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Title: Maximising the Success of the New Cambodian Commercial Arbitration Center: What Can Be Learned From the Singapore International Commercial Arbitration Center

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MAXIMISING THE SUCCESS OF THE NEW CAMBODIAN COMMERCIAL ARBITRATION CENTER: WHAT CAN BE LEARNED FROM THE SINGAPORE INTERNATIONAL COMMERCIAL ARBITRATION CENTER

I. INTRODUCTION

International commercial arbitration has experienced remarkable growth as a means of dispute resolution. There has been an increase in the growth of cross-border transactions worldwide. It is unavoidable that these transactions will create disputes between parties, which has led to an increase in demand for dispute resolution.

Cambodia is a newcomer to commercial dispute resolution. The Cambodian government has established a brand new commercial dispute resolution body called the National Arbitration Center (NAC) in response to its commitment as a member of the World Trade Organization (WTO). In March 2013, the NAC opened its office to receive commercial cases.¹ However, to date, it has not received any cases to consider.² This poses a concern to the success of the Center.

This paper examines the factors necessary to maximise the success of the NAC based on its Asian counterparts' experience—the Singapore International Commercial Arbitration Center (SIAC). The SIAC is a good example to consider because it has proven to be an effective dispute resolution body in the region.³ There are many factors that help contribute to this success. Among these are the support and commitment given by the Singaporean government in structuring the Singapore legal framework.⁴ The success of the SIAC can also be attributed to several factors including: the competence of arbitrators;⁵

¹ Kimsay Hor, 'Arbitration Center facing hurdles', *The Phnom Penh Post* (online), 16 August 2013 <<http://www.phnompenhpost.com/business/arbitration-centre-facing-hurdles>>.

² Ibid.

³ Michael Pryles, *Singapore: The Hub of Arbitration in Asia* <<http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia>>.

⁴ Ibid.

⁵ Ibid.

flexible arbitral procedure; limitations on the intervention of the court;⁶ and importantly, the enforceability of arbitral awards made.⁷

This paper is divided into the following parts. Part II provides a brief overview of the history of the establishment of the NAC. The focus will be on both local and international pressures that triggered the establishment of the Center. Part III delves further into the relevant legal frameworks that are designed to oversee the work of the NAC, including the *Commercial Arbitration Law of the Kingdom of Cambodia* (The *Commercial Arbitration Law*)⁸ and the *Sub-Decree on the Organisation and Functioning of the National Arbitration Center* (Sub-decree).⁹ Part IV examines the establishment of the SIAC and factors that contributed to its success. Part V makes various recommendations, which the author believes will help to maximise the success of the NAC.

II. BRIEF HISTORY OF THE ESTABLISHMENT OF THE NATIONAL ARBITRATION CENTER IN CAMBODIA

To understand the current operation of NAC, it is worthwhile to consider briefly the reasons for its establishment, including local and international pressures.

A. Reasons for the Establishment of the NAC

The establishment of the NAC was triggered by both internal and external factors. Although there is no academic research regarding this proposition, the situation in Cambodia prior the establishment of the NAC justifies it.

⁶ Ibid.

⁷ Ibid.

⁸ *The Commercial Arbitration Law of the Kingdom of Cambodia* (Cambodia) adopted by the Parliament on 06 March 2006, <http://www.cambodiainvestment.gov.kh/content/uploads/2012/03/Law-on-Commercial-Arbitration_full-text_060306.pdf> (The *Commercial Arbitration Law*).

⁹ *Sub-Decree on the Organisation and Functioning of the National Arbitration Center* (Cambodia) issued by the Royal Government of Cambodia Prime Minister on 12 August 2009 (Sub-decree).

1. Internal Pressures

a) Economic Growth

Notwithstanding that Cambodia suffered a civil war for nearly two decades, signs of economic growth were evident following the resolution of the war. Between 1998 and 2008, the country's GDP underwent almost 10 percent per annum average growth,¹⁰ primarily in the four main sectors of garment, tourism, construction and agriculture.¹¹ Exports have very substantially increased, from almost zero to 65 per cent of GDP.¹² As a World Bank report points out: '[T]his is unusual by post conflict countries standard'.¹³ Such growth impelled the government to work harder in facilitating trade, as Cambodia does not have commercial regulations in place to cover the disputes that are anticipated to occur between Cambodian businesses engage in international trades.

b) Weak Judicial System

The Cambodian judicial system remains weak and has been criticised for lacking independence as it is under the control of the government and the rich can interfere in court decisions.¹⁴ This criticism is supported by the research conducted by Amnesty International, which expressed concern over the independence of the judiciary. Amnesty International has concluded that the Cambodian people do not trust their own court system due to its lack of independence in decision-making and it being controlled by the government.¹⁵

Concerns about the weak court system are shared by American investors who said that they have a great hesitation in litigating their commercial disputes in the Cambodian

¹⁰ Stephane Guimber, 'Cambodia 1998-2008: An Episode of Rapid Growth' (Report, World Bank, 2010) Abstract.

¹¹ Ibid 3.

¹² International Finance Corporation, 'The Establishment of Commercial Arbitration Services in Cambodia' (Private Sector Discussions Paper, 2009) 1.

¹³ Guimber, above n 10, 2.

¹⁴ Hugo van Noord, Hans S. Hwang and Kate Bugeja, 'Cambodia's Arbitration Council: Institution-Buidling in Developing Country' (Working Paper, International Labour Organisation, 2011) 2.

¹⁵ Amnesty International, 'Cambodia: Convictions of Activists Demonstrate Dire State of Justice' (Press Release, 27 December 2012) < <http://www.amnesty.org/en/for-media/press-releases/cambodia-convictions-activists-demonstrate-dire-state-justice-2012-12-27>>.

judicial system.¹⁶ Those investors held the opinion that the courts are unreliable and also under political influence.¹⁷ Due to this problematic court system, many businesses are reluctant to enter into contracts or commercial agreements because they do not have enough confidence that their contract will be enforced by the Cambodian legal system.¹⁸ Before the establishment of the NAC, commercial disputes were resolved by negotiations assisted by the Ministry of Commerce, the Cambodian Chamber of Commerce, and other interested institutions.¹⁹

In summary, the rapid economic growth and a weak judicial system are the two main internal factors that triggered the establishment of the NAC. It is evident that the establishment of the NAC was not only motivated by internal factors but also external factors. The following focuses on the latter.

2. External Pressures

Another reason for establishing the NAC is Cambodia's membership of the WTO. Cambodia took a long journey to becoming a member of this organisation. The process started in 1994 and the country successfully became a member in 2004.²⁰ It was a long and exhausting process for a small economy like Cambodia. The country was questioned by members of the WTO regarding many different matters.²¹ Among those issues, the members raised concern over the independence of the Cambodian judicial system and how commercial disputes were going to be resolved if the country was accepted as a member.²²

¹⁶ U.S. Department of State, *2011 Investment Climate Statement- Cambodia* (2011)

<<http://www.state.gov/e/eb/rls/othr/ics/2011/157251.htm>>.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Siphana Sok, 'Lessons from Cambodia's Entry into the World Trade Organization' (Report, Asian Development Bank Institute, 2005) 29.

²¹ Ibid.

²² Ibid 35.

In order to respond to this concern, the government of Cambodia agreed to put in place a number of new pieces of legislation to facilitate trade and investment.²³ A law on commercial arbitration was included in the plan among other priority matters.²⁴ Technical assistance was provided by Canada in order to help the Cambodian government prepare the rules for the NAC as well as the draft on the establishment of the commercial court in Cambodia.²⁵

As a consequence of this, the *Commercial Arbitration Law* was passed in March 2006, two years after Cambodia became a member of the WTO. The *Commercial Arbitration Law* has largely followed the United Nations Commission on International Trade (Model Law) with various provisions being almost identical. The operation of the NAC is governed by the *Sub-decree*, governmental regulation, made under the authority of the *Commercial Arbitration Law*. The *Sub-decree* was made in 2009 (the *Sub-decree*)²⁶ and the NAC opened its office in March 2013. It is unclear why it took so long to operate the NAC after the enactment of the *Sub-decree*.

It took around a decade, from the time that the *Commercial Arbitration Law* was passed until the time that the Center started to operate. The government had promised to the WTO that legal frameworks to deal with commercial dispute resolution were a priority task to do after Cambodia became a member of the WTO. It took around 10 years for the government to fulfill this promise. This long delay indicates that the commitment from the government in dealing with commercial disputes was limited.

