Alternative Dispute Resolution: Cambodia

A Textbook of Essential Concepts

Steven M. Austrermiller, Esq.

January 2010
Alternative Dispute Resolution: Cambodia

A Textbook of Essential Concepts

Steven M. Austermiller, Esq.

2010

A publication of the American Bar Association’s Rule of Law Initiative
The statements and analysis contained herein are the work of the American Bar Association’s Rule of Law Initiative. The statements and analysis expressed are solely those of the author, and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and do not represent the position or policy of the American Bar Association. Furthermore, nothing in this book is to be considered rendering legal advice for specific cases.

This book is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the American Bar Association’s Rule of Law Initiative and do not necessarily reflect the views of USAID, the United States Government or EWMI.
Acknowledgements

In many respects, this book was a group effort. It would not have been possible without the support of so many people. I would be remiss if I did not first acknowledge the source of funding—the American people. The United States Agency for International Development (USAID), which receives its money from American taxpayers, was the funder of the program that supported this book.

Next, I would like to give a huge thanks to my three editors who volunteered to make this book much more concise and readable: Naomi Svensson, Sara Eliot and Monica Saxena. They provided great suggestions and were essential for making the English version clear and logical. As for those who made the Khmer version possible, I would like to thank Kim San and Peng Sokunthea. The translation from English to Khmer was not an easy or straightforward task and I am grateful for their time and effort. Sokunthea not only provided translation assistance but also helped in many other ways, including legal research, extensive editing and making sure that the content was culturally appropriate.

I would also like to thank my colleagues at East West Management Institute (EWMI), Herb Bowman and Nick Mansfield, who patiently put up with delays and provided the scheduling freedom necessary for this project. The American Bar Association (ABA) provided important research support. In this regard, I would like to thank researchers Kun-Fang Lee, Dominic Jerry Nardi, Jr., Nathan Nagy and the rest of the folks at ABA’s Rule of Law Institute (ABA-ROLI).

And finally, I would like to thank my wife Amy Antoniades Austermiller for her editing assistance and her consistent support and encouragement, even on those Saturdays when I should have been at the swimming pool playing with our kids instead of at the computer writing about Cambodian ADR.

While all these individuals helped me with this project, I would like to make clear that the opinions expressed and any errors herein remain my own.
Table of Contents

The Purpose of the Textbook ........................................................................................................... 1

Chapter 1 – Introduction to ADR .................................................................................................. 3
   A. What is ADR? ....................................................................................................................... 3
   B. Solving Problems ............................................................................................................... 3
   C. A Problem Becomes a Dispute ......................................................................................... 6
   D. Alternative Dispute Resolution ....................................................................................... 10

Chapter 2 – Negotiation .............................................................................................................. 13
   A. Introduction ....................................................................................................................... 13
   B. Advantages of Negotiation ............................................................................................... 15
   C. Disadvantages of Negotiation ......................................................................................... 17
   D. Two Basic Approaches to Negotiation ............................................................................ 18
      1. Distributive Negotiation (win-lose) ......................................................................... 18
      2. Interest-based Negotiation (win-win) ........................................................................ 18
   E. Details of the Distributive Approach .............................................................................. 21
      1. General Principles of the Distributive Approach ...................................................... 21
      2. Distributive Approach to Dispute Resolution .......................................................... 22
         a) Expected Monetary Value ...................................................................................... 22
         b) BATNA ..................................................................................................................... 26
         c) The Reservation Price ........................................................................................... 27
      3. Tactics in a Distributive Negotiation ......................................................................... 30
      4. Advantages and Disadvantages of the Distributive Approach ................................. 35
   F. The Prisoner’s Dilemma .................................................................................................... 36
   G. Details of the Interest-based Approach to Negotiation .................................................. 40
      1. General Focus of the Interest-based Approach ......................................................... 40
      2. Separate the People from the Problem ...................................................................... 41
         a) Perception ................................................................................................................ 41
         b) Emotion ..................................................................................................................... 47
         c) Communication ....................................................................................................... 50
      3. Focus on Interests, Not Positions .............................................................................. 53
      4. Invent Options for Mutual Gain ............................................................................... 56
         a) Separate Inventing From Judging ........................................................................... 57
         b) Broaden the Options ............................................................................................... 58
         c) Look for Mutual Gain ............................................................................................ 58
         d) Make Their Decision Easy ..................................................................................... 61
      5. Insist on Using Objective Criteria ............................................................................. 62
         a) Fair Standards .......................................................................................................... 63
         b) Fair Procedures ....................................................................................................... 63
   H. The Stages of the Negotiation Process .............................................................................. 65
      1. The Preparation Stage .................................................................................................. 65
      2. The Preliminary Stage .................................................................................................. 67
      3. Information Stage ....................................................................................................... 68
      4. Distributive/Interest-based Stage .............................................................................. 69
B. Advantages and Disadvantages of Arbitration .................................................... 144
   1. Advantages ................................................................................................. 144
   2. Disadvantages ......................................................................................... 146
C. Arbitration Agreement ......................................................................................... 147
   1. The Basic Arbitration Clause in a Contract ................................................ 147
   2. Drafting an Arbitration Clause .................................................................. 148
      a) Should the arbitration be binding? .......................................................... 148
      b) Should the arbitration be administered or ad hoc? ............................. 148
      c) Where will the arbitration take place? .................................................. 149
      d) What is the number and method of selecting arbitrators? ................. 149
      e) Should the parties engage in negotiation or mediation first? .............. 150
      f) Will the tribunal have the power to grant interim relief? ..................... 151
      g) Can the parties consolidate their arbitration with others? ............... 152
      h) To what extent will the parties be required to disclose information? .... 152
      i) What remedies can the arbitrator grant? .............................................. 153
      j) What rules will govern the proceedings? ............................................ 153
      k) What language will be used in the arbitration proceedings? .......... 154
      l) What substantive law will govern the proceedings? ......................... 154
      m) Are the proceedings confidential? ....................................................... 155
      n) Does the arbitrator have to prepare a written explanation? ............... 155
      o) Who pays for the fees and expenses? ................................................... 155
D. The Arbitration Process ....................................................................................... 157
   1. Initiation of Arbitration ............................................................................. 159
      a) The Claimant’s Submission ................................................................... 159
      b) The Respondent’s Submission ............................................................... 160
   2. Selection of and Challenges to the Arbitral Tribunal .................................... 160
      a) Selecting the Arbitrators ..................................................................... 160
      b) Challenging the Selected Arbitrators .................................................. 161
      c) Challenging the Arbitral Tribunal’s Jurisdiction .................................. 161
   3. Pre-Hearing Process ................................................................................. 162
      a) Rules of Procedure .............................................................................. 162
      b) Place of Arbitration ............................................................................ 162
      c) Language ............................................................................................. 163
      d) Mediation ............................................................................................ 163
      e) Interim Measures ................................................................................. 163
      f) Disclosure of Information or Discovery .............................................. 164
      g) Experts ................................................................................................. 164
   4. Arbitration Hearing .................................................................................... 165
   5. Decision Making ....................................................................................... 165
      a) Judge or Amiable Compositeur? ............................................................ 166
      b) Industry or Trade Standards .................................................................. 166
      c) Majority Decision ................................................................................ 166
      d) Default Rules ....................................................................................... 166
      e) Form of the Award .............................................................................. 167
   6. Appeal and Enforcement ............................................................................ 167
      a) Recourse Against Arbitral Awards ....................................................... 167
# Table of Exercises

## Negotiation
- Calculating the EMV ................................................................. 24
- Reservation Price ................................................................. 29
- Distributive Negotiation ....................................................... 34
- The Prisoner’s Dilemma ......................................................... 38
- Perception Problems ............................................................. 46
- Brainstorming .................................................................... 58
- Negotiation Case 1: Khmer Timber ......................................... 71
- Negotiation Case 2: Barong Wood Labor ............................... 72

## Mediation
- Understanding Non-Verbal Communication ............................... 112
- Re-framing ......................................................................... 115
- Mediator Ethics: Before the Mediation .................................. 124-125
- Mediator Ethics: During the Mediation .................................. 126
- Mediator Ethics: After the Mediation .................................... 127
- Mediation Case 1: Fallen Fence ............................................ 130
- Mediation Case 2: Administration Argument ......................... 131
- Mediation Case 3: Joint Project Argument ............................ 132
- Mediation Case 4: Movie Star ............................................. 133

## Arbitration
- Drafting an Arbitration Clause ............................................. 156
- Arbitrator Ethics ................................................................. 175-176
- Arbitration Case: Workplace Harassment ............................. 185-186

## Arbitration / Mediation
- The King’s Table ............................................................... 196-197
The Purpose of the Textbook

The primary purpose of this textbook is to introduce Cambodian students and professionals to modern concepts of Alternative Dispute Resolution, or “ADR.” Although most Cambodians are aware that disputes can be resolved in alternative ways, without traditional court adjudication, there is little material currently available to explain these alternative means of dispute resolution. As a result, Cambodian law students, practitioners and other legal and judicial professionals have not been sufficiently exposed to modern ADR practices and their role in the Cambodian justice system. Because ADR is an integral part of Cambodia’s past, current, and future legal landscape, this book aims to provide readers with a basic understanding of these contemporary ADR principles.

The concepts underlying Alternative Dispute Resolution are a recognizable part of Cambodian day to day practices. For example, negotiation is an integral part of most Cambodian efforts to resolve disputes. It is the natural first step in resolving most disputes, from a simple one over the price of vegetables at the market to a larger dispute relating to a large construction project. Similarly, mediation is also part of the Cambodian tradition. For example, couples often seek mediation of their marital disputes from respected local elders or the local Commune Council. And while arbitration is not as common, it is becoming more important in modern dispute resolution. The well-respected Arbitration Council has arbitrated many important labor-management issues for the garment and hotel industries. Now that the government has passed the Law on Commercial Arbitration, the role of arbitration will be extended into the commercial sphere, especially when the Ministry of Commerce’s National Arbitration Center is opened.

Each section of this book describes an ADR process and the surrounding legal framework, provides examples of how the process is used, and includes case-based hypothetical study problems and exercises to allow readers an opportunity to become familiar with each method. The textbook can be used as part of an interactive class where students learn through participation in these exercises.

