, under the law of the Kingdom of Cambodia;

- The party making the application was not given proper notice of the appointment of an arbitrator(s) or of the arbitral proceedings, or was otherwise unable to effectively present his case;

- The award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this the Arbitration Law from which the parties cannot derogate;

- The subject matter of the dispute is not capable of settlement by arbitration under the law of the Kingdom of Cambodia; or

- The recognition of the award would be contrary to public policy of the Kingdom of Cambodia.

In the event that an arbitral award is set aside at the seat of arbitration, it will be invalid in all jurisdictions under the New York Convention, and the party seeking enforcement will be prohibited from doing so in every jurisdiction.
6. RECOGNITION, ENFORCEMENT AND REFUSAL OF AN ARBITRAL AWARD

6.1 Law Governing the Recognition, Enforcement and Refusal of an Arbitral Award

6.2 Legal requirements and grounds for recognition, enforcement of an arbitral award
The Arbitration Law and the Law on New York Convention provide the procedure and legal means for the courts of Cambodia to recognize all arbitral awards as binding. In order to enforce an arbitral award (domestic or international), the claimant must submit a written application to the Court of Appeal. The application must include the original arbitration agreement and arbitral award (or certified copies thereof). In the event that the agreement or award is made in a language other than Khmer, the claimant must submit a certified translation as well (Arbitration Law Article 45).

Once such an application has been made, the court must recognize the arbitral award unless one of the limited grounds for refusal stated in the law is found.

6.3 Grounds to refuse the recognition of an arbitral award
The grounds on which a court may refuse to recognize and enforce an arbitral award are very limited. Under Article 46 of the Arbitration Law, the Court of Appeal will refuse to recognize and enforce an arbitral award if the party against whom the arbitral award is invoked furnishes proof that:

- The party was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing, any indication by the parties, under the law of the Kingdom of Cambodia;
- The party making the application was not given proper notice of the appointment of an arbitrator(s) or of the arbitral proceedings, or was otherwise unable effectively present his case;
- The award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
• The composition of the arbitral panel or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law where the arbitration took place;

• The award has not yet become binding on the parties in the country in which, or under the law of which, that award was made, or the award has been set aside or suspended by a court in the country which the award was made;

• The subject matter of the dispute is, not capable of settlement by arbitration under the law of the Kingdom of Cambodia; or

• The recognition of the award would be contrary to public policy of the Kingdom of Cambodia.
7. Procedures For Recognition, Enforcement and Refusal Of Arbitral Award

7.1 Domestic arbitral awards
The party seeking enforcement of an arbitral award issued by the NCAC must apply to the Court of Appeal for the enforcement (Arbitration Law Article 42).

In order to enforce a domestic arbitral award, an execution ruling must be obtained. The court of appeal may only refuse to grant an execution ruling for the limited grounds stated above. However, the decision is subject to review by the Supreme Court, which review is final and binding.

7.2 Foreign arbitral awards
Cambodia is a signatory to the New York Convention. All signatories of the New York Convention are obligated to recognize and enforce arbitral awards issued in other member states. Therefore, foreign arbitral awards can be enforced in Cambodia, and vice versa.

An applicant seeking recognition and enforcement of a foreign arbitral award must apply to the Court of Appeal (Law on New York Convention Article 6). The opposing party has sixty calendar days to object to the recognition and enforcement of the award (Law on New York Convention Article 9). If a party fails to make such an objection, it waives its right to appeal to the Supreme Court. In the event that an appeal is made to the Supreme Court, the decision is final and binding, and is not subject to any further appeal (Law on New York Convention Article 23).
**Dispute Resolution Practice**

Bun & Associates has a robust and experienced dispute resolution team, capable of handling complex commercial disputes, whether in or out of court. Through our in-depth knowledge of commercial law and practice, our team has assisted many high profile companies navigate the dispute resolution mechanisms in Cambodia.

Among others, our expertise includes:
- Commercial Litigation
- Commercial Arbitration, Enforcement of Foreign and Domestic Arbitral Award
- Legal Counsel in or Expert Witness on Cambodia Law in International Commercial Arbitration
- Mediation
- Negotiation

Bun & Associates is an advocate for alternative dispute resolution in Cambodia. We have been at the forefront of the development of the Arbitration Rules and Internal Rules of the NCAC through active participation in the working groups charged with developing these rules. Our team members are also among the first commercial arbitrators admitted to the NCAC.
OTHER PRACTICE AREAS

Our firm meets the diverse needs of domestic and international clients with extensive, wide-reaching services. In particular, we offer comprehensive advice and services to foreign investors throughout all stages of the investment process, from building a business structure to maximizing incentives, forging key partnerships and managing operational challenges. We are the leaders in the banking & finance and insurance practices and have developed an outstanding reputation in all other major practice areas, such as commercial contracts & trade, corporate, real estate and tax. We also offer private client services, legal translations and certifications.