III. CURRENT LEGAL FRAMEWORK ON NATIONAL ARBITRATION CENTER

Part III goes further into the legal frameworks that are designed to oversee the work of the NAC, including the *Commercial Arbitration Law* and the *Sub-decree*. It is important to note at the time of writing this paper, the NAC has not yet established its own arbitration rules.

²³ Ibid 92.

²⁴ International Finance Corporation, above n 12.

²⁵ Sok, above n 20, 92.

²⁶ *Sub-Decree*.

However, both the *Commercial Arbitration Law* and the *Sub-decree* provide many substantial provisions in resolving commercial disputes.

Before proceeding further, a very brief review of the country context as well as of the Cambodian judicial system will be provided. The overview of the court system is important because there are various provisions that need involvement of the court under the *Commercial Arbitration Law*.²⁷

A. Country Context

For nearly three decades, Cambodia suffered from civil conflict where social, economic and political institutions were terribly destroyed.²⁸ The country was also under the genocidal regime for a half decade, between 1975 and 1979. During that period, more than 1.7 million²⁹ people died due to systematic execution, starvation and disease.³⁰ The legal system was destroyed by the regime and arbitration did not exist.³¹

After this regime collapsed, it was estimated that around ten law graduates had survived.³² The court system was re-established and 14 years later in 1993, Cambodia passed its Constitution.³³ Cambodia is a Civil Law country based on the French civil law system.³⁴

²⁷ The *Commercial Arbitration Law* art 45.

²⁸ Noord, above n 14.

²⁹ Sophal Ear, *Aid How Foreign Assistance Dependence Undermines Democracy in Cambodia* (Columbia University Press, 2013) xi.

³⁰ Ibid.

³¹ Kim Rooney and Vicheaka Lay, 'Arbitration in Cambodia' in Shahla F. Ali and Tom Ginsburg (eds), *International Commercial Arbitration in Asia* (Juris, 2013) 52.

³² John A. Hall, 'Human Rights and the Garment Industry in Contemporary Cambodia' (2000) 36 (1) *Stanford Journal of International law* 119.

³³ *The Constitution of the Kingdom of Cambodia* (Cambodia) adopted by the Parliament on 21 September 1993 <<http://www.constitution.org/cons/cambodia.htm>>.

³⁴ Jennifer Holligan and Tarik Abdulhak, *Overview of Cambodian History, Governance and Legal Sources* (April 2011) <<http://www.nyulawglobal.org/globalex/cambodia.htm>>.

B. A Brief Overview of the Cambodian Court System

The court system in Cambodia is divided into two levels. The lower tier of the system consists of the Municipal, Provincial, and Military court.³⁵ The Upper tier is the Appellate Court and the Supreme Court.³⁶ To date, Cambodia has not yet established a Commercial Court. If the Commercial Court were established, it would sit at the lower tier, below the Court of Appeal and Supreme Court. In the absence of the commercial court, the Municipal, Provincial, Appellate and Supreme Court have jurisdiction over commercial matters.³⁷

C. The NAC Legal Framework

1. An Overview of the *Commercial Arbitration Law*

The *Commercial Arbitration Law* was adopted by the Cambodian National Assembly in March 2006.³⁸ This regulation has largely adopted most of the principles from the Model Law.³⁹ The Model Law was recommended by the General Assembly of the United Nation in 1976, in order to create a unified legal framework for resolving international commercial disputes.⁴⁰ This piece of legislation, *Commercial Arbitration Law*, covers both domestic and international commercial disputes as an alternative to litigation.⁴¹

It is to be noted that alternative dispute resolution is not a new concept in Cambodia; it has been implemented successfully in the Cambodian Arbitration Council to resolve collective

³⁵ *Law on the Organization and Activities of the Adjudicative Courts of the States of Cambodia* (Cambodia) adopted by the Parliament on 25 February 1993, art 2
<http://cambodia.ohchr.org/klc_pages/KLC_files/section_002/section02_001_1993.pdf>.

³⁶ Ibid art 3.

³⁷ *Law on the Commercial Regulations and the Commercial Register* (Cambodia) adopted by the Parliament on 03 May 1995, art 55 <http://www.bigpond.com.kh/Council_Of_Jurists/Commerce/com002g.htm>.

³⁸ The *Commercial Arbitration Law*.

³⁹ Rooney, above n 31, 60.

⁴⁰ United Nations Commission on International Trade Law, *UNCITRAL Model Law On International Commercial Arbitration 1985 With Amendments as adopted in 2006* (The Model Law), UN Doc A/40/17 (Adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (The Model Law)
<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

⁴¹ The *Commercial Arbitration Law* art 2(h).

labour disputes.⁴² This suggests that the Country has some experience with non-judicial dispute resolution as it has been adopted successfully in the field of labour dispute settlement.

The *Commercial Arbitration Law* consists of 9 different chapters and 47 articles, which stipulate various rules and procedures for resolving commercial disputes in both the local and international context.⁴³ This paper will not present all of the Chapters in this law. However, it will demonstrate some relevant provisions, which will link to the work of the NAC.

2. Purposes

The purposes of the *Commercial Arbitration Law* help explain the reasons for creating this piece of legislation. They also lay the groundwork to identify the extent to which the roles and functions of the NAC help to fulfill the purpose of this law. Article 1 of the *Commercial Arbitration Law* provides that:

The purpose of this law is to facilitate the impartial and prompt resolution of commercial disputes in accordance with the wishes of the parties, to safeguard the legal rights and interests of the parties, and to promote the sound development of the economy.⁴⁴

In light of this provision, the *Commercial Arbitration Law* has three different purposes. First, it helps to facilitate the commercial disputes according to the agreement of the disputing parties. For instance, parties are free to agree on the procedure for appointing arbitrators,⁴⁵ on arbitral rules,⁴⁶ the place of arbitration,⁴⁷ and the language that needs to be used in the arbitral procedure.⁴⁸ These wishes are permitted as long as parties can reach agreement in relation to these matters.

⁴² *Labour Law* (Cambodia) adopted by the Parliament on 13 March 1997, art 312.

⁴³ Seng Hun, 'National Arbitration Center: Legislative Framework And Recent Development' in Kuong Teilee et al (eds), *Cambodian Yearbook of Comparative Legal Studies* (Cambodian Society of Comparative Law, 2010) 185.

⁴⁴ The *Commercial Arbitration Law* art 1.

⁴⁵ Ibid art 19 (2).

⁴⁶ Ibid art 27.

⁴⁷ Ibid art 28.

⁴⁸ Ibid art 30.

However, if the parties cannot reach an agreement on the above matters, an interested party can request the involvement of the court or the NAC. The court also can issue an interim order to protect the interest of the parties.⁴⁹ Despite the fact that the court has some potential role in resolving commercial disputes, Article 5 of the same law is intended to minimise the involvement of the court. Article 5 provides that 'In matters governed by this Law, no court shall intervene except where so provided in this law'.⁵⁰

It is important to note that the definition of the 'Court' in *Commercial Arbitration Law* is varied. Under the Article 2 (c) of this law, 'Court' is defined as 'a body or organ of the judicial system of a state'.⁵¹ This is referring to all three tiers of the court system— Provincial, Municipal Court, the Appellate Court and the Supreme Court. However in some provisions, the reference to court is only one particular court— the Commercial Court or Appeal or Supreme Court. For example, the parties can also request the assistance from these courts in taking evidence.⁵² The parties can also request the involvement of these courts in appointing the arbitrators.⁵³ From this observation, careful attention to detail is important as 'Court' can refer to different bodies throughout the Law.

The second purpose of the *Commercial Arbitration Law* is that it helps to protect the legal rights and interests of the parties. For instance, article 9 of the *Commercial Arbitration Law* provides that interested parties can request the court issue interim orders in order to protect the interests of parties.⁵⁴ The court has this jurisdiction only if it is not incompatible with the arbitration agreement.⁵⁵

⁴⁹ Ibid art 9.

⁵⁰ Ibid art 5.

⁵¹ Ibid art 5.

⁵² Ibid art 35.

⁵³ Ibid art 19(4).

⁵⁴ Ibid art 9.

⁵⁵ Ibid.

Third, the *Commercial Arbitration Law* is designed to promote the growth of the economy through the prompt resolution of commercial disputes. This purpose perhaps can be achieved if the arbitration system is seen as an effective mechanism in resolving commercial disputes. Hopefully this effective dispute resolution body will attract more investors to the country, which arguably leads to economic growth. It is now too early to comment on the achievement of this purpose, as the NAC so far has not received any cases to settle.