Organization of the Textbook

The text begins with an introduction to ADR. Before delving into the details of any particular ADR process, the reader should understand what ADR is, why it is used, and how it is relevant to a Cambodian legal practitioner. Accordingly, Chapter 1 focuses on what ADR is and how and why it is used. Chapter 2 focuses on negotiation, the most common form of ADR. Chapter 3 focuses on mediation, which builds on many of the concepts developed in the preceding chapter. Chapter 4 focuses on arbitration. This chapter explains how arbitration is similar to and differs from traditional litigation.
Chapter 5 compares the three methods to help readers determine which method is best in different circumstances. It also offers a brief survey of additional ADR methods that have developed in recent years.
Chapter 1 – Introduction to ADR

A. What is ADR?

ADR stands for Alternative Dispute Resolution. It refers to the various ways parties can settle disputes outside of the traditional, court-centered adjudication system. ADR encompasses many forms of dispute resolution, some of which are common and some of which are quite new. Arbitration, negotiation and mediation are the most common forms of ADR. Lawyers call these ADR forms an alternative because many people today consider courts to be the main form of dispute resolution, whereas anything else is an alternative.

However, ADR has deep historical roots in many different countries and cultures. In Cambodia, ADR has played an important part in the traditional village dispute resolution system. This will be discussed further in the subsequent chapters.

Today, Cambodia is creating formal ADR mechanisms by law. In 2001, Cambodia enacted its first ADR law that established the Arbitration Council. Then, in 2006, Cambodia passed its second ADR law, called the Law on Commercial Arbitration. That same year, Cambodia also passed a new Code of Civil Procedure, which explicitly allows for ADR mechanisms to take place even after the Plaintiff has filed her complaint with the court. As a result, ADR is now becoming an important part of Cambodia’s formal legal system.

Why is Cambodia passing these ADR laws? To understand the appeal of alternative dispute resolution, one must first step back and understand the nature of disputes.

B. Solving Problems

For example, we all experience times or moments in life when we want something that we do not have. This could be called a problem. We can choose to ignore the problem or we can act. If we decide to act, we can generally choose how we go about getting what we want. If we try and fail, the problem might become a dispute. For example, imagine the following story:

Sophea is a nineteen-year-old girl. She has an older sister named Sreymom. One day, Sreymom decides that she will take the family’s moto for an all-day ride into the city to be with her boyfriend. Sophea is very

\[ \text{MOL PRAKAS #317-01 (2001).} \]
\[ \text{LAW ON COMMERCIAL ARBITRATION OF THE KINGDOM OF CAMBODIA, 37 Official Gazette of the Kingdom of Cambodia 3000, (2006).} \]
upset because she needs the moto on that same day to go to her cousin’s house. She can choose to do nothing about it or she can try to get the moto. She decides that she really wants it, so she asks Sreymom to use the moto.

If she asks Sreymom for the moto and Sreymom gives it to her, then she has achieved her goal—obtaining possession of the moto for the day. For her, the problem is solved. If Sreymom says, “No, you cannot have the moto today, I am using it,” then Sophea has a choice. She can ignore the problem and perhaps tell herself that she can visit her cousin tomorrow. Or, she can continue with her efforts to obtain the moto. If she chooses the first option, she is choosing to do nothing, sometimes called, “taking no action.” If she chooses the second option, then she is turning the situation into a dispute.

This simple story can be analyzed in more detail through the flow chart on the following page.
Origins of a Dispute

Initial problem: Sophea wants to use the moto that Sreymom plans to use.

Sophea’s Choice

- Try to get the use of the moto
  - Try to convince Sreymom to give her the moto.
  - Try to forcibly take the moto from Sreymom.
  - Ask mother or another to help get moto.

Sreymom says yes and gives the moto to Sophea.
Sreymom says no and refuses to give the moto to Sophea.

Take No Action

Sophea decides to take further action. Now, a dispute exists.
The flow chart shows the complex calculations that might go on in Sophea’s brain as she ponders the situation and decides how to act. She might weigh the consequences of her actions in this logical fashion but do it at a very fast, subconscious level. She might not even be aware that her brain is engaging in this exercise.

As the chart shows, Sophea has several opportunities to end the matter without turning it into a dispute.

**Study Questions**

- Why might Sophea choose to take no action if she wants the use of the moto?
- What are some of the consequences for Sophea if she turns this into a dispute?
- In your personal life, have you ever chosen to take no action on a problem that you had? If so, why?

Life is full of these simple problems and we usually resolve them one way or another, easily, quickly, and without great cost. Sometimes, ignoring a problem is the best strategy. In the example above, Sophea might be able to visit her cousin on the following day. Or, she might learn that her parents plan to buy another moto so that she can use one all the time. If she had insisted on taking the moto from Sreymom, her mother might choose not to buy the moto because she might be angry with Sophea for being so selfish.

Turning a problem into a dispute also has the potential to damage the relationship between the individuals involved. Disputes can affect relationships by creating bad feelings between the people, especially if one side has to lose. If Sophea values her relationship with Sreymom highly, she may decide that causing a dispute over a moto might not be worth it.

**C. A Problem Becomes a Dispute**

To see how relationships are affected by disputes, consider the following problem.

Now Sophea has grown older and works in a restaurant in Kampang Cham. She is paid $75 per month but learns that the male workers are paid more to do the same job. She feels bad about this since she works harder than anybody at the restaurant and has been working there longer than the others. What can she do?

She can ignore the problem and try not to worry about it. Or, she can decide to take action. One action she could take is to confront the restaurant manager informally and explain to him that she is not being paid enough money. If the manager agrees and raises her salary, then the problem is resolved. If the manager disagrees, then there is a dispute,
and Sophea must choose to take action or not. If she decides to take action, she might threaten the manager with some kind of consequence. Or, she might file a lawsuit against him. The chart below illustrates the options.
Traditional Dispute Resolution Options

Initial problem: Sophea wants a higher salary and asks the manager for a raise.

Manager says yes and gives Sophea a raise.

Manager says no and refuses to give Sophea a raise.

Take No Action

Sophea decides to take further action. Now, a dispute exists.

Threaten manager with harm. (Self Help)

File a lawsuit against restaurant. (Traditional Litigation)

Restaurant fires Sophea. Now, she must find a new job.

Sophea must pay a lawyer for one to two years to pursue legal claim against restaurant.

Sophea wins lawsuit but now must enforce the judgment against restaurant owner.

Sophea loses lawsuit.
In the flow chart, the good outcomes are represented by green color boxes and the bad outcomes are represented by red boxes. The yellow boxes represent Sophea’s actions. As the flow chart demonstrates, the only good outcome is if the manager initially gives her a raise.

1. Option One: Self-Help

If she threatens the manager with some kind of harm (perhaps physical or financial), the outcome is unclear. The manager might threaten to have her harmed, or may actually have her harmed in some way. He would likely fire her from her job. He might contact the police and have her arrested. Regardless of what his response is, it is unlikely that he will agree to give her a raise. Threatening harm is one example of “self help.”

In many cases, we look to self help solutions to deal with our problems. However, it can often backfire and does not solve our problem but instead creates bigger ones. Additionally, self-help remedies are often illegal. This option is not the best one for Sophea.

Study Questions

- Can you think of a situation where you or somebody you know chose a “self-help” remedy in a dispute?
- What was the result?

2. Option Two: Traditional Litigation

Sophea could choose the traditional litigation option and file a lawsuit against the restaurant. As the flow chart demonstrates, the results may not be satisfactory. She will likely lose her job. She will likely have to pay expensive legal fees for over one year. She will have to answer questions from the judge and the restaurant’s lawyers.

The restaurant, in its defense, might claim that Sophea was not a good worker and might bring up past instances where she made mistakes. The restaurant might ask customers and other workers to testify against Sophea and claim that she was not a good worker. These other workers might not want to do this but might feel that they must do so to keep their jobs at the restaurant. This might be very disturbing and stressful for Sophea. In the end, Sophea might lose the case. Even if she wins, she has likely lost her job, paid a large amount of legal fees, gone through a long, painful experience and she might not be able to collect her judgment if the restaurant owner hides his assets or goes out of business.
Therefore, both courses of action, self-help and litigation, seem to destroy Sophea’s relationship with her manager and the restaurant. Both courses of action will likely result in Sophea losing her job.

Study Questions

- Have you or somebody you know ever filed a lawsuit?
- How long did it take to complete?
- How much money was paid in legal and other fees?
- What was the result?

3. Option three: Ignoring the Problem

So, for Sophea, the self-help and traditional litigation remedies are not very attractive. However, in this case, ignoring the problem may also not be the ideal solution either. Ignoring the pay issue might make Sophea work less hard. She might subconsciously say to her herself, “if I am not being paid properly, then why should I be motivated to work hard?” But, if the manager notices that she is not working hard, the manager might fire her. Even if she is not fired, she might feel stressed about the problem and this might affect her physically and psychologically. Perhaps the next time that she has a grievance at the restaurant, she may overreact since she is still upset about the pay. Sometimes, these small problems, if kept inside and not addressed, can build up and eventually explode into violence or other forms of anti-social and unproductive behavior.³ For these reasons, the result from Sophea choosing to take no action—ignoring the problem—is represented as a red box to show that it is also probably not a good idea.

If the three solutions presented—self-help, litigation, and ignoring the problem—do not result in a good outcome for Sophea, what other alternatives exist?

D. Alternative Dispute Resolution

ADR offers alternatives to these problem-solving options. Today, ADR has become an important part of the legal landscape in Cambodia and elsewhere because of the perceived problems with the traditional court system. Those problems include:

- cases often take years to adjudicate;

- parties are in a difficult position where their dispute is left “open”;

³ The Cambodian concept known as kum, kumkuon, kumnun and kongkuon is relevant here. As the reader is probably aware, Kum refers to holding on to a grudge that may result in future retaliation. Often, the retaliation is disproportionate to the original offending act. See, e.g., Alexander Laban Hinton, WHY DID THEY KILL?, 64 - 72 (U. of California Press, 2005).
• if the parties have hired lawyers to represent them, they often have to pay high legal fees and costs to continue the dispute;

• parties to litigation often feel that they have no control over the process;

• sometimes parties worry about corruption in the judicial system;

• judges are constrained in their decision-making abilities—they can usually only order money damages for one side or the other; and

• often, the judgment results in a complete loss for one side and this can have negative effects on the parties’ relationship.

Given these problems, it may not be surprising that the World Bank’s International Finance Corporation reported:

Going to court is rarely considered viable by entrepreneurs, but other informal dispute resolution options also have major flaws. Consequently, many businesses choose to ‘cut their losses’ and walk away from disputes rather than pursue their legal rights and entitlements.4

Anecdotal evidence in Cambodia also shows that most international contracts identify a dispute resolution forum outside of the country due to these perceived local problems. Therefore, Cambodia should continue working to develop a strong menu of ADR options to improve dispute resolution.5

In recent years, many people have looked to ADR to find dispute resolution solutions that mitigate or avoid these perceived limitations in the traditional court system. Arbitration, for instance, tends to be a faster and cheaper method of resolving disputes when compared with the courts. Arbitration was the first ADR solution to receive widespread support and it remains the most popular formal ADR mechanism in most developed legal systems.