Combining international business acumen and local legal knowledge, our approach ensures optimum results.

We practice in the following key areas:

- Banking & Finance
- Commercial Contracts & Trade
- Corporate
- Insurance
- Intellectual Property & Telecommunications
- Labor & Employment
- Real Estate & Construction
- Regulatory Reform & Administrative Law
- Tax & Customs
Youdy is one of the first commercial arbitrators admitted to the NCAC and also a member of the Singapore Institute of Arbitrators (SIArb). He currently serves as an executive board member of the NCAC and a board member of the European Chamber of Commerce in Cambodia (EuroCham). He is a former Secretary-General of the Bar Association of the Kingdom of Cambodia. Youdy has been consistently ranked a leading lawyer (first tier) in Cambodia by IFLR 1000 and Chambers & Partners’ Asia Pacific. In the Chambers & Partners Asia Pacific 2014, according to an interviewee, "Youdy is well qualified, and his broad experience and knowledge in the banking industry allow us to move efficiently in our financing transactions. He is extremely intelligent and his advice is always of high quality." He is fluent in Khmer, English and French.

At Bun & Associates, Youdy serves as the firm's Practice Leader of the Corporate, Banking & Finance and Dispute Resolution teams. He is currently a panel lawyer for numerous foreign banks operating in Cambodia. His expertise includes project finance, off-shore financing, and other complex financial products. He has provided advice to some of the largest financial institutions and securities firms in Asia relating to their business expansion and market entry strategies into Cambodia. Youdy recently counseled a leading Japanese bank in the acquisition of a substantial stake in Cambodia's largest bank. He previously assisted a large Japanese electronics manufacturer with their USD65 million investment project establishing the first electronic large-scale mass-production facility in the country. He also acted as counsel to one of Cambodia's largest conglomerates on the acquisition of a USD60 million turn-key brewery plant. He has assisted numerous clients in organizing their litigation strategies and acted for an international construction company to enforce a foreign arbitration award in Cambodia under the New York Convention.

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At Bun & Associates, Sovath’s practice focuses on corporate, intellectual property and dispute resolution. He recently advised a Malaysia-based financial group to sell its 100% shares in a commercial bank in Cambodia and was involved with an entire share capital acquisition in which a France-based company acquired the 100% controlling shares of a parent company which has its subsidiaries in Cambodia and Thailand. He also assisted a Hong Kong based client in securing the multi-million dollar asset purchase of a garment factory, and advised on Cambodia’s first company acquisition in the securities sector. In his previous employment, he was involved in a number of major projects, including the largest financing project for the purchase of a majority share of Cambodia’s largest telecommunications operator.

Sovath is one of the first commercial arbitrators selected in Cambodia and has become a member of the National Commercial Arbitration Centre (NCAC) and of the Singapore Institute of Arbitrators (SI Arb). Recently, he served on the working group that drafted the Internal Rules and Arbitration Rules of the NCAC. He has particular expertise is dispute resolution strategies and assisted clients in the enforcement of foreign arbitral awards in Cambodia under the New York Convention. Sovath has particular expertise and extensive experience practicing in intellectual property and provides advice and support for the protection, commercialization, and enforcement of intellectual property rights to a wide range of right holders in various sectors. He is a qualified Trademark Agent in Cambodia, registered with the Ministry of Commerce. He has recently been listed as an Intellectual Property Expert for ASEAN IPR SME Helpdesk, a project co-funded by the European Commission’s Directorate-General for Enterprise and Industry under the Competitiveness and Innovation Framework Programme (CIP). He has also taught intellectual property law in and outside Cambodia and has researched and published articles on Cambodian Intellectual Property law.

Sovath served as a National Legal Adviser for the Asian Development Bank’s projects assisting the Ministry of Commerce of Cambodia in drafting a competition law and the Ministry of Health of Cambodia in drafting food safety regulations. He has also recently served as a national legal consultant for international organizations in assisting the Ministry of Health of Cambodia in drafting a law concerning public health and intellectual property. Sovath is influent in Khmer and English.
**Disclaimer:** This guide is intended to provide general information only and is not meant to be exhaustive, comprehensive or authoritative. The information in this guide should not be treated as a substitute for specific legal advice concerning particular situations. Legal advice should always be sought before taking any action based on this guide.

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