3. Provisions in Relation to the National Arbitration Center

Article 10 to Article 17 of Chapter III of the *Commercial Arbitration Law* relates to the NAC. Article 10 states that the objective of establishing this body is to promote commercial dispute resolution. To that end it states additional purposes, to establish the infrastructure or rules that are necessary to administer the commercial cases, and to ensure the quality standards of arbitration including the creation of standards for the qualification of arbitrators.⁵⁶

The NAC has been created under the ‘auspices of the Ministry of Commerce’.⁵⁷ This poses a concern. Seng, a Cambodian academic who specializes in international commercial arbitration, suggests that the supports given by the Ministry of Commerce might create doubt to business people about the independence of the NAC.⁵⁸ The reason for this is that the Ministry of Commerce was actively involved in selecting the first group of arbitrators, and provided support in the setting-up and operations of the NAC.⁵⁹ He even went further to express his concern over partiality of the NAC from the government. He quoted the speech of the director of the Cambodia Chamber of Commerce (the national institution created to promote and facilitate trade)⁶⁰ who noted that ‘I am happy [it is being set up], but is really hard for me to say that the arbitration center will be independent because it is

⁵⁶ Ibid art 10.

⁵⁷ Ibid.

⁵⁸ Hun, above n 43, 187.

⁵⁹ Ibid.

⁶⁰ Cambodia Chamber of Commerce, *Vision and Mission* <<http://www.ccc.org.kh/about-ccc/vision-and-mission>>.

under the supervision of the public sector'.⁶¹ Seng's concern may be reasonable, but time will be a better guide. It is too soon to evaluate whether this concern is warranted. Perhaps it would be more reasonable to examine the independence of the NAC, after it is fully established and functioning. Additionally, it would make users of the NAC more confidence in its independence if the phrase 'auspices of the Ministry of Commerce' were identified under the *Commercial Arbitration Law*.

The *Commercial Arbitration Law* specifies that a natural person can be an arbitrator whether or not he or she is Cambodian or a foreigner.⁶² He or she shall register with the NAC.⁶³ This does not mean the parties cannot select an arbitrator outside the list. The parties are still free to choose whoever they want to be an arbitrator.⁶⁴ It appears that this provision provides a good development of commercial dispute resolution as it provides a wide range of individuals to become arbitrators, including foreigners. It remains unclear whether this provision is going to be workable to the extent that a foreigner needs to apply for a work visa to enable him or herself to be eligible to work in Cambodia.

The NAC also receives the power from this piece of legislation to determine the arbitrators' qualification and it is required to publish the list of arbitrators on a yearly basis.⁶⁵ Application to become the member of the NAC is under the control of the Executive Board of the NAC who has a maximum of a 7 members with the three years term, and this term can be extended for other 3 years.⁶⁶ Both the *Commercial Arbitration Law* and the *Sub-decree* do not provide any provisions that an individual can appeal the decision of the Executive Board if he or she thinks that the decision is inappropriate or biased.

⁶¹ Makara Kun, 'Concerns about Arbitration Center', *The Phnom Penh Post* (online), 2 October 2009 <<http://www.phnompenhpost.com/business/concerns-about-arbitration-centre>>.

⁶² The *Commercial Arbitration Law* art 11.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid art 12.

The NAC is governed by a General Assembly and an Executive Office.⁶⁷ The General Assembly comprises members of the NAC and a representative of each legal entity.⁶⁸ It has functions and duties such as conducting meetings once or twice a year on request from the Chairman of the NAC or the majority of members of the Executive Board.⁶⁹ It also has a duty to elect members of the Executive Board,⁷⁰ to inspect the annual report,⁷¹ to approve the financial budget of the NAC,⁷² to determine the fees and costs of arbitration,⁷³ to approve the amendment of rules or regulations related to the operation of the NAC and other functions that are stipulated under the Sub-decree.⁷⁴ The Executive Board is elected from members of the NAC.⁷⁵ The Chairman of the Executive Board is also the chairman of the NAC.⁷⁶ According to the local news, The Cambodia Daily, the Executive Board was elected on 23 January 2013 by 53- member of the general assembly.⁷⁷

D. *Sub-decree* on the Organisation and Functioning of the NAC

The *Sub-decree* provides more detailed provisions regarding the operation of the NAC. This paper will not focus on all of them, but it will demonstrate several provisions that are deemed important for later discussion in relation to maximising the success of the NAC. Moreover, where it is possible, this part will link to several provisions under the *Commercial Arbitration Law*. This part includes the appointment of arbitrators, the conduct of arbitral proceedings, the role of the court and the enforcement of arbitral awards.

⁶⁷ Ibid art 14.

⁶⁸ Ibid art 15.

⁶⁹ Ibid art 14.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid art 16.

⁷⁶ Ibid.

⁷⁷ Sun Mesa and Ben Woods, 'Arbitration Body Selects President, Gains Independence', *The Cambodia Daily* (online), 24 January 2013
< <http://www.cambodiadaily.com/archive/arbitration-body-selects-president-gains-independence-8422/>>.

1. The Appointment of Arbitrators

a) The Selection of the First Group of Arbitrators

According to the *Sub-decree*, the first selection of the arbitrators relies on the Commission.⁷⁸ The Commission is established by the Ministry of Commerce and has a function to conduct the selection of the first group of arbitrators.⁷⁹ It is noted that the role of the Commission ends when the Executive Board is elected to handle their roles and responsibilities.⁸⁰ Among those is the appointment of subsequent arbitrators.⁸¹

The Commission cannot have more than 12 members who are representatives of various institutions, including 6 representatives from the public sector such as ministries and the Cambodian Chamber, and another 6 representatives of the private sector, such as Employers' organisations and the legal profession.⁸² Despite the fact that the Commission comprises an equal number of members from each sector, in the case of an equal vote, the vote by the Chairman, who is a representative from the Ministry of Commerce, is 'a casting vote'.⁸³ Under the *Sub-decree*, there is no provision that provides an individual a right to challenge the decision of the Commission.

There are certain criteria that an individual has to fulfill in order to apply for registration with the NAC. These criteria apply to both the first group of arbitrators and ongoing selection of the arbitrators. He or she has to be at least 30 years old,⁸⁴ holding a bachelor's degree from either a local or international education institution,⁸⁵ and participate in the training course organised by the NAC or by any other international arbitration institutions accepted by the NAC.⁸⁶ If an individual cannot fulfill these criteria, he or she can still apply

⁷⁸ *Sub-Decree* art 46.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* art 54.

⁸¹ *Ibid* arts 28, 32.

⁸² *Ibid* art 45.

⁸³ *Ibid* art 50.

⁸⁴ *Ibid* art 29.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

for registration with the NAC if he or she is a member of a commercial arbitration center recognized by the NAC, an arbitrator or representative in arbitration proceedings on three or more occasions, or have written at least three arbitral awards.⁸⁷ On the top of certain criteria listed in the *Sub-decree*, the Executive Board may create more criteria if they think it is appropriate and provide more benefits to the NAC.⁸⁸ The amendment to article 52 of the *Sub-decree* in 2010 provides that (in translation) ‘The first batch of not less than fifty persons who attend the training course and pass the exam can apply for registration as arbitrators with the NAC.’⁸⁹

This amendment provides an important step that the Cambodian government has taken to ensure the arbitrators’ competencies in resolving commercial matters.⁹⁰ The selection criteria also provide flexibility and are realistic in the Cambodian context. As noted earlier, after the civil war ended, only around ten law graduates had survived. This suggests that legally trained workers in commercial matters are quite limited.

There are some categories of individuals who are prohibited from becoming arbitrators. Article 30 of the *Sub-decree* prohibits those who are officers working for the executive, legislative or judiciary branch or have been convicted of any misdemeanor or felony to apply to become arbitrators’ positions.⁹¹ However, Seng points out that it remains unclear to what exactly the word ‘officers’ refers to and ‘whether a long term advisor to these institutions is also included in this category of illegitimate candidates’.⁹² This provision appears to be clear to the author of this paper—as long as an individual is an officer from one of these three branches, he or she is not eligible to apply for an arbitrator position, no matter what level work he or she is doing or how long he or she has been doing the work

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ *Amendment to the Article 52 of the Sub-decree on Organisation and Functioning of the National Arbitration Center, Article 52 new* (Cambodia) issued by the Royal Government of Cambodia on 31 December 2010.

⁹⁰ Ana Phann and Tim Sturrock, ‘Gov’t Orders Arbitrators to Sit Examination’, *The Cambodia Daily* (Cambodia), 25 January 2011, 1.

⁹¹ *Sub-Decree* art 30.

⁹² Hun, above n 43, 186.

for the institution. This provision perhaps intends to maximise as much as possible the independence of the arbitrators in deciding commercial cases. The officer may need to resign from his or her officer's position before he or she can apply for an arbitrator's position.