However, mediation has also become popular lately as a dispute resolution mechanism. Mediation offers parties faster and cheaper dispute resolution with the opportunity of more flexible solutions that can preserve the parties’ ongoing relationship. Mediation is also voluntary so parties only resolve the dispute if they all agree on a settlement.

In addition, mediation and some other forms of ADR have been used as a tool to improve access to justice. In many countries, including Cambodia, the formal court system is too expensive for the poorest members of society. They cannot afford to pay the court costs and the attorney’s fees that are necessary in order to have their disputes decided by the courts. Since most forms of ADR allow parties to resolve their disputes in a more informal and inexpensive setting, they can be an important tool to help poor people resolve their disputes.

For these and other reasons to be discussed in this book, modern ADR methods are becoming an important and integral part of Cambodia’s legal system. This book will help the reader learn more about ADR and how to use it effectively.
Chapter 2 – Negotiation

A wise man should be cautious of others’ wisdom. (Cambodian Proverb)

A. Introduction

This Chapter focuses on negotiation. It is intended to assist people involved in negotiation, whether they are negotiating for themselves or on behalf of another. Negotiation is the process of back and forth communication, whereby parties submit and consider offers until an offer is made and accepted. Negotiation is the most common form of dispute resolution process in the world, found both in civil law and common law jurisdictions. Negotiation can resolve large and small disputes, and can be a very complex process or a simple one.

People negotiate all the time. It is one of the most basic forms of human interaction. People negotiate even when there is no dispute. For instance, people negotiate over the price of mangos or the price of a moto. Sometimes, people do not even realize that they are negotiating. For instance, when an individual tries to convince a group of family members to take a trip, there may be negotiations over where to go or when to leave.

Negotiation can take place in many ways. It can be oral or written. It can be directly between two parties or through the parties’ representatives. It can be casual or formal. It can be done via letters or emails. In Cambodia, negotiation commonly occurs in person, but it can also be done over the telephone. When the negotiation involves a legal dispute, the negotiation likely involves a combination of these methods of communication.

Cambodian law supports negotiation. The Cambodian Code of Civil Procedure states that negotiated settlements between two parties are to be encouraged. In the U.S., and other jurisdictions, negotiation is also encouraged through a variety of procedural rules.

Many jurisdictions favor negotiated settlement for good reason. Because most jurisdictions have significant case backlogs, one way to resolve disputes in a timely manner is to encourage the parties to discuss the issue between themselves and try to reach an agreement. In the U.S., for instance, 90% of all cases are resolved by ADR, and negotiation is the most popular form of ADR. In Cambodia, a World Bank survey of small firms found that negotiation was the most preferred method of dispute resolution.

7 CODE OF CIVIL PROCEDURE OF THE KINGDOM OF CAMBODIA, 55 Official Gazette of Kingdom of Cambodia 5296, 5336, art. 97 (2006) (“The court may attempt to effect a compromise settlement at any stage of the litigation”) and art. 104 (“At the preparatory proceedings for oral argument, the court shall first seek to effect a compromise settlement . . .”) [hereinafter CCP-KC]. Under these articles, the court may encourage the parties to negotiate or may take a more active role, in which case the intervention would be as a mediator.

8 In the U.S., the Federal Rules of Civil Procedure require, in most cases, pre-trial settlement conferences where the parties are encouraged to negotiate a settlement. Fed. R. Civ. P. 169(a)(5); 16(c)(7). The Federal Rules also provide that a party’s failure to accept a reasonable settlement offer can result in that party having to pay the other party’s trial costs. Fed. R. Civ. P. 68. Finally, the Federal Rules of Evidence promote settlement by disallowing into evidence any offers to settle a case. Fed. R. Evid. 408.


10 The Provincial Business Environment Scorecard in Cambodia: A Measure of Economic Governance and Regulatory Policy, World Bank/IFC-MPDF and AusAid/The Asia Foundation, 40 (2007)[hereinafter Business Environment Scorecard]. The survey found that 92% of Cambodian firms choose negotiation as their top dispute resolution option. In contrast, only 1% of firms cited local courts as their most common dispute resolution method.
B. Advantages of Negotiation

Compared with the other common methods of dispute resolution, negotiation has some important advantages:

- **Cost savings**
  The cost of negotiation is lower than for any other dispute resolution method. This is partly why negotiation is so popular. There are no court fees or other expenses.

- **Privacy**
  Negotiation can be a completely private process. It is just between the parties or their representatives. There is no court involvement. There is no press. There are no outsiders. The parties do not even have to involve lawyers, although as this chapter makes clear, lawyers have a very important role to play in most legal disputes. But, even with lawyers, the details of the dispute will remain private,\(^{11}\) which can be very important to individuals and businesses.

- **Flexibility**
  Negotiation is flexible in both its process and its results. First, the *process* of negotiation can be very flexible because, as mentioned above, it can be informal or formal. Negotiation can be informal, occurring between two people on the street, or it can be very formal, with parties and their lawyers sending written letters back and forth.

  Second, the *results* of negotiation can be very flexible. Since it is the parties themselves who are reaching a settlement, they can agree to many different solutions that would otherwise be impossible in arbitration or litigation. For instance, a person might agree to pay a higher settlement amount if it is paid over a period of years, instead of one lump sum payment. While perfectly permissible in negotiation, this kind of award is not generally allowed in litigation.

- **Speed**
  Negotiations can potentially resolve matters very quickly and efficiently. The parties do not have to wait for the judge, arbitrator or mediator to hear and make a

---

\(^{11}\) In Cambodia, lawyers must keep communications with their clients completely confidential. LAW ON THE BAR ASSOCIATION OF THE KINGDOM OF CAMBODIA, art. 58, (1995) [hereinafter BAKC Law]; CODE OF ETHICS FOR THE BAR ASSOCIATION OF THE KINGDOM OF CAMBODIA, art. 7, [hereinafter BAKC Code of Ethics]. The analogous rule in the U.S. is known as the “Attorney-Client Privilege” or the “Rule of Confidentiality” (See e.g., ABA Model Rules of Professional Conduct, R. 1.6); in Europe, it is known as “Legal Privilege” or “Secret Professionnel” (Council of Bars and Law Societies of Europe, Code of Conduct, art. 2.3); and in England, it is known as “Legal Professional Privilege” or the broader “Duty of Confidentiality” (England and Wales Solicitors’ Code of Conduct, R. 4.01). See also, INTERNATIONAL CODE OF ETHICS, International Bar Association, R. 14.
decision on the case. Matters can be settled as soon as the parties reach agreement.

- **Party Control**
  Negotiation offers the parties complete control over the process and the conclusion. The parties determine how the negotiation takes place and whether there is a settlement. In negotiation, a party cannot be forced into the negotiation process or into a settlement to which the party does not agree.\(^{12}\)

- **Preservation of Ongoing Relationship**
  Negotiation allows for the possibility that the parties can craft a settlement that will preserve their ongoing relationship. For example, if an employer and an employee have a dispute over vacation time and they negotiate an agreement, they will be able to preserve the relationship so that the employee keeps her job. In litigation or arbitration where a third party decides the matter, the solution may not keep both sides happy enough to allow them to continue to work together. Through negotiation, however, the parties are able to work together to find a solution that is acceptable to both sides.

- **Settlement Enforcement**
  A negotiated settlement of a lawsuit can be recorded in a court proceeding in front of a judge and it becomes enforceable as a judgment.\(^{13}\)

---

\(^{12}\) Under Cambodian law, a party can void a negotiated settlement if she can prove that the other side engaged in duress or fraud in order to induce her to enter into the settlement. *See Decree 38 ON CONTRACTS AND OTHER LIABILITIES*, arts. 6 – 10, [hereinafter Decree 38]. Under Article 10, acts of deception, dishonesty, or misrepresentation can constitute a fraudulent act sufficient to void a contract such as a settlement agreement. *Id.* art. 10. Under the new Cambodian Civil Procedure Code, a “judicial compromise” (settlement between the parties in a case) can be undone for mistake or fraud, etc. *Textbook ON CODE OF CIVIL PROCEDURE OF KINGDOM OF CAMBODIA*, Working Group on the Code of Civil Procedure of Cambodia, Book Three, Ch. Four, Section II (V)(3)(a) at 110 (2007) [hereinafter CCP-KC COMMENTARY].

\(^{13}\) *See CCP-KC, supra note 7, art. 222, 56 Official Gazette of Kingdom of Cambodia at 5462. Parties that are already in a lawsuit in the Cambodian Courts may attempt to settle their cases. If they reach a ‘judicial compromise’ that is recorded in the court protocol (court record), it has the same force and effect as a court judgment and can be automatically enforced through the courts. CCP-KC, art. 222. If the parties are *not* in a lawsuit, the settlement agreement cannot be a judicial compromise and does not have automatic enforceability. The settlement agreement then is merely a contract. *Civil Code of the Kingdom of Cambodia*, art. 724 (2008) [hereinafter CC-KC]; CCP-KC COMMENTARY, *supra* note 12, at Book Three, Ch. Four, Section II (V)(1), p. 108. As a result, Art. 222 creates a curious incentive to file a complaint *first* and then try to settle, so that the parties can claim a judicial compromise and enjoy the benefits of automatic enforceability.*
C. Disadvantages of Negotiation

Despite its many advantages, there are some reasons why a party might not choose negotiation:

- **Delay**
  One disadvantage with negotiation is that a party can delay the process if it wishes. In a pure negotiation situation, there is no way to force a party to speed things up. It is possible that the offending party is not even serious about settlement and is using negotiation as a way to delay matters or avoid litigation.

- **Unreasonable Party**
  On a related note, parties also face the possibility that the other party may take an unreasonable position in the negotiation. As discussed above, this could be because they are not serious about negotiation and are engaging in this tactic to waste time or avoid litigation.

- **Settlement Enforcement**
  After negotiations, the parties may agree to a settlement agreement that is written and signed. But some time later, one of the parties may fail to abide by the settlement’s terms. For instance, a party may fail to deliver a certain quantity of goods that she agreed to deliver in the settlement. Because the settlement was only a negotiated agreement, the other party has no direct means of judicial enforcement. As a result, that party may have to file a lawsuit and wait a long time to enforce the original settlement agreement.\(^\text{14}\)

- **One Party is Too Powerful**
  There are some circumstances where the parties have disproportionate bargaining power and thus, one party has too much control. For instance, a very rich and powerful businessman may fail to pay an auto repairman. The repairman might be subject to pressure or threats from the businessman during a private negotiation. It is possible that the repairman would give in to the threats and agree to a bad settlement. With private negotiation, there is no third party who can prevent this unjust result.

These disadvantages, while worth considering, are relatively rare. Usually, negotiation is the best initial option. Before filing a lawsuit or invoking an arbitration clause, many lawyers explore negotiation because it is quicker and cheaper than other dispute resolution methods. There is usually no downside to attempting to negotiate a dispute.

\(^{14}\) CCP-KC, *supra* note 7, art. 222, which describes the “judicial compromise,” is only available to parties that are already in a lawsuit in the Cambodian Courts.
D. Two Basic Approaches to Negotiation

Parties can approach negotiation in two basic manners. First, there is the *distributive* or win-lose style of negotiation.\textsuperscript{15} Second, there is the *interest-based*, win-win style of negotiation.\textsuperscript{16}

1. Distributive Negotiation (win-lose)

In the distributive negotiation, the parties assume that there is a fixed amount of resources that they must divide and distribute between them. It is sometimes referred to as a zero-sum game. The more one side is allocated, the less there is available for the other side. Usually, resources are expressed in terms of money.

During the negotiations, the parties stake out positions. The accused party knows the maximum she is willing to pay and the injured party knows the minimum that she is willing to accept. The negotiation discussion and possible outcomes are limited to the positions that each party holds. Each party’s goal is to maximize the amount of resources gained within this bargaining range.

As an example, one party may claim to have been injured by a car driven by the other party. The injured party may have sustained $1,000 worth of injuries. When the two negotiate in a distributive manner, they take positions on the amount of the payment. The injured party will try to persuade the accused to pay her $1,000 or as close to that as possible. The accused will try to persuade the injured to accept as little payment as possible.

The distributive negotiation process usually looks and feels very competitive.

2. Interest-based Negotiation (win-win)

The interest-based negotiation is more collaborative than distributive negotiation. It assumes that there are other important interests that need to be identified and satisfied. The parties may have some interests in common or at least some that are complimentary.

To illustrate the different approaches, take the classic case of the Orange Dispute:

In distributive bargaining, Phary claims ownership of an orange, citing favorable arguments and facts (e.g., that Phary paid for the orange or

\textsuperscript{15} This is also sometimes referred to as “positional bargaining” or a “zero-sum” negotiation.

\textsuperscript{16} This is also sometimes referred to as the “collaborative” approach to negotiation or a “non zero-sum” negotiation.
perhaps suggested buying the orange). Socheata cites contrary arguments and facts (e.g., she selected the orange or maybe she stored the orange). Each party will try to discredit the other party's arguments, and possibly the other party's credibility. The resolution through distributive bargaining is limited to the following solutions:

1) One party gets the entire orange.

2) The orange is divided between the parties, perhaps 50-50 or some other proportion.

3) If they cannot reach an agreement, the parties go to a judge or arbitrator, and the parties present their arguments and attempt to discredit the other party even more vigorously than before. The judge/arbitrator decides on either alternative (1) or alternative (2), above.

Consequently, one party and maybe both parties are dissatisfied, and their ongoing relationship has been damaged by the pressure tactics employed during the negotiation process.17

In contrast, with interest-based bargaining, Phary and Socheata sit together and list the components of the orange, and then try to come up with ideas. Maybe it turns out that Phary’s primary interest is in the orange rind, to make a cake, while Socheata’s primary interest is in the juice of the orange for a drink. The seeds may be useful to one or both and therefore may be divided. By proceeding in this way, an agreement can be reached by which both parties get most of what they want, and their relationship remains intact.

Use curved wood for wheels; use straight wood for spokes. (Cambodian Proverb)

It is important to remember, however, that interest-based negotiation is not always successful. Some negotiations are very simple and based solely on money. Many purchases at the market are simple, money-based negotiations. In those cases, a distributive negotiation is likely the most appropriate. However, in most dispute resolution negotiations, it is worth at least considering an interest-based approach first.

because it can usually lead to better results for both parties. The next sub-section will focus on the details of the distributive approach.

*The interest-based approach to negotiation usually looks and feels more cooperative than competitive.*
E. Details of the Distributive Approach

1. General Principles of the Distributive Approach

The distributive approach is sometimes referred to as “haggling.” In essence, each party goes back and forth with a suggested number. Sometimes the parties reach an agreement and sometimes they don’t. As an example, Thea goes to the market and wants to buy a table from Vanna. Vanna states that the table is for sale for $25. Thea says, “Oh, that is a nice table, but you are asking too much money. I would gladly pay $10, but no more.” Vanna then replies, “Yes, it is a nice table with nice wood. It took five days to make it and I cannot sell it for a loss. I can give you a special discount--$20, but no less, I must make a small profit.” Then Thea says, “How about $12?” And the negotiation goes on.

The two might come to agreement, but only if Thea’s maximum purchase price is equal to or greater than Vanna’s minimum sale price. Thea’s secret maximum price that she is willing to pay is called her reservation price. Vanna’s secret minimum sale price is her reservation price. If they overlap, they can complete a sale. The following graph can illustrate the parties’ respective reservation prices:

![Graph showing the bargaining zone between Vanna's minimum sale price and Thea's maximum purchase price]

The illustration shows that Vanna’s minimum sale price, her reservation price, is $14, while the maximum price that Thea will pay for the table is $18, her reservation price. The area where the two parties’ reservation prices overlap is called the bargaining zone. As the illustration shows, the bargaining zone for this transaction is between $14 and $18, the grey area above. The sale agreement could be made anywhere in that bargaining zone.

In this kind of negotiation, it important to try to determine the other side’s reservation price as accurately as possible. If Thea knows that Vanna’s reservation price is $14, Thea will try to pay no more than $14. On the other hand, if Vanna is a smart seller, she will try to determine how much Thea is willing to pay—Thea’s reservation price—and

---


19 A party’s reservation price is sometimes referred to as the “resistance price.”
she will try to sell the table for as close as possible to Thea’s reservation price of $18. Thus, information gathering is an important aspect of successful negotiation.

Therefore, in a distributive negotiation, each party aims to try to keep his own reservation price secret or to make the other side believe it is something different. Vanna would like for Thea to believe that her reservation price is higher than $14. She makes more money if Thea buys the table for $15 or $16. So, she might try to make Thea believe that $15 or $16 is her reservation price. However, this is a dangerous game. If Thea believes that Vanna’s reservation price is too high, Thea will likely give up and walk away without a purchase.

In addition, in a negotiation, it is sometimes useful to try to persuade the other party that their reservation price should be higher or lower. Thea might say to Vanna that the table can be purchased elsewhere for $12 instead of $14. Of course, Vanna could do the opposite, perhaps telling Thea that she sold a similar table yesterday for $20, so Thea must raise her reservation price to $20. However, this may be risky since a party may lose credibility if her assertions are false or unreasonable.

Study Questions

- What could Vanna say that might convince Thea that Thea’s reservation price is too low and should be raised?
- What could Thea say that might convince Vanna that Vanna’s reservation price is too high and should be lowered?

2. Distributive Approach to Dispute Resolution

Dispute resolution under the distributive approach has the same basic analysis as outlined above for the sale of Vanna’s table with a few additional variables. To determine a party’s reservation price in a dispute, one must first calculate the EMV (the expected monetary value of the case) and then the BATNA (the best available alternative to a negotiated settlement). After that, one can easily determine the most appropriate reservation price for a distributive negotiation in a dispute.

a) Expected Monetary Value

1) Calculating EMV

Every case has an expected monetary value (EMV). This is the “value” of the case after considering all possible scenarios. It is an important calculation that a lawyer should do
for every case. For instance, take the earlier example of a car accident where Vutha was driving his car and hit Thavy who was walking down the street. In this example, the lawyers representing each person would first need to calculate the EMV for the case.

The first step in calculating the EMV is to determine Thavy’s total sustained damages. Let’s assume that she broke her leg in the accident and she had to pay $500 in medical bills and medicine. Let’s also say that she was carrying her new $100 mobile phone and it was broken in the accident. Finally, let’s say that she was walking to a job interview but she was unable to attend the interview because of the accident. The company hired another person and Thavy claims that she would have made $400 per month if she had been able to take the job. But, because of her accident, she missed the interview and could not work for three months afterwards.

Here is a list of the potential damages that Vutha might have to pay:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical costs</td>
<td>$500</td>
</tr>
<tr>
<td>Mobile phone</td>
<td>$100</td>
</tr>
<tr>
<td>Lost income</td>
<td>$1,200</td>
</tr>
<tr>
<td>Total damages</td>
<td>$1,800</td>
</tr>
</tbody>
</table>

The next step is to determine the odds that a court would award each of these damages to Thavy.

Perhaps a Cambodian judge would find that Vutha was driving too fast and was not looking carefully at the street. Although Thavy was not crossing at a corner, she was walking slowly and carefully. In this case, the judge might be inclined to find Vutha liable and award the medical costs and mobile phone to Thavy. But, perhaps the lost income is too speculative. Thavy might not have received the job even if she had been able to attend the interview. Yet, there might be a small chance that the judge will find that the Vutha acted very carelessly and may award lost income to Thavy.

Here is a list of the odds of Thavy’s success on each of the three damage items as might be calculated by Thavy’s lawyer:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical costs</td>
<td>90%</td>
</tr>
<tr>
<td>Mobile phone</td>
<td>90%</td>
</tr>
<tr>
<td>Lost income</td>
<td>10%</td>
</tr>
</tbody>
</table>

The next step is to combine the odds of success for each damage item with the amount of those damages:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical costs</td>
<td>$500 x .9 = $450</td>
</tr>
<tr>
<td>Mobile phone</td>
<td>$100 x .9 = $90</td>
</tr>
<tr>
<td>Lost income</td>
<td>$1,200 x .1 = $120</td>
</tr>
<tr>
<td><strong>Total EMV</strong></td>
<td><strong>$660</strong></td>
</tr>
</tbody>
</table>
Based on this analysis, the expected monetary value of the case is $660. This does not mean that Thavy will receive $660 if her case against Vutha goes to trial. She might receive nothing if the judge decides that she was completely at fault. Or, she might receive the full $1,800 in damages if the judge decides the opposite way. Rather, the EMV reflects an average recovery amount that she would receive if the case were tried many times. It helps a party understand the “value” of the case if the party wants to consider negotiating a settlement.