In practice, in October 2009 the first batch of arbitrators was selected by the Commission. However, there were concerns about the transparency and fairness of the recruitment process.⁹³ For example, the Commission, through the Ministry of Commerce announced that applications would be accepted during working hours, starting from 29 September 2009 to 20 October 2009. The Commission would stop accepting applications once it has received 60 qualified applications.⁹⁴ Although this announcement made it clear that the deadline for submitting the application was on 20 October 2009, applications were still being accepted after the deadline.⁹⁵ This fact became notorious in the tribunal and commercial circle. There was concern that it might have negatively impacted on earning the trust of investors and users of the system since the first selection of arbitrators.

Article 49 of the *Sub- decree* provides that the Commission has to hold a meeting to select at least 50 arbitrators from the applicants. On 12 April 2010, 56 arbitrators were selected by the Commission for the first group of arbitrators.⁹⁶ It took around 6 months from application deadline to the time of selection. It is unclear why the Commission took this long time to select the first group of arbitrators.

The Ministry of Commerce also had a duty to set up the office for registration of the first arbitrators and manage this office until the NAC started its operation and the Executive Board had been elected.⁹⁷

⁹³ Ibid.

⁹⁴ Ministry of Commerce, 'Recruitment Announcement: 50-60 People to Arbitrate Commercial Disputes for National Arbitration Center of Cambodia (NAC)' (Announcement, 2009) <http://www.moc.gov.kh/pdf/pdf_highlight/NAC%20announcemet%20English.pdf>.

⁹⁵ Hun, above n 43, 186-187.

⁹⁶ Ministry of Commerce, 'List of First selection of Arbitrators' (Media Release, No 1310, 12 April 2010).

⁹⁷ *Sub-Decree* art 53.

b) The Selection of and Challenge to Arbitrators by a Party

According to Article 18 of the *Commercial Arbitration Law*, there is no limitation on the number of arbitrators in a dispute. However, the number has to be an odd number.⁹⁸ This article further requires there to be three arbitrators if the parties fail to determine the number of arbitrators.⁹⁹ The odd number of arbitrators is designed to avoid deadlock among the arbitrators in deciding the case.

Article 19(3)(a) provides that in the event that parties have not reached agreement on the method for selecting their arbitrators, each party shall appoint one arbitrator and the two arbitrators shall appoint the third.¹⁰⁰ If the third arbitrator is not appointed within 30 days of the appointment of the first 2 arbitrators, then the court (Commercial or Appeal or Supreme) or the NAC will appoint the third arbitrator, upon request of a party.¹⁰¹ In the circumstance that parties cannot reach an agreement on the appointment a sole arbitrator to hear their case and have also failed to delegate this authority to an appointing authority, the court (Commercial or Appeal or Supreme) or the NAC will appoint an arbitrator, upon request of a party.¹⁰²

The parties are allowed to challenge an arbitrator if they can prove that the arbitrator cannot perform his or her job impartially or independently, or if he or she does not have the qualifications that were agreed on by the parties.¹⁰³ In the absence of a procedure agreement in relation to challenging an arbitrator, interested parties must send a written statement providing reasons for challenging the arbitrator. The written submission has to be submitted to the court (Commercial or Appeal or Supreme) or the NAC, within 15 days

⁹⁸ The *Commercial Arbitration Law* art 18.

⁹⁹ Ibid.

¹⁰⁰ Ibid art 19 (3)(a).

¹⁰¹ Ibid.

¹⁰² Ibid art 19 (3)(b).

¹⁰³ Ibid art 20.

after learning of the circumstance.¹⁰⁴ In this regard, the decision of one of these institutions—Commercial or Appeal or Supreme Court or the NAC— is final and parties cannot appeal the decision.¹⁰⁵

If one of these institutions agrees with the challenge raised by a party, the mandate of the arbitrator is terminated under Article 21 or 22 of the *Commercial Arbitration Law*, a new arbitrator will then be appointed according to article 19 (i.e. the provision regarding the appointment of arbitrator) of the *Commercial Arbitration Law*.¹⁰⁶ These provisions are intended to ensure that the arbitration process can be commenced without unnecessary delay.

2. Conduct of Proceedings

Parties are free to determine the arbitral proceedings.¹⁰⁷ If they fail to reach agreement on this matter, the arbitral tribunal (the arbitrator/ arbitrators who are setting in the case) can conduct the arbitration procedure in such a way that he or she or they consider suitable for the case.¹⁰⁸

An arbitrator can decide whether to hold an oral hearing for the presentation of the evidence or the proceeding shall be conducted on the basis of documents or any other materials. The arbitrator is empowered to decide on this matter only if the parties do not have an agreement on the conduct of proceedings in dealing with their commercial dispute.¹⁰⁹

The process of resolving commercial disputes provides more flexibility to both disputants and decision makers (i.e., an arbitrator). This is unlike the court where the parties of the dispute have no control at all on the court proceedings.

¹⁰⁴ Ibid art 21(3).

¹⁰⁵ Ibid.

¹⁰⁶ Ibid art 23.

¹⁰⁷ Ibid art 27.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid art 32.

3. The Role of the Court

As mentioned earlier in Part III subsection C (2) of this paper, the court has certain functions in relation to commercial arbitration. First, the court can intervene in the arbitration process where there is no arbitration agreement or the arbitration agreement is considered as incapable of being implemented.¹¹⁰ The court can also refer parties to arbitration if the matter that is brought before the court is subject to an arbitration agreement.¹¹¹ The parties can reject the court decision to go to arbitration only if the court finds that the arbitration agreement is null and void or it is incapable of being implemented.¹¹² Second, the court can issue an interim measure, if the order does not contradict the arbitration agreement of the parties.¹¹³ Third, the court may need to appoint an arbitrator if the parties fail to do so, or upon a request to remove the arbitrators.¹¹⁴ Fourth, the court can be involved in dealing with an application to challenge an arbitrator on the matter of conflict of interest.¹¹⁵ Fifth, party can request assistance from the court in matters related to taking evidence in the arbitration process.¹¹⁶

It is important to note that the involvement of the court in the arbitration process is not always negative. There are several advantages that court has in developing commercial dispute resolution. First, the court has a coercive power which gives the its authority to direct a party to do something.¹¹⁷ It can impose negative consequences if a person refuses to apply the decision without a valid reason. The arbitrator's authority stands from the arbitration agreement of the parties obligate them to accept and give full effect to the decision.¹¹⁸

¹¹⁰ Ibid art 20.

¹¹¹ Ibid art 8.

¹¹² Ibid.

¹¹³ Ibid art 9.

¹¹⁴ Ibid art 19 (3)(a).

¹¹⁵ Ibid art 20.

¹¹⁶ Ibid art 35.

¹¹⁷ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008) 84.

¹¹⁸ Ibid.

Second, the court has a role in ensuring that justice is delivered in this private mechanism, including the independence of the arbitrator (s).¹¹⁹ For example, it must ensure that the arbitration system is not tainted by bribery, which results in a lack of natural justice.

Third, interested parties may request the court to maintain the property in the dispute during the arbitration.¹²⁰ Fourth, the court can also help to push the arbitration forward with the evidence that is needed for the arbitration process, such as documents that are under the control of a third party.¹²¹ Fifth, the court also has a role to make sure that arbitrators perform their work under the power that is given them by the arbitration agreement.¹²² This is important because it is likely that some arbitrators would think that they have jurisdiction to hear the case to avoid losing good fees that can be earned from the case.¹²³ In this event, the court should provide helpful assistance and minimise its unhelpful interference.

4. Enforceability of Arbitral Awards

Article 45 of the *Commercial Arbitration Law* provides that:

An arbitral award, irrespective of the country in which it was made, shall be recognised as binding, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and article 44 (i.e application to setting aside as exclusive recourse against arbitral award)...¹²⁴

Under this article, the term ‘competent court’ is not defined. However, this term is used in Article 35, which is related to the court assistance in taking evidence. Under Article 35, the word ‘competent court’ refers to ‘*Commercial, or Appeal, or Supreme Court*’.¹²⁵ In light of Article 35, the term ‘competent court’ under Article 45 can be interpreted as the commercial court or Appellate Court or Supreme Court. As Cambodia has not established a

¹¹⁹ Ibid.

¹²⁰ Ibid 85.

¹²¹ Ibid 108.

¹²² Ibid 88.

¹²³ Ibid.

¹²⁴ The *Commercial Arbitration Law* art 45.

¹²⁵ Ibid art 35.

commercial court, an application to enforce the award needs to be submitted to the Court of Appeal or the Supreme Court.

Both domestic and international awards can be recognised and enforced in Cambodia. However, in order to make this provision workable, the interested party must submit an application to request the competent court. Those documents can be ‘the original arbitration award or duly certified copy or the original arbitration agreement or a duly certified copy plus a duly certified Khmer translation, if not originally in the Khmer Language.’¹²⁶

The competent court may decide to refuse the enforcement of the award only in certain circumstances as provided in article 46 of the *Commercial Arbitration Law*, which can be summarised as the following:

1. Party did not have capacity when he or she entered into the arbitral agreement; or
2. The arbitral agreement is not valid under the law which parties are subjected to; or
3. The party making the application was not given proper notice of the arbitrator(s) appointment or the arbitral proceedings or otherwise was not able to present his or her case effectively; or
4. The arbitral award was not dealing with the matters of the arbitral agreement, or was beyond the scope of the agreement; or
5. The composition of the tribunal or the procedure was not in accordance with the arbitration agreement; or
6. The award is not yet binding on the parties; or

The Appeal court finds that:

7. The subject matter of the dispute is not appropriate for arbitration under the law of Cambodia; or
8. The recognition of the award is contradictory to public policy of

Cambodia.¹²⁷

¹²⁶ Rooney, above n 31, 74.

¹²⁷ The *Commercial Arbitration Law* art 46 (1), (2).

Under this provision, it is clear that the court is limited in the circumstances when it can refuse the recognition or enforcement of an award.

So far, this paper has presented the overview of the history of the establishment of the NAC, which was driven by both local and international factors. It has also considered various legal frameworks that are designed to provide an oversight role on the work of the NAC. The following part examines the establishment of the SIAC, its legal frameworks and factors that contributed to its success. This part will be used later in the paper to recommend various elements, which the author believes will help to maximise the success of the NAC in Cambodia.

IV. Singaporean Experience in Establishing SIAC and Factors in Its Success

This part focuses on the reason for the establishment of the SIAC, its legal framework and factors that contribute to its success. Before proceeding further, the author believes that it is worthwhile providing a very brief overview of the Singapore country context, as it is different to the Cambodian context.

A. Country Context

The British occupied Singapore in the early 1800s.¹²⁸ As a result, the English common law was introduced into the Singapore legal system.¹²⁹ Although the country is now completely independent from Britain, its legal system remains part of the English Common law tradition.¹³⁰

In the international sphere, the large majority of treaties that are adopted by Singapore relate to economic and commercial activity.¹³¹ Singapore is also a member of the New York

¹²⁸ Lee Suet Lin Joyce, 'Much Ado about Errors: The Singapore Perspective' (1998) 15 (1) *Journal of International Arbitration* 95, 95.

¹²⁹ Gary F Bell, 'The Singapore Legal System in Context', in Kevin YL Tan (ed), *The Singapore Legal System* (Singapore University Press, 1999) 1.

¹³⁰ Ibid 12.

¹³¹ Simon SC Tay, 'The Singapore Legal System and international Law' in Kevin YL Tan (ed), *The Singapore Legal System* (Singapore University Press, 1999) 484.

Convention.¹³² This is in line with the government commitment to establish Singapore as an international commercial arbitration center.¹³³

It is important to note that Singapore has a 'dual system' in dealing with commercial matters.¹³⁴ Domestic commercial arbitration is regulated under the *Arbitration Act 1953* with its revision in 2002.¹³⁵ However, under the Act, parties can 'opt in' to the international regimes if they wish. International commercial arbitration is governed by the International Arbitration Act (IAA), unless the parties choose to 'opt out' of this regime.¹³⁶ One of the reasons for Singapore deciding to operate the two systems is that the court could continue to exercise a degree of supervision over domestic arbitrations.¹³⁷

B. Reasons for Establishing SIAC

There are at least three main reasons for establishing the SIAC to deal with the international commercial disputes. First, the Arbitration Act that was previously adopted by Singapore in 1953, which then was amended in 1969 and in 1980, did not provide a satisfactory result in resolving international commercial disputes.¹³⁸ This Act was largely based on the English model law for arbitration.¹³⁹ A lot of provisions under the Act allowed a high degree of court intervention in arbitral proceedings, which did not give full liberty to international parties in attempting to resolve their differences.¹⁴⁰ That is, this legal framework based on the English model, did not respond to the needs of the parties. It

¹³² Sornarajah Muthucumaraswamy, 'The Enforcement of Foreign Arbitral Awards in Singapore' [1988] 1 *Malaysia Law Journal* ixxxvi.

¹³³ Ibid.

¹³⁴ Benny S. Tabalujan, 'Singapore's Adoption of the UNCITRAL Model Law on International Commercial Arbitration: Some Preliminary Observations' (1995) 12 (2) *Journal of International Arbitration* 51, 53.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Law Reform and Revision Division, Attorney-General's Chambers, *Review of Arbitration Laws* (LRRD No. 3/2001, 2001) vii.

¹³⁸ Lawrence Boo and Charles Lim, 'Overview of the International Arbitration Act and Subsidiary Legislation in Singapore' (1995) 12 (4) *Journal of International Arbitration* 75, 75.

¹³⁹ Ibid.

¹⁴⁰ Ibid 76.

became popular for Commonwealth countries such as Australia, Canada, Hong Kong and New Zealand to depart from that English model for arbitration and to adopt the Model Law under the United Nations' system.¹⁴¹

Secondly, the Singaporean government had a strong commitment to strengthen the legal framework to support the resolution of the international commercial disputes. This anxiety can be observed in the speech of the Parliamentary Secretary to the Minister of Law, Associate Professor Ho Peng Kee, when he introduced the 1995 Act.

.... As Singapore businessmen expand overseas there will be greater contracts with foreign parties. Currently, foreign businessmen are uncomfortable with unfamiliar arbitration laws and excessive intervention from local courts if they select Singapore as the venue for arbitration... Sir, international arbitration is a highly competitive business. Businessmen are able to choose from a variety of attractive international centers including Hong Kong, Hawaii, Kuala Lumpur, Melbourne and Vancouver. Currently, a glaring disadvantage of the SIAC is the no applicability of the Model Law in Singapore.¹⁴²

In light of this speech, it was clear that the government wanted to protect the Singaporean businessmen who were conducting business outside the country. The government had a strong belief that the adoption of the Model Law would help to provide a venue for settlement of commercial disputes. It is also evident that parties are more likely to choose the jurisdiction that they are more familiar with.¹⁴³ For example, it is probable that international parties would choose a jurisdiction that adopts the Model law to resolve their dispute rather than a jurisdiction that does not adopt the Model Law.¹⁴⁴ Moreover, the Singaporean government believed that it must adopt the international standard or rules (Model Law) if it wanted to resolve international commercial disputes.¹⁴⁵

¹⁴¹ Jan K. Schaefer, 'Borrowing and Cross-Fertilising Arbitration Laws: A Comparative Overview of the Development of Hong Kong and Singapore Legislation for International Commercial Arbitration' (1999) 16 (4) *Journal of International Arbitration* 41, 45.

¹⁴² International Arbitration Bill 1994.

¹⁴³ Joyce, above n 128, 105.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

Thirdly, the decision to adopt the Model law also resulted from recommendations made by the Sub-committee on Review of Arbitration Laws (Sub-committee).¹⁴⁶ The Sub-committee was established to 'examine the existing laws relating to commercial arbitrations in Singapore in the light of international developments in international commercial arbitration and to make recommendations for the reform or revision of the existing laws...'.¹⁴⁷ The Sub-committee then recommended that the Model Law be adopted.¹⁴⁸ The IAA was passed on 31 October 1994, which largely incorporated the Model law¹⁴⁹ and came into operation on 27 January 1995¹⁵⁰ as a legal framework to support the operation of the SIAC.¹⁵¹ This piece of legislation has been amended many times and the most recently in 2009.¹⁵²

C. SIAC Current Legal Framework

1. A Brief Overview of SIAC

The SIAC is a non-profit organisation, which administers arbitration.¹⁵³ It was created to promote arbitration as an alternative to litigation.¹⁵⁴ SIAC helps parties in appointing arbitrators if the parties cannot reach agreement in selecting their arbitrators. By the end of December 2012, SIAC had 167 individual appointments of arbitrators.¹⁵⁵ The arbitrators appointed by SIAC came from various places around the world such as Australia, Austria, China, Hong Kong, India, Korea, Malaysia, New Zealand, Singapore, the United Kingdom and

¹⁴⁶ Tabalujan, above n 134, 52.

¹⁴⁷ Law Reform and Revision Division, above n 137, 1.