**Exercise -- Calculating the EMV**

Calculate Kim San’s EMV for the following case:

Kim San ordered 1,000 bags of rice at a cost of $9 per bag. He had a contract to re-sell the rice to a Chinese export company for $12 per bag. The supplier, Tonle Sap Rice Company, failed to deliver the rice on time to Kim San and the Chinese company was threatening to sue Kim San for his failure to deliver. After repeated demands to Tonle Sap, Kim San was forced to purchase 500 bags from the Kampong Cham Rice Company at $12 per bag and then re-sell to the Chinese at the same price--$12 per bag.

Finally, after two weeks’ delay, Tonle Sap delivered the original 1,000 bags to Kim San. Kim San accepted 500 bags and re-sold them to the Chinese at $12/bag, making him a profit of $3 per bag. The Chinese were very unhappy about the delay and told Kim San that they would not buy from him again. Kim San didn’t have a buyer for the other 500 bags so he sent them back to Tonle Sap at a cost of $500.

Kim San believes he has damages for a) loss of profit, b) cost of sending the rice back to Tonle Sap, and c) loss of future profits from contracts with the Chinese company due to the harm to his reputation.

**2) Attitudes About Risk**

It is important to note that the EMV does not take into account the parties’ attitudes toward risk. Some people are very afraid to lose money, while some people are not. Consider two cases, each with an EMV of $5,000. In the first case, one party has a 50% chance of winning $10,000 and a 50% chance of winning nothing, but paying nothing. In the second case, that party has a 60% chance of winning $10,000 and a 20% chance of winning nothing and paying nothing, but also a 20% chance of having to pay $5,000 to

---

the other party. Both cases will have a final EMV calculation of $5,000, but may result in very different settlements depending on the parties’ attitudes toward risk.

The two cases’ EMV calculations can be expressed below:

<table>
<thead>
<tr>
<th>Case #1</th>
<th>Case #2</th>
</tr>
</thead>
<tbody>
<tr>
<td>$10,000 (amount of award) x .5 (odds of winning) = $5,000</td>
<td>$10,000 (amount of award) x .6 (odds of winning) = $6,000</td>
</tr>
<tr>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>$0 (amount of award) x .5 (odds of winning) = $000</td>
<td>$0 (amount of award) x .2 (odds of winning) = $000</td>
</tr>
<tr>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>-$5,000 (amount of award) x .2 (odds of winning) = -$1,000</td>
<td></td>
</tr>
<tr>
<td>Total EMV</td>
<td>Total EMV</td>
</tr>
<tr>
<td>$5,000</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

**Study Questions**

- Would you be willing to settle for the same amount of money in Case #2 as compared with Case #1? Explain.

- Would you be worried about the 20% chance that you might actually lose $1,000 in Case #2?

**3) Different EMV Calculations**

It is also important to remember that both parties in the example above will be calculating the EMV separately. As a result, they may come up with very different EMV figures for the same case. For example, perhaps Vutha thinks he did nothing wrong and that Thavy recklessly ran out in front of Vutha’s car. In that case, he might believe that the judge is less likely to award the damages than Thavy believes. Or, perhaps Vutha believes that Thavy’s medical costs are unjustified because they relate to a problem that she had prior to the accident. In that case, Vutha’s EMV calculation might be much lower than Thavy’s calculation.
b) BATNA

After the parties have calculated the EMV, they will use that number to calculate another item—the BATNA. The acronym BATNA stands for the Best Alternative To a Negotiated Agreement. The BATNA is a very important item in ADR. The BATNA tells a party what will likely happen if it does not reach a settlement. Usually, the BATNA involves taking the EMV and adding a few additional items.

In the example above, Thavy must consider how much she would have to pay her lawyer to file the lawsuit against Vutha. If the cost is $150, then she must subtract $150 from her EMV. If she does not reach a negotiated settlement with Vutha, she will likely receive an average net payment of about $510 by suing Vutha in court ($660 (EMV) - $150 (lawyer fees/costs) = $510).

However, she should also consider that the payment might not be made for a year or more because the court system works slowly. She would also have to worry about the stress of testifying in court. Finally, she is taking a risk that the court may decide in favor of Vutha leaving Thavy with little or no payout. If she needs the money immediately or if she is very nervous about testifying in court then she might consider subtracting an amount of money from her original BATNA to take these subjective factors into account. However, it is difficult to place a monetary value on stress or on the need to receive money immediately. But, she might believe that these issues—stress and immediate need for money—would be worth $100 in the calculation. If so, she is in essence, saying to herself:

I really need money now and I am afraid to go to court. I am willing to settle for less money to ensure that I receive money soon and avoid a long and stressful court process.

In that case, Thavy’s final BATNA is calculated as follows:

Thavy’s original EMV $660
Thavy’s Attorney fees and Court Costs -$150
Thavy’s subjective concerns about going to court -$100
Thavy’s BATNA $410

21 Usually, the time value of money (interest rate) is also part of the BATNA calculation. For simplicity, that has been left out of this equation.
22 It is possible, but less likely, that Thavy will have the opposite feeling about going to trial in the case. She may be from a rich family and not really need the payment. And, she may be very angry with Vutha and actually prefer to take him to court so that she can prove him guilty in public. In that scenario, she would want to add, not subtract, some money to her BATNA to take account of her desire to not settle and instead go to court.
So, this is Thavy’s BATNA, her best alternative to a negotiated agreement — $410.

c) The Reservation Price

Every party in a dispute negotiation needs to have a reservation price (recall the example of Vanna and Thea haggling over the price of the table). This is near the “bottom line” for that party, i.e., the least one party is willing to accept and the most the other party is willing to pay. At each party’s reservation point, she is indifferent to settlement, meaning that her expected result from settlement and litigation are the same, thereby making her indifferent to which process to select. In these situations, the party’s reservation price is usually the party’s BATNA.

Thus, in the Thavy-Vutha example, Thavy’s BATNA and her reservation price, as discussed above, is $410. If she settles at $410, she is no better off or worse off than if she pursued litigation. In other words, she should be willing to settle the case for a payment of $410 or more. But, she would reject any offer for less than $410 because it would be lower than her best alternative to a negotiated agreement—going to court. If Vutha’s reservation price is higher than Thavy’s (i.e., he would be willing to pay more than $410), then the parties should be able to settle the case. This means that they are both better off reaching a negotiated settlement than going to court.

The graph below shows the possible solutions available if Thavy’s reservation price is $410 and Vutha’s is $600:

Somewhere in that bargaining zone, a settlement is possible. On the other hand, if Vutha calculates his reservation price to be only $310, which is $100 lower than Thavy’s reservation price, there will not be a settlement. This would mean that the parties’ reservation price calculations show that they are better off going to court than settling the case. The following graph shows that scenario and the gap between the two reservation prices:
The same rules about using outside relevant facts to come up with a reservation price at the market also apply in a dispute negotiation. During negotiation, Thavy would likely try to persuade Vutha that Vutha’s reservation price should be very high, perhaps because of the bad injuries she has sustained. Vutha would try to persuade Thavy that her reservation price should be low—the courts are uncertain, lawyers cost a lot of money, she will have to wait a long time, and it was her fault, not his, etc.
Sophal owns a store in Phnom Penh that sells mobile phones. He purchases many of his phones from Nora’s import business. In July, Sophal ordered 100 new Motorola phones from Nora. Nora charged Sophal $100 per phone. Sophal was very excited to receive these phones because they were new to the Cambodian market. Motorola had just begun making these phones and they had a new look, were very thin and had proved to be very popular in the U.S. and Japan. Sophal was planning to sell the phones for $200 retail. Sophal spent $500 advertising these new phones and stated that they would be available starting Saturday, August 8. Sophal’s store was the first to offer these phones in Cambodia.

In July, Sophal paid Nora one-half the purchase price ($5,000) and agreed to pay the other half upon delivery on August 7. But, on August 7, the phones did not arrive. On August 8, many customers visited Sophal’s store to purchase the new phones but he did not have them. The customers were upset that he did not have the new phones on Saturday, as promised in his advertisements. Nora promised delivery in a few more days, citing problems with customs.

Finally, on August 15, Nora delivered the Motorola phones, but many of Sophal’s customers had already bought the new Nokia phone at a competing store. Sophal also learned that the phones were defective and did not work properly. He did not pay Nora the second payment and he has demanded that Nora return the first $5,000 he paid in July. Nora has refused and has promised to send another 100 Motorola phones in two weeks time if Sophal would return the defective phones.

Sophal has come to you to ask about negotiating a settlement or possibly filing a lawsuit against Nora. Sophal is worried that a lawsuit would take too much time away from his business. He is also nervous about testifying in court against Nora. He has heard that Nora is very powerful.

Please calculate the EMV, BATNA and reservation price for Sophal.

Then, try to estimate Nora’s reservation price. What additional information would you need to estimate Nora’s reservation price?
3. Tactics in a Distributive Negotiation

One might achieve improved results from distributive negotiations by employing a few well-known tactics. The following are some tactics that have been used by negotiators. These tactics are offered as possible tools to be used in distributive negotiations, but not necessarily in interest-based negotiations.

- **Your Reservation Price.** The first tactic is to carefully and objectively develop a good EMV, BATNA, and resulting reservation price. As mentioned above, this is crucial to determining how to proceed in a dispute.

- **Other Party’s Reservation Price.** The second tactic is to try to accurately determine the other party’s reservation price. This can be difficult. One way to do this is to try to gather as much information as possible about the other party and the subject of the dispute. In addition, it is important to listen carefully to everything the other party says or writes during the negotiation. Consider the figures she suggests and how flexible she is during negotiation. This might provide some insight as to her reservation price. Conversely, it is important to not give away your own reservation price.

- **“Bluff.”** To bluff is to show intention to do something that is not really intended, such as to pay only a certain amount or stop all cooperation with the other party or walk away from the negotiations. With a bluff, the party might be able to create additional bargaining power. It may cause the other party to alter her own reservation price or alter her assessment of your reservation price. Either way, it may improve the results for the person making the bluff.

  However, this is risky since a bluff can sometimes be “called.” This means that the other person may force you to do what you threatened to do. If you don’t follow through, then you will have lost credibility in the eyes of the other party. And, in the future, the other party may not trust anything you say. If a bluff is called, the likely end result is much worse than before.

  Moreover, a bluff can sometimes hurt the long-term relationship between the two parties because of lack of trust. Bluffing is best used in negotiations that involve two parties that do not intend to have a future relationship, such as a purchase at a market on holiday.

- **Anchoring.** Anchoring is the use of a number, whether high or low, to influence the other party’s perception of value. Research has shown that people will change their evaluation and counter-proposals based on an initial anchor offer. For example, a Swedish study found that purchasers of an apartment offered a higher

---

initial amount if the initial listed price was higher. Purchasers offered a lower amount if the initial listed price was lower for the same property. In other words, purchasers’ perceptions of the market value of the property were affected by the amount of the sellers’ initial offer. Anchoring even influences experts. In a German study, researchers found that professional automobile mechanics’ estimated value of cars were heavily influenced by an initial anchor question made by a customer.

Anchors work because they tend to make people focus on certain aspects of a subject. A high anchor price related to a product will tend to make people focus on the product’s positive aspects, while a low anchor will cause the opposite effect. Negotiators can take advantage of this by presenting a high initial demand from the other party (as with the Swedish property sellers) or a low initial offer if the party is the one paying. It should be noted that absurdly high or low initial anchors work less effectively and run the risk of causing the other party to walk away.

- **The Irrevocable “Bottom Line.”** Sometimes a party may claim that he is offering the absolute, bottom line position. It is his best offer and he cannot bargain any further. Declaring an irrevocable bottom line is sometimes similar to bluffing, except that the bottom line is the legitimate position of the party and not merely a bluff. The bottom line is usually the reservation price. If, for example, after trying to negotiate a settlement, a party is only willing pay $1,000, that party might declare this to the other party. In the U.S., a party may say that his “hands are tied.” This means she does not have the ability to adjust her position any further.

This should only be done after negotiations have reached a point where the party knows that he will not get any better deal than his reservation price. Declaring a bottom line too early may result in a less advantageous outcome. If, for example, a party declares too early in the negotiation that he will pay no more than $1,000, he has lost the opportunity to pay less, say, $900. The party should be absolutely convinced that nothing less than $1,000 is possible. Then and only then should a bottom line be declared to the other party.

Declaring a bottom line will likely end the negotiations, either with an agreement or with failure. As a result, this is a time efficient tactic but potentially risky if

---

24 *Id.*
25 Adam D. Galinsky, *Should You Make the First Offer?*, NEGOTIATION (Harvard Bus. School 2004). “In the study, researchers had customers approach German mechanics—individuals expected to be knowledgeable about the true value of cars—with a used car that needed numerous repairs. After offering their own opinion of the car's value, the customers asked the mechanics for an estimated value. Half the mechanics were given a low anchor; the customer stated, ‘I think that the car should sell for about DM 2,800.’ The other half were given a high anchor; ‘I think that the car should sell for about DM 5,000.’ The mechanics estimated the car to be worth DM 1,000 more when they were given the high-anchor value!” *Id.*
26 *Id.*
employed too early in the process. New information later revealed in the negotiation may change the bottom line.

- **Reservation Price Change.** One party can advocate that the other party change her reservation price based on facts or opinions presented during the negotiations and important information that the other side might not possess. This is part of the attorney’s job as an advocate for her client. For example, one party might provide evidence of significant damage to a business as a result of the other party’s defective product.

However, a lawyer should not too vigorously advocate for her client’s position and commit a fraudulent misrepresentation. Most jurisdictions provide remedies to victims of fraudulent statements that induced a settlement agreement. Such remedies can include suing for damages resulting from the fraud or rescission of the agreement followed by reinstatement of litigation.²⁷ In Cambodia, acts of deception, dishonesty, or misrepresentation can constitute a fraudulent act sufficient to void a settlement agreement.²⁸ There is a fine line between an act of deception and a sharp negotiating tactic designed to move the other party’s reservation price. Legal practitioners should be careful not to cross that line or risk creating a voidable agreement and violating the Cambodian lawyer ethics rules.²⁹

²⁷ Settlement agreements, like other contracts, are voidable in case of fraud or misrepresentation. In the U.S., see, e.g., UCC 2-721; Phipps v. Winneshiek County, 593 N.W.2d 143 (Iowa 1999). In England, see, e.g., A Fulton Co. Ltd. v. Totes Isotoner (UK) Ltd., 2002 WL 32068011 (PCC), R.P.C. 27 (2003). For contracts, in the EU, see, e.g., THE PRINCIPLES OF EUROPEAN CONTRACT LAW, Art. 4.107, Commission on European Contract law (1998).

²⁸ Decree 38, supra note 12, arts. 6-10; CC-KC, supra note 13, arts. 347-349 (rescission based on fraud, misrepresentation and duress); CCP-KC COMMENTARY, supra note, 12, at Book Three, Ch. Four, Section II (V)(3), p. 110. Fraud, misrepresentation and duress should be distinguished from mere mistake of fact or law, which is clearly not grounds for rescission of a settlement agreement. CC-KC, arts. 727-728.

²⁹ The Code of Ethics of the Bar Association of the Kingdom of Cambodia states that “all interactions among lawyers shall occur in a spirit of brotherhood, propriety, and courtesy. Subject to the interests of his or her client, the lawyer must abstain from all acts which may be prejudicial to other lawyers.” BAKC Code of Ethics, Art. 25 (unofficial BAKC translation in Legal Profession in Cambodia, BAKC 2005). The Law on the Bar Association further states, “Any lawyer who abuses the rules of the profession or commits any act affecting the ethics or honor of lawyers shall be subject to disciplinary action . . .” LAW ON THE BAR ASSOCIATION OF THE KINGDOM OF CAMBODIA, Art. 59 (unofficial BAKC translation in Legal Profession in Cambodia, BAKC 2005).
Study Questions

- Have you ever used any of these tactics in a negotiation?
- If so, which ones were the most successful and why?
- Lawyer Phary claims to Lawyer Sokanha that his client is “very motivated” to go to trial and to have a judge determine who was right. But secretly, Phary knows that his client is very afraid to go to court. If the parties successfully settle the dispute, would Phary’s representation constitute a fraudulent act, making the settlement agreement voidable?
- Would you want to know more facts to answer this question? If so, what facts would be helpful?
Exercise – Distributive Negotiation

The Siem Reap Construction Company is building a large hotel in Siem Reap called the “Angkor Tower.” The ASEAN Cement Company has just signed a contract to supply Siem Reap with cement for the project. The contract requires ASEAN to deliver 10,000 kilos of mixed cement to Siem Reap on January 15. Then, ASEAN is to deliver another 5,000 kilos of cement on the 15th day of each month thereafter until December 15. The total contract price is $65,000 ($1/kilo of cement x 65,000 kilos).

ASEAN made the first two deliveries on time and Siem Reap made the first two payments on time. Then in March, Siem Reap refused to pay for the third delivery because it claimed that the cement was of poor quality. ASEAN replied that it had inspected the cement and that it was fine when delivered but that Siem Reap’s workers had not properly installed it at the building site, based on its observations and inspections. ASEAN further stated that if Siem Reap refused to pay, it would refuse to deliver any additional cement.

Siem Reap then decided to make an emergency contract with another cement supplier at twice the ASEAN price. Siem Reap contacted its lawyers and claimed that it received 5,000 kilos of bad cement from ASEAN. It had spent $5,000 in labor and other costs associated with installing and then removing the bad cement. Since it would suffer further damages if it were late in finishing the construction, Siem Reap contracted with the only other supplier available and had to pay twice the contract rate it had with ASEAN. In other words, Siem Reap will have to pay $100,000 for its future cement needs ($2/Kilo x 50,000 kilos), $50,000 more than the price it contracted to pay ASEAN. After investigating the site, however, Siem Reap privately thinks that it might be partly at fault for the cement problem.

ASEAN contacted its lawyers and claimed that Siem Reap hired unskilled workers who did not know how to properly install the cement. They claim it is Siem Reap’s fault that there was a problem at the site. ASEAN believes it can prove this, but privately thinks that it might be partially at fault. ASEAN has not been paid for its third delivery of 5,000 kilos of cement. Furthermore, Siem Reap has breached the contract by refusing to accept the other nine deliveries. ASEAN would have made a profit of $25,000 on the remaining cement deliveries. Also, ASEAN had already transported most of the cement materials and equipment to Siem Reap for the job. Now, it has lost not only the profit from the contract, but also must pay $5,000 to move the materials and equipment to another location.

If the dispute goes to court, each side will have to pay about $10,000 in lawyer fees and costs. Also, both companies are afraid that a public trial might make them look incompetent and hurt their businesses.

Students should divide into teams of lawyers representing Siem Reap and ASEAN. They should privately calculate the two sides’ reservation prices and engage in a short distributive negotiation to see if an agreement can be reached.
4. Advantages and Disadvantages of the Distributive Approach

The distributive approach to negotiation is common throughout the world. This is because it has some important advantages. First, distributive negotiation is simple. Anybody can engage in this style of negotiation. There are usually just the two numbers that the two parties are advocating. Second, distributive negotiation is universally understood. People from different cultures can negotiate over the price of a chicken at the market quite easily. Third, distributive negotiation is concrete. One party offers something and the other party either accepts or counteroffers. If they agree, a deal is made. Fourth, distributive negotiation is usually efficient. A distributive negotiation can often take place in a few seconds. Even with a larger subject, the parties do not need to waste a great deal of time if they are merely trading numbers. And finally, distributive negotiation’s focus on numbers allows parties to avoid giving up a great deal of information about their interests.

Distributive negotiations tend to work best where the issue is simple, the stakes are relatively low and bargaining is well-established and expected.

However, the distributive negotiation approach has some significant drawbacks. By focusing on positions and concrete commitments, it discourages the search for creative, value-maximizing options. It assumes that there is no chance for the parties to find joint gains. It also encourages arbitrary “split-the-difference” outcomes that may have no logical basis and may be difficult to explain or justify to third parties or superiors.

Furthermore, it can lead to bad decisions by the participants. When parties engage in distributive negotiation, they tend to lock themselves into positions. They defend and justify them, making it harder to move off of them. They begin to have an interest in “saving face” and keeping to their own position.

Most importantly, distributive negotiations tend to promote an adversarial relationship between the parties. It causes the parties to go “head-to-head” against each other. Each party will try to gain an advantage at the expense of the other. This can sometimes lead to a self-fulfilling cycle of hostility as each side begins to view the other party’s motives with suspicion and negative feelings. At this point, the parties’ relationship will be adversely affected. Even if they reach an agreement, the parties may wonder if they were “taken advantage of.” They may resent how the negotiations occurred and may choose to end the relationship.