¹⁴⁸ Tabalujan, above n 134, 52.

¹⁴⁹ Lih Shyung Yang and Leslie Chew, 'Arbitration in Singapore' in Shahla F. Ali and Tom Ginsburg (eds), *International Commercial Arbitration in Asia* (Juris, 2013) 467.

¹⁵⁰ Tabalujan, above n 134, 52.

¹⁵¹ Schaefer, above n 141, 55.

¹⁵² Chan Leng Sun, *The Arbitration Laws of Singapore*

<<http://www.siac.org.sg/v1/images/stories/articles/9th-Article-Chan-Leng-Sun-The-Arbitration-Laws-of-Singapore.pdf?phpMyAdmin=OP8vu698vunuzlZYZoW2%2CoDB3yb>>.

¹⁵³ Singapore International Arbitration Center, *About Us* <<http://www.siac.org.sg/about-us>>.

¹⁵⁴ Joel Lee Tye Beng, 'The ADR Movement in Singapore', in Kevin YL Tan (ed), *The Singapore Legal System* (Singapore University Press, 1999) 428.

¹⁵⁵ Singapore International Arbitration Center, '2012 CEO's Annual Report' (Report, 2012) 6 <http://www.siac.org.sg/images/stories/articles/annual_report/siac_annual_report_2012_new.pdf>.

the USA.¹⁵⁶ It is interesting to note that a large majority of arbitrators appointed by SIAC come from common law jurisdictions. This may reflect what Schaefer, an academic, noted 'the Model Law seems to be more attractive to common law jurisdictions than civil law jurisdictions'¹⁵⁷ and arguably this links to the tendency to have more arbitrators from the common law countries than the civil law countries.

SIAC also manages the financial and other practical aspects of arbitration and facilitates the smooth progress of arbitration.¹⁵⁸ SIAC is overseen by a Board of Directors and carries out its responsibilities according to its Code of Practice.¹⁵⁹

In addition to acting as an arbitration authority, the SIAC can arbitrate matters that are referred to it by the IAA. In 2012, SIAC received 235 new cases, which equates to almost one case a day. This number is around 100 times more than its first few months of operation in July 1991.¹⁶⁰ From this statistic, the success of the SIAC is undeniable. A wide range of issues have been brought to SIAC, including trade, corporate, commercial, shipping, and others.¹⁶¹ Another indicator of its success is that in 2012, the total sum in dispute amounted to S\$3.61 billion.¹⁶²

¹⁵⁶ Ibid.

¹⁵⁷ Schaefer, above n 141.

¹⁵⁸ Singapore International Arbitration Center, above n 153.

¹⁵⁹ Ibid.

¹⁶⁰ Tabalujan, above n 134, 52.

¹⁶¹ Singapore International Arbitration Center, above n 155, 5.

¹⁶² Ibid.

2. A Brief Overview of SIAC Legal Framework

a) IAA

The law governing international arbitration in Singapore is the IAA.¹⁶³ The IAA may be seen as a piece of legislation that combines both the Model Law, with some modifications¹⁶⁴ and the New York Convention.¹⁶⁵

IAA is divided into four parts.¹⁶⁶ Part I is Preliminary, and contains the short title of the Act. Part II, International Commercial Arbitration, outlines general provisions on international arbitration including the adoption of Chapters I to VII of the Model Law. Chapter VIII describes the recognition and enforcement of Awards. Specifically, Part III focuses on Foreign Awards, which adopts the New York Convention on enforcement of foreign awards. Part IV includes two schedules—Model Law and The New York Convention.

The IAA provides two important roles to be performed by the SIAC. The first role is to appoint the conciliator¹⁶⁷ and arbitral tribunal.¹⁶⁸ The second role is to tax the arbitral award, which means ‘any costs directed by an award shall be taxable by the Registrar of the SIAC’, unless it is directed by the award.¹⁶⁹ It is also able to tax the fees of the arbitral tribunal.¹⁷⁰

b) SIAC Rules of Arbitration

An arbitral tribunal receives its power from two sources—the arbitration agreement or the institutional rules, which are agreed to by parties, and powers granted by the law of the forum. In Singapore, SIAC has its own Arbitration Rules, which are largely based on the

¹⁶³ Matthew Secomb, ‘Shades of Delocalisation: Diversity in the Adoption of the UNCIRAL Model Law in Australia, Hong Kong and Singapore’ (2000) 17(5) *Journal of International Arbitration* 123, 126.

¹⁶⁴ Sun, above n 152.

¹⁶⁵ *The International Arbitration Act* (Singapore, cap 143A, 2006 rev ed) 2 (IAA).

¹⁶⁶ IAA 1, 2.

¹⁶⁷ Ibid s 16.

¹⁶⁸ Ibid s 8(2).

¹⁶⁹ Ibid s 21(1).

¹⁷⁰ Ibid s 21(2).

UNCITRAL Arbitration Rules.¹⁷¹ The rule has been amended from time to time. The last amendment was made in 2013.¹⁷² Rule 1 of the SIAC Rule 2013 provides that when parties who agree to refer their commercial dispute to be arbitrated at the SIAC, the parties shall be considered to also agree to be bound by the SIAC Rule, unless this Rule is incompatible with the application law of arbitration that parties have to follow.¹⁷³

SIAC Rules 2013 include the procedure for the appointment of arbitrators,¹⁷⁴ grounds for challenging arbitrators¹⁷⁵ and certain details of procedure with respect to the arbitration itself.¹⁷⁶ The two different schedules—Emergency arbitrator and special provisions for SIAC domestic arbitration rules—are also included in the 2013 Rule.¹⁷⁷

D. Reasons for the Success of the SIAC

1. Support from the Government

There are many reasons why SIAC has become a successful international commercial dispute resolution body. It is evident that the Singapore government has played an important role in supporting international arbitration in two main ways. First, it supports international arbitration through its legislative provisions.¹⁷⁸ For example, the IAA takes some provisions from each of the Model Law and the New York Convention. This happened in attempting to establish the SIAC in the line with the well-known arbitral institution such

¹⁷¹ Michael Polkinghorne and Darren Fitzgerald, 'Notes and Current Developments Arbitration in Southeast Asia: Hong Kong, Singapore and Thailand Compared' (2001) 18(1) *Journal of International Arbitration* 101, 105.

¹⁷² Singapore International Arbitration Center, *SIAC Rule 2013* <<http://www.siac.org.sg/our-rules/rules/siac-rules-2013>>.

¹⁷³ Ibid rule 1.

¹⁷⁴ Ibid rules 7-8.

¹⁷⁵ Ibid rule 11.

¹⁷⁶ Ibid.

¹⁷⁷ Singapore International Arbitration Center, above n 172.

¹⁷⁸ Warren B. Chik, 'Recent Developments in Singapore on International Commercial Arbitration' (2005) 9 *Singapore Year Book of International Law and Contributors* 259, 260.

as the Court of International Arbitration in Paris, the London Court of International Arbitration and the American Arbitration Association.¹⁷⁹

Second, the government also supports international arbitration through its public policy including trade promotion, public-private partnership, and direct financial support. The government has allowed foreign firms in Singapore to conduct international arbitration with a tax incentive, and without needing to apply for work visas for those who conduct arbitration activities.¹⁸⁰ The restrictive provision, on foreign lawyers being unable to represent their clients in Singapore— if the arbitration agreement is governed by Singapore law—has been removed.¹⁸¹ This led to the amendment of the *Legal Profession Act*.¹⁸² The number of the foreign firms has increased remarkably. As of 1 July 2013, the total number of foreign firms was 114, which included nine out of ten of the top of the World's top law firms.¹⁸³ Many of these firms have focused on international arbitration practices.

Furthermore, the government has also accepted or incorporated arbitration clauses into some of its own international, regional and bilateral agreements and domestic contracts.¹⁸⁴ This initiative was attempted by the Singapore government to increase the use of its system in resolving the conflict.

¹⁷⁹ Ibid 260.

¹⁸⁰ Gordon Smith and Andrew Cook, 'International Commercial Arbitration in Asia-Pacific: A Comparison of the Australian and Singapore Systems' (2011) 77(1) *Chartered Institute of Arbitrators* 108, 109.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Attorney General's Chambers, *List of Foreign Law Practices As Of 1 July 2013*

<https://app.agc.gov.sg/DATA/0/docs/LPS/List/List%20of%20Foreign%20Law%20Practices_%2001072013_amended.pdf>.

¹⁸⁴ Chik, above n 178.

2. Support from Courts

In Singapore, the judicial system consists of two tiers system. The lower tier consists of district and magistrates courts.¹⁸⁵ The higher tier is made up of the Appellate Court and the High Court.¹⁸⁶

The High Court is the only court in Singapore that has jurisdiction to hear matters arising from the IAA.¹⁸⁷ Since 1 November 2004, three High Court Justices have been specially appointed to oversee the development of Singapore's case law jurisprudence in the field of arbitration.¹⁸⁸ These appointments were designed to ensure that judges are highly expert in dealing with commercial matters and also to promote the consistency of their decisions.¹⁸⁹ The media release also noted that having arbitration matters referred to the High Court without going through the district or magistrates courts helps the commercial disputes to be resolved quickly and effectively.¹⁹⁰

The court has also been proven to be very knowledgeable on international arbitration and extremely supportive of international commercial arbitration.¹⁹¹ There are many recent decisions of the court that can be characterised as striving to uphold the arbitral agreements and implementing the foreign awards.¹⁹² By way of illustration, in 2012 the High Court in Singapore considered a distributorship agreement between the Italian Company and the Australian Company – *Quarella SpA v. Scelta Marble Australia Pty Ltd*.¹⁹³ This was governed by the Uniform Law for International Sales under the United Convention of April 11, 1980 (CISG).¹⁹⁴ In the event that CISG is silent or not applicable

¹⁸⁵ Smith, above n 180, 111.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Chik, above n 178, 261.

¹⁹¹ Ibid.

¹⁹² Pryles, above 3.

¹⁹³ *Quarella SpA v. Scelta Marble Australia Pty Ltd* [2012] SGHC 166 (High Court).

¹⁹⁴ Ibid.

then the Italian law will operate.¹⁹⁵ Under the arbitration agreement between the parties, any dispute would be determined by the ICC arbitration with a seat in Singapore.¹⁹⁶

At the start of arbitration proceeding, the Australian company submitted that Italian law was applicable because CISG does not govern distributorship agreements.¹⁹⁷ The Italian company appeared to agree.¹⁹⁸ Three weeks before the hearing, the Italian company changed its position and argued that CISG was an applicable law.¹⁹⁹ In this case, the Arbitrator held the decision that Italian law was an applicable law and continued the proceeding and finally issued the award.²⁰⁰

The Italian company filed a complaint to the High Court arguing that the sole arbitrator in the case had wrongly apply Italian Law as the applicable law of the contract.²⁰¹ Therefore, the company refused to implement the award. The High Court took the view that the arbitrator had a valid reason to apply the Italian law in the circumstances and therefore refused to set aside an order enforcing the award.²⁰² The High Court upheld the arbitrator decision.²⁰³ This case adds another value to the support of the High Court in upholding arbitral award.²⁰⁴

The court intervention in the arbitration process is very limited under the IAA. There are only four limited grounds for challenge by a party to the court which include the application to request the grant a stay,²⁰⁵ the application to challenge the impartiality,

¹⁹⁵ Andrew Battisson and Sunil Mawkin, 'Quarella SpA v. Scelta Marble Australia Pty Ltd [2012] SGHC 166' (2012) 27 (12) *MEALEY's International Arbitration Report* 1, 1.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid 2.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid 3.

²⁰⁴ Pryles, above n 3, 9.

²⁰⁵ Yang, above n 149, 472.

qualification, or independence of arbitrators, the application on a rule of appeal against a holding by the tribunal on its own jurisdiction, or to set aside the award.²⁰⁶

As stated by the Parliament Secretary for the Minister for Law during the Parliamentary Second Reading, the IAA is intended to accord ‘full liberty to parties...to choose laws and arbitrators to resolve their disputes with minimum intervention from domestic courts.’²⁰⁷ This provision was made perhaps in the recognition of the concerns that have been raised by ‘foreign businessmen [who] are uncomfortable with unfamiliar arbitration laws and excessive intervention from local courts if they select Singapore as the venue for arbitration.’²⁰⁸

3. Support from Competent Arbitrators and their Confidentiality

Under the IAA, however, there is no specific qualification for arbitrators. The absence of a provision for qualifications of arbitrators appears to allow a broader range of individuals from various disciplines to become arbitrators.²⁰⁹ In practice, the SIAC has set minimum standards for the SIAC Panel.²¹⁰ The applicant must have tertiary education, at least 10 years post qualification experience, a fellowship from the Chartered Institute of Arbitrators, Singapore Institute of Arbitrators or any comparable professional arbitration institute, experience as an arbitrators in five or more cases, completion of at least two commercial arbitral awards and be aged between 30 and 75 years.²¹¹ The SIAC also has the right, in its absolute discretion, to admit or to refuse the admission of any person to the Panel.²¹² SIAC also reserves the right, in its absolute discretion to remove any person from

²⁰⁶ Ibid.

²⁰⁷ International Arbitration Bill, above n 142.

²⁰⁸ Ibid.

²⁰⁹ Smith, above n 180, 110.

²¹⁰ Singapore International Arbitration Center, *Standards for Admission to SIAC Panel* <<http://www.siac.org.sg/our-arbitrators/standards-for-admission-to-siac-panel>>.

²¹¹ Ibid.

²¹² Ibid.

the Panel at any time.²¹³ The SIAC rule has been designed to ensure the qualification of arbitrators.²¹⁴

As a means of protecting the privacy and confidentiality of the arbitral proceedings, the SIAC Rules exempt arbitrators from any obligation to make any statement to any person about any matter concerning the arbitration.²¹⁵ Parties who submit to the SIAC Rules are also not allowed to make any arbitrator or officer of the SIAC a witness in any legal proceedings arising out of the arbitration at any time.²¹⁶

4. The Support from Its Procedural Flexibility

In choosing a neutral place of arbitration, parties to an international arbitration will normally choose a place that has a legal framework that they are familiar with and is reliable. On top of that, parties also need a degree of freedom and flexibility in relation to arbitration rules and procedures. The Model Law is designed to meet this need. For example, under section 15 (1) of the IAA, if the parties to an arbitration agreement have agreed not to be bound by the Model Law or the IAA part that relates to the law of arbitration, then Model Law or this Part of IAA shall not apply in resolving the commercial dispute between parties.²¹⁷

In light of this provision, it is clear that the legislature intends to provide parties with options. For example, parties are at liberty to agree on the number of arbitrators they require. If they cannot reach an agreement on this matter, then a single arbitrator is presumed.²¹⁸ There is no rule against having a tribunal of two or three arbitrators. However, in most cases parties agree to either a single or a three-man tribunal. If the parties agree to an even number of arbitrators and then a deadlock exists between

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Singapore International Arbitration Center, above n 172, rule 33.2.

²¹⁶ Ibid.

²¹⁷ IAA s 15.

²¹⁸ *The Model Law* art 12 (2).

arbitrators who cannot reach agreement, then the matter will be referred to a third person as an umpire. However, this practice is not very common.²¹⁹

5. Enforceability of Arbitral Award

After receiving the arbitration decision, the losing party has several options. First, he or she may implement the award. Second, he or she may use the award as a basis for further negotiation. Third, he or she may not implement the award and file an application to challenge the enforcement of the award, although in theory, arbitral award is considered as final and binding on parties to the dispute.²²⁰ Therefore to implement this finality of the award, the court can assist in their enforcement and recognition of the award, as arbitral tribunals do not have any method of enforcing their awards on parties.

In Singapore, to challenge the arbitral award, the interested party can file a complaint to the High Court.²²¹ The court can only refuse not to enforce the award under the limited grounds, which are regulated in both the Model law and the IAA.²²² In addition to the provisions to set aside of the award under the Model Law, the IAA provides two more grounds to enable the court to set aside the award.

Section 24 of the IAA provides two grounds to set aside the implementation of the award, if the award is made by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.²²³ Yang, a lawyer, and Chew, a senior judge from the lower court in Singapore,²²⁴ noted that in light of this provision it appears to be clear that the breach of

²¹⁹ Singapore International Arbitration Center, above n 172, rule 6 and IAA s 9.

²²⁰ Gwendolyn Gn Jong Yuh, 'The Law of Recognition and Enforcement of Arbitration Awards in Singapore' (1993) 14 *Singapore Law Review* 220, 221, 222.

²²¹ Secomb, above n 163, 128.

²²² Yang, above n 149, 494.

²²³ Michael Hwang and Andrew Chan, 'The Role of the Singapore Courts in Relation to International Commercial Arbitration' (1999) 16(4) *Journal of International Arbitration* 101, 112.