---

30 Patton, supra note 18, at 288.
31 ROGER FISHER, WILLIAM URY AND BRUCE PATTON, GETTING TO YES, at 4-5 (2nd ed. 1991).
32 Id.
33 Id.
F. The Prisoner’s Dilemma

A famous game, the *Prisoner’s Dilemma*, illustrates the importance of cooperation and thinking in terms of win-win instead of the traditional distributive negotiation’s win-lose mentality. The Prisoner’s Dilemma was developed by Merill Flood and Melvin Dresher in the U.S in 1950 as part of the emerging field of science known as “game theory.” Albert Tucker, a mathematician, was the first to adopt the concept of game theory to prisoner sentences and to give the game the famous name, Prisoner’s Dilemma.

The Prisoner’s Dilemma is a story about two prisoners who have been arrested by the police. They are held in pre-trial detention and agree not to betray one another and not to confess to the crime. But then, the two are separated and cannot communicate with each other. The police have only limited evidence for a conviction. They visit each prisoner and offer the same deal: if one confesses and testifies for the prosecution against the other and the other remains silent, the “betraying” prisoner goes free after only ten days in prison while the silent accomplice will be convicted and receive a ten-year sentence based on the testimony of the other prisoner. If both prisoners stay silent and refuse to betray each other, they will both be sentenced to only six months in jail because the police have only limited evidence. If both prisoners confess and betray each other, each prisoner receives a five-year sentence. Each prisoner must make the choice to cooperate with each other and remain silent or to betray the other prisoner and confess. However, neither prisoner knows what choice the other prisoner will make and they cannot talk about it.

The Prisoner’s Dilemma asks the question, how should each prisoner act? The following graph explains the choices and consequences:

---

35 *Id.*
The dilemma exists because both prisoners likely care most about minimizing their own jail terms. Each prisoner has two choices, to remain silent or to betray the other prisoner for a lighter sentence. Each prisoner must choose without knowing what the other will choose.

### Study Questions

- According to the chart, if Prisoner A chooses to stay silent and cooperate, which decision gives Prisoner B the best result: betray or stay silent/cooperate?

- According to the chart, if Prisoner A is going to betray, which decision gives Prisoner B the best result: betray or stay silent/cooperate?

- What if Prisoner B does not know what Prisoner A is going to do? In that case, which decision gives Prisoner B the best result?

---

### Choices For **Prisoner B**

<table>
<thead>
<tr>
<th></th>
<th>Prisoner B Stays Silent/Cooperates</th>
<th>Prisoner B Betrays</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prisoner A Stays</strong></td>
<td>Each prisoner serves six months in jail</td>
<td>Prisoner A serves 10 years in jail</td>
</tr>
<tr>
<td>Silent/Cooperates</td>
<td>Prisoner B serves 10 days in jail</td>
<td>Prisoner B serves 10 years in jail</td>
</tr>
<tr>
<td><strong>Prisoner A Betrays</strong></td>
<td>Prisoner A serves 10 days in jail</td>
<td>Each prisoner serves five years in jail</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Prisoner A</th>
<th>Prisoner B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stays</td>
<td>Each prisoner serves</td>
<td>Prisoner A serves 10</td>
</tr>
<tr>
<td>Silent/Cooperates</td>
<td>six months in jail</td>
<td>years in jail</td>
</tr>
<tr>
<td></td>
<td>Prisoner B serves</td>
<td>Prisoner B serves</td>
</tr>
<tr>
<td></td>
<td>10 days in jail</td>
<td>10 years in jail</td>
</tr>
<tr>
<td></td>
<td>Each prisoner serves</td>
<td>Five years in jail</td>
</tr>
<tr>
<td></td>
<td>five years in jail</td>
<td></td>
</tr>
</tbody>
</table>
Exercise – The Prisoner’s Dilemma

The class should be separated into groups of two people each. Each group should play the Prisoner’s Dilemma in two rounds. In both rounds, the players are prisoners in the Prisoner’s Dilemma game.

In the first round, the players should make a fist with the one hand behind their back. Each player should secretly hold either one or two fingers out behind his back. If the player holds one finger out, the player had decided to stay silent and cooperate with the other prisoner. If the player holds two fingers out, that player has decided to betray the other prisoner.

At the count of three, both players should simultaneously bring their hands in front of them to show the other player how many fingers he has held out. The objective of the game is to get the best result for yourself—the least amount of jail time. In this first round, neither player can reveal his choice before the fists are simultaneously revealed and they cannot discuss their decision with the other player or make any agreements. Before choosing, it is helpful to review the Prisoner’s Dilemma chart.

After the players reveal their choices, they should record them below. Circle the number of fingers that each player chooses. Then consult the chart and fill in the result to determine how many years in prison each person received.

In the second round, the players will play the game exactly the same as in the first round except there is one important difference. In the second round, the players can talk to each other about their decision. They have the opportunity if they want, to cooperate or make an agreement prior to showing their fingers. After revealing their decision, the players record the results in the table.

<table>
<thead>
<tr>
<th></th>
<th>Player A</th>
<th>Player B</th>
<th>Result (Years in Prison)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Round 1</strong></td>
<td>One finger/stay silent</td>
<td>One finger/stay silent</td>
<td></td>
</tr>
<tr>
<td>(No communication)</td>
<td>Two fingers/betray</td>
<td>Two fingers/betray</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Player A ______</td>
<td>Player B ______</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Player A ______</td>
<td>Player B ______</td>
<td></td>
</tr>
<tr>
<td><strong>Round 2</strong></td>
<td>One finger/stay silent</td>
<td>One finger/stay silent</td>
<td></td>
</tr>
<tr>
<td>(Communication possible)</td>
<td>Two fingers/betray</td>
<td>Two fingers/betray</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Player A ______</td>
<td>Player B ______</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Player A ______</td>
<td>Player B ______</td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>What were some of the differences in behavior between the two rounds?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did you make a deal with the other player in the second round? If so, what was the deal?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If you were a prisoner in this situation, which format would you prefer, the format in round 1 without communication or the format in round 2 with communication?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If you add up the total prison terms for the two prisoners in round 1 and compare to the total in round 2, which format resulted in less total prison time?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
G. Details of the Interest-based Approach to Negotiation

1. General Focus of the Interest-based Approach

The prisoner’s dilemma is a bargaining model that allows for a win-win result. It demonstrates that there are more total benefits to be divided among the negotiators in a setting of joint cooperation than in a setting of mutual betrayal. In other words, if the players cooperate, they can achieve better results than if they are separated and have to make their decision independently. If they cooperate, they can enlarge the benefits, or the “pie,” as it is sometimes referred to in the U.S.

Interest-based negotiation resembles the prisoner’s dilemma. Interest-based negotiation attempts to overcome the disadvantages of distributive negotiations by enlarging the total benefits for both parties though cooperation. In the same way that the two prisoners could have cooperated and received light sentences (against the apparent logic in favor of betrayal), the two sides in an interest-based negotiation look for creative ways to find the best solution for everybody. Interest-based negotiation can overcome the disadvantages of distributive negotiations in the following ways:

- Instead of focusing on positions, interest-based negotiations focus on fulfilling the parties’ underlying interests.
- Instead of requiring commitments and concessions, the interest-based approach postpones all formal commitments to the end of negotiation.
- Instead of demands and offers, parties work together to fulfill each other’s interests. Only at the end of the negotiation do they settle on commitments.
- Instead of arbitrary results, interest-based negotiations help produce fair, justifiable and understandable results.
- Instead of jeopardizing the parties’ relationship, interest-based negotiations allow parties to maintain and sometimes even strengthen their relationships.

36 The Prisoner’s Dilemma is not a perfect analogy for interest-based negotiations. The Prisoner’s Dilemma assumes that there are only two choices: cooperate or defect. In reality, negotiators usually have a wide range of options, and some may not neatly fit into either category. However, it does capture the importance of cooperation with an adversary, even when each party’s best interests seem to be served by taking an adversarial, win-lose approach. See Michael L. Moffitt, Disputes As Opportunities to Create Value, HANDBOOK OF DISPUTE RESOLUTION, 173, 181-183 (Michael L. Moffitt, Robert C. Bordone ed. 2005).

37 Patton, supra note 18, at 292-293.
The original proponents of the interest-based approach to negotiations were Roger Fisher and William Ury of the Harvard Negotiation Project at Harvard Law School. In their famous book, *Getting to Yes*[^38], they identify four main principles of the interest-based approach:

- Separate the People from the Problem
- Focus on Interests, not Positions
- Invent Options for Mutual Gain
- Insist on Using Objective Criteria

The next sections of this book provide further detail on these four main principles.

### 2. Separate the People from the Problem[^39]

Because negotiations are between people, sometimes participants mistakenly view negotiations as a competition and a battle of wills, rather than as a discussion over terms of an agreement. Also, people have emotions. They can misinterpret what is said. During negotiations, parties can become angry, hostile, offended or frustrated, complicating what could otherwise be a simple negotiation. When this happens, the parties may not be able to reach agreement. The way to diffuse this situation is to try to separate the people from the problem.

In a negotiation, each party has two separate interests: (1) the substance of the negotiation and (2) the relationship with the other party. An example of the substance of the negotiation would be who should pay for an item or how much to reimburse one party for a loss caused by the other. Examples of the parties’ relationship would be two long-term business partners or perhaps a husband and wife or even two neighboring countries. In many cases, the relationship may be far more important than the substance of the negotiation. Yet, the relationship can suffer when people negotiate. They might become angry because of a perceived slight, or lack of respect, or a strongly-held position.

There are three areas where a smart negotiator can focus on the person and preserving the relationship (as opposed to the substance of the dispute). They are perception, emotion and communication[^40].

#### a) Perception

In 1787, a man in the U.S. discovered a very large dinosaur bone in a creek. This was possibly the first time in modern history anybody had made such a discovery. He showed the bone to a Dr. Casper Wistar, an expert in human anatomy. After analysis, he determined that it was not important. Dr. Wistar had no idea what it was and the bone

[^38]: Fisher et al., *supra* note 31, at 4-5.
[^39]: *Id.* at 17-39.
[^40]: *Id.* at 18.
was eventually lost. About fifty years later, somebody else discovered different dinosaur bones and made history by publicly proposing that they represented evidence of huge creatures that walked the earth long before mankind. He called them *dinosaurs* and it was considered a famous discovery.\footnote{See Bill Bryson, *A Short History of Nearly Everything*, 109 – 129 (Black Swan ed., 2004).}

Today, we might look upon Dr. Wistar as a fool who did not know what he had found but, we must remember his perspective. At that time, no one had ever heard of dinosaurs. With our education, we see the bones as obvious evidence of giant creatures from the past. But Dr. Wistar could not see this given his perception and the available scientific knowledge at that time. This is an example of how people combine perception with available knowledge to determine “reality” as they see it. If Dr. Wistar had lived fifty years later and had access to theories about evolution and other discoveries, he might have been able to “see” the dinosaur in the bone much easier.