²²⁴ Yang, above n 149, 465.

natural justice alone is not enough to set aside the enforcement of the award.²²⁵ It needs to be further proved that the breach of the natural justice is caused by the prejudice.²²⁶

The restriction in challenging the enforcement of the award is perhaps designed to encourage parties to voluntarily implement the award. This is based on the pragmatic view that if there is a wide range of reasons for a party to challenge the award, the losing party would be likely to challenge it no matter whether he or she has a valid reason to do so. In contrast, if parties know that the most substantial challenges to awards will be dismissed, they are far more likely to voluntarily comply with an arbitral award and there will be no need to resort to court enforcement.

So far, this paper has presented the overview of the history of the establishment of the SIAC, which was driven by the internal commitment of the Singaporean government. It also considered various legal frameworks that are designed to provide support to the work of the SIAC. This part also explored various factors that contribute to the success of the SIAC.

The following part provides recommendations, which the author believes will help to maximise the success of the NAC in Cambodia, based on its Asian counterpart—SIAC.

V. Recommendations for the Success of the National Arbitration Center

A. Support from the Cambodian Government

A review of the Singaporean institutional experience invites the observation that the Cambodian government has not provided enough commitment in supporting the development of the commercial dispute resolution. It is evident that the government took a long time to establish the NAC although it had promised to the WTO that the establishment of the center was a priority. The government relied heavily on donors to help establish the center. For example, a Memorandum of Understanding was signed between the Ministry of Commerce and the International Finance Corporation ‘to implement the project to support the setting up and operations of the NAC,’²²⁷ which includes the initial operation cost of the

²²⁵ Ibid.

²²⁶ Ibid 494.

²²⁷ Hun, above n 43.

center.²²⁸ It is not surprising to learn that the Cambodian government relies largely on donors to support its own national institution. It points out in the report produced by the Asian Development Bank that development assistance provided by donors made up around 10% of the gross domestic product.²²⁹

In Singapore, the government had a strong commitment to strengthening the legal framework to support the international commercial dispute resolution. The support includes the establishment of the IAA in line with international standards by incorporating the New York Convention and the Model Law. It also amended its *Legal Profession Act* to enable foreign lawyers to represent their case without needing to have a work visa. The government has also incorporated arbitration clauses into its local, regional and international agreements to increase the use of SIAC. Additionally, financial support has been given by the government to sustain the SIAC in its early operation.²³⁰

From a direct comparison with Singapore, it is clear that the Cambodian government has to work harder and be proactive in supporting the development of the NAC. Perhaps it could also use its public policy to incorporate arbitration clauses into its local, regional and international agreement to increase the use of the NAC. The government should also review the provisions relating to legal practice, which currently requires foreign lawyers to have a local lawyer assisting them. A strong commitment from the government is essential in supporting the development of the NAC.

B. The Support from the Court in Enforcing the Arbitral Award

In Singapore, the losing party can file a complaint to the High Court in the event the other party refuses to implement the arbitral award. The application directly to the High Court helps to speed up commercial matters, rather than going through the normal court process

²²⁸ Nguon Sovan, 'In Brief: Kingdom to get first arbitration center', *The Phnom Penh Post* (online), 11 August 2009 <<http://www.phnompenhpost.com/business/brief-kingdom-get-first-arbitration-centre>>.

²²⁹ Hall Hill and Jayant Menon, 'Cambodia: Rapid Growth with Weak Institutions' (Working paper, Asian Development Bank, 2013) 4.

²³⁰ Singapore Sports Council, *Singapore International Arbitration Center*
<<http://www.ssc.gov.sg/publish/etc/...a.../Annex%20A-%20Profiles.doc>>.

requiring considerable time and resources. The three High Court Justices, experts in commercial matters, have been specially nominated to oversee the development of Singapore's arbitration case law. Such specialisations provide more confidence to international businesses in resolving commercial disputes.

In Cambodia, it is too early to discuss the involvement of the court in enforcing the arbitral award. So far, it remains unclear to what extent Cambodian courts are involved in commercial arbitration processes or in enforcing foreign awards, due to the fact that the public cannot access the court decisions. In theory, since Cambodia is a member of the New York Convention, the award made in this country or any other countries, who are members of the New York Convention shall be enforceable in Cambodia.

Judges in Cambodia will need to understand that enforcing a commercial arbitral award is an important part of their role.²³¹ In this regard, it is necessary that special training be provided to judges on the judicial procedures related to enforcing arbitral decisions. The International Finance Corporation suggests in their report that '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'.²³² This is a sensible option to ensure that the relevant enforcement bodies understand each other's roles in helping to support the development of the NAC. It will be important to ensure that the Cambodian experience at least in part reflect the institutional comity.

Another option is for commercial cases to be heard by judges who are highly expert in the commercial matters. This process will eliminate the time and effort that would be necessary, if parties were litigating before a randomly selected judge, to educate the judge about the particular industry or the matter at issue. Since Cambodia has not yet established the commercial court and all the commercial matters can be heard by the normal courts, it is important that cases should be heard by judges, who have knowledge and experience in commercial matters.

²³¹ International Finance Corporation, above n 12.

²³² Ibid.

C. The Support of Arbitrators

In Cambodia, the process of recruiting or selecting the arbitrators needs to be more transparent and reliable. It is necessary that arbitrators are highly qualified and properly appointed. This transparent process will help to ensure that qualified individuals can become arbitrators and be able to register with the NAC. The proper selection of arbitrators will earn trust from businesses so that they can voluntarily use the system. As warned by Bretton Sciaroni, a legal consultant in Cambodia and also partner in a big law firm in Cambodia, *Sciaroni and Associates*,²³³ 'if business communities have no confidence, nobody will use it'.²³⁴

Furthermore, since the NAC funding resources are also coming from the 'administrative service fees of the NAC',²³⁵ it is important that arbitrators appearing on the list be qualified. Otherwise, parties will not appoint arbitrators from the list and perhaps will not use the system, which ultimately leads to the bankruptcy of the institution.

In Singapore, according to the SIAC schedule of fees, parties have to pay a number of fees such as 'case filling fee, arbitrator's appointment fees, administration fees, arbitrator's fees, emergency interim relief fees, and assessment or taxation fees.'²³⁶ SIAC has survived and become a very successful commercial dispute resolution body; part of the reason is that competent arbitrators are properly appointed by the SIAC in a transparent manner.

It is interesting to note that under Article 18 of the *Commercial Arbitration Law*, three arbitrators have to be appointed if the parties fail to determine the number of arbitrators.²³⁷ This requirement is different from the Singaporean counterpart where only one arbitrator will be appointed if parties cannot reach an agreement on the number of arbitrators or the number of arbitrators was not specified in their arbitration agreement.

²³³ Hun, above n 43, 188.

²³⁴ Ibid.

²³⁵ *Sub-Decree* art 42.

²³⁶ Singapore International Arbitration Center, *Estimate Your Fees* <<http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees>>.

²³⁷ The *Commercial Arbitration Law* art 18.

Although a sole arbitrator will bring less experience and knowledge to the arbitration, it will provide more cost savings to the parties, it will be easier to arrange a meeting or hearing schedule, and the process will be quicker. In this regard, it may be important for parties to state in their arbitration clause that, for example, if the amount in dispute over a certain amount, there would be three arbitrators; otherwise there will be only one arbitrator.

VI. Conclusion

This paper has reviewed the history of the establishment of the NAC, and its current legal framework that is designed to oversee the work of the Center. It explored the provisions that are related to the appointment of arbitrators, the conduct of arbitral proceedings, the role of the court, and the enforceability of arbitral awards. Based on those provisions, it is evident that commercial dispute resolution in Cambodia—in most respects— responds to international standards. This is a welcome development and potentially encourages foreign investment to the country. It also helps Cambodia to fulfill its obligation under the New York Convention as well as under the WTO's membership.

The paper also examined Singapore's success in its efforts to establish the SIAC, one of the most successful commercial dispute resolution bodies in Asia. After this examination, it is evident that the success of the NAC in resolving commercial disputes will rely largely on the support of the Cambodian government, the court, and arbitrators. Various reform options should be considered to maximise the success of this brand new institution including a strong commitment from the government, high expertise of judiciary in its support of commercial arbitration resolution, and a competent and reliable arbitration panel. With these supports, the NAC will provide a sensible option for the resolution of commercial disputes, and potentially encourage foreign investment in the country, which ultimately was one of the purposes of establishing the NAC. As Austermiller, legal education advisor in Cambodia, points out 'If the NAC is properly implemented, the commercial arbitration will be off to an excellent start in Cambodia'.²³⁸

²³⁸ Steven Austermiller, 'ADR in Cambodia's Legal System' in Kuong Teilee et al (eds), *Cambodian Yearbook of Comparative Legal Studies* (Cambodian Society of Comparative Law, 2010) 162.

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