This is also true in negotiations. People tend to see matters differently. Even the same set of facts can be subject to very different interpretations. Sometimes they may not seem rational or logical, but they still have to be dealt with if the parties are going to reach an agreement.

An important skill for every negotiator is to try to see the issues from the other party’s standpoint.

The following sub-sections discuss three important perception problems for everybody.

1) Egocentrism

People generally perceive the world from their own perspective, and focus on their own needs, views, and interests. People typically do not take the time to perceive the world from another perspective. This is called “egocentrism.”

A childhood example:

Kunthy is a four year old child who is talking to her mother, Chakriya, on the telephone. Kunthy is at home, while Chakriya is at the office working. Chakriya asks Kunthy “where is your dad?” Instead of saying something to Chakriya, Kunthy instead points with her hand at her father who is sitting nearby. Kunthy doesn’t realize that her mother cannot see her pointing. She has not yet developed the ability to view the world from other peoples’ perspectives.

Adults have the ability to understand others’ perspectives, but often forget to use this skill. People want to have a positive view of themselves, so they often interpret facts in
the light most favorable to themselves. An adult example would be a couple in a divorce negotiation over assets. Rethy believes that he should be entitled to 70% of the assets, but Vanna believes that she should be entitled to 60% of the assets. But, they cannot both be right since their total claims are 130%. Another example would be situations where two partners each claim that they performed 80% of the work on a project.

**Study Questions**

Most people are egocentric to some extent:

- Ask one of two business partners what percentage of the team’s work she performs every week. Then, ask the other partner. Add the two percentages together. Do they total 100% or more?

- Can you think of a personal example of egocentrism in a friend or work colleague?

2) Overconfidence

Self-serving, egocentric interpretations can also lead to overconfidence. In one study, business students who failed to reach an agreement in a simulated, two-person labor-management dispute were asked to submit their final offers to an arbitrator who would choose one of the two offers. Then, the students were asked to estimate the odds that the arbitrator would choose their offer over that of their counterpart. The average student felt that she had a 68% chance of her offer being chosen, even though everybody knew that only 50% of all the offers could be chosen. This shows that the students were overconfident.

*When a party is overconfident of her position, she will fail to make appropriate compromises and may jeopardize her ability to reach an agreement.*

3) Confirmation Bias

A related issue is confirmation bias, where a person interprets information in a way that confirms a pre-existing belief or position. This causes parties to ignore or downplay

---

information that contradicts their viewpoint and to overemphasize information that confirms their own viewpoint.43

The chart below provides examples of differing perceptions of an owner and a tenant in an apartment:44

<table>
<thead>
<tr>
<th>Tenant’s perceptions</th>
<th>Owner’s perceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>The rent is too much money.</td>
<td>The rent has not been increased for two years.</td>
</tr>
<tr>
<td>With food and other costs going up, I cannot afford to pay any more for this apartment</td>
<td>With food and other costs going up, I need more income from this apartment</td>
</tr>
<tr>
<td>The apartment needs some painting and other improvements.</td>
<td>The tenant has caused a lot of damage to the apartment.</td>
</tr>
<tr>
<td>I know people who pay much less money for a similar apartment.</td>
<td>I know owners who charge more money for a similar apartment.</td>
</tr>
<tr>
<td>Young people like me cannot afford to pay such high amounts of money.</td>
<td>Young people like him sometimes cause problems and can be destructive to the apartment.</td>
</tr>
<tr>
<td>The rent should be lower because the neighborhood is unsafe.</td>
<td>We owners have to raise rents to improve the quality of the tenants in this area.</td>
</tr>
<tr>
<td>When the owner asks for the rent, I always pay him promptly.</td>
<td>He never pays me the rent until after I ask him for it.</td>
</tr>
<tr>
<td>The owner is not very nice, she never asks me how I am doing or shows any interest in me.</td>
<td>I am a considerate person who respects the tenant’s privacy.</td>
</tr>
</tbody>
</table>

4) Avoiding the Perception Problems

There are five ways to avoid these perception problems when negotiating:

- Be objective
- Consider the other side’s perspective
- Discuss perspectives
- Involve the other side in your reasoning
- Save face for the other side45

44 Fisher et al., supra note 31, at 24.
45 Id at 23 - 29.
One way to avoid egocentrism and overconfidence is to try to look at the dispute as objectively as possible; look at the dispute as if you have no interest in it, as a judge perhaps.\textsuperscript{46} Another simple solution is to think very seriously about the other party’s perspective—it will help you have a clearer view of your own. For example, in a study of academic co-authors, two groups of authors were asked to rate what percentage of the credit they individually deserved on their works. The authors who were asked to think about their co-author’s contributions tended to rate their own credit lower than those authors who were merely asked to rate their own contribution without thinking about their co-author.\textsuperscript{47} Thus, the mere act of thinking about somebody else’s work caused the authors to downgrade their own egocentric bias.

Aside from altering your own behavior and thinking, it is important to try to influence your counterpart’s behavior and thought. First, one must understand how the other party feels and how the other party might believe what they are saying, even if it seems patently false. One way to achieve this understanding is to explicitly discuss perceptions. Even if it seems unimportant or unrelated to the “real substance” of the dispute, an explicit discussion of perceptions can make parties feel more comfortable and trusting. For example, one party might say “Am I correct in saying that you perceive this dispute as a threat to your authority?”

Another way to understand and possibly influence perceptions is to make sure you involve the other party in your reasoning process.\textsuperscript{48} Do not merely assert a conclusion but work with the other party to help you reach it. A conclusion that is reached together is more likely to be accepted by the other side.

In trying to understand the other party’s perceptions, do not assume that the other party has bad intentions. Do not blame the other party for your problems or difficulties. Blaming the other party will likely force a defensive reply.

\textbf{It is better to try to avoid blame during negotiations.}

Finally, do not ignore the importance of saving face.\textsuperscript{49} Try to make proposals that appear consistent with the other party’s principles or stated needs. This may simply mean carefully framing the proposal.

\textsuperscript{47} Bazerman et. al., \textit{supra} note 42, at 56.
\textsuperscript{48} Fisher et. al, \textit{supra} note 31, at 27 – 28.
\textsuperscript{49} In the US, saving face is sometimes looked down upon as an insignificant concern. However, if it is important to that person, it needs to be addressed. Cambodian culture understands saving face as more important and it could be the most important part of a settlement agreement.
Exercise – Perception Problems

How would you avoid the perception problem in this case?

Sovann wants you to represent him. He has just fired a Cham Muslim employee at his factory because the employee was stopping the production line and praying three times each day. This lowered production levels and when Sovann asked the employee to stop praying, the employee had refused.

The employee is very angry and is threatening to file a lawsuit against Sovann. He feels that Sovann has discriminated against him because of his Muslim religion. He is also considering asking all the Cham people working at the factory to go on strike.

What suggestions can you give Sovann in his upcoming negotiation with the Cham employee he fired?
b) Emotion

**Beginning Study Questions**

Nany is working in an office with Bunsang. One day, Bunsang comes in to Nany’s office and looks very nervous.

“What is wrong?” asks Nany.

“I have an important negotiation with our client tomorrow. I have prepared for a week but I am still nervous. I know that our client might be very emotional about this negotiation and I might become emotional too.”

What advice should Nany give Bunsang?  

A. Use your emotions to show your authority and seriousness.  
B. Forget about this concern and focus on the specific issues.  
C. Hide all emotions and work to stay in total control.

**1) Negative Emotions**

As the study question above illustrates, emotions can become problematic during an intense negotiation. During heightened states of emotion, memories become much simpler and less specific even though they may be particularly vivid. And when those emotions are negative, they can significantly reduce the chances of settlement. Anger and other strong negative emotions can cause poor judgment and reduced concern for other people. Emotions are also contagious so a strong negative emotion in one party is likely to cause a strong negative emotion in the other. Everybody has seen the dynamics of something like this:

---


51 *Id.* at 154. This helps explain how parties can have very different recollections of the same event.

52 While this is the near universal view, there might be an exception for some distributive negotiations. Some experts posit that in one-time, distributive negotiations, such as at the market, where the parties do not care about a future relationship, negative emotions can produce improved results. Showing anger at an insultingly high price for a product at the market can effectively communicate the gravity of feelings about that price. This may lead to a better result than with a non-emotional or positive emotional reaction. *Id.* at 73-74.


54 Shapiro, *supra* note 50, at 76.
Kanha is upset that she did not receive a pay raise at the restaurant where she works. She confronts her boss, Kunthy, and becomes emotional.

“I have worked very hard here for over fifteen months and I do all the extra work you ask. How can you give Kim Sean a raise after just three months? It’s obvious that you don’t like me, but I have earned a raise!”

Kunthy, who was not emotional until now, says, “How dare you accuse me of favoring one employee over another. I treat everybody equally. You are not as good as Kim Sean. You never stay late. You never offer to help clean up…”

Each statement makes the other side angrier in a vicious cycle. This could continue for a long time.

Anger begets error; anger begets injury; anger begets waste. (Cambodian Proverb)

It follows then, that it is important to try to avoid behavior that might create or increase negative emotions during a negotiation. In his popular book, Blink, Malcom Gladwell describes a Dr. John Gottman who is able to analyze short video tapes of couples discussing difficult issues. Based on these short videos, Gottman can determine whether the couple will get divorced with an amazing 95% accuracy. He does this by looking for four negative behaviors that cause negative emotions and ultimately, divorce. Those four important negative behaviors are:

1) Criticism of the other’s character (e.g., “you didn’t clean the kitchen, you are so selfish”)
2) Expressions of contempt (e.g., rolling one’s eyes when the other person speaks)
3) Defensiveness (“I might have been late this morning, but you are always late in the morning”)
4) Stonewalling (refusing to discuss matters when the other wishes to discuss)

It is clear that one should try to avoid these four negative behaviors in negotiation. But, what should be done if the other side is exhibiting these behaviors? One way to mitigate the effects of these powerful emotions is to allow the other party ample time to give her

56 Id. at 21.
57 Id. at 32. Gottman considers contempt to be the most important one in predicting divorce. It follows then that in negotiations, expressions of contempt are probably the most counterproductive of all emotions.
emotional speech. She may feel better after doing so.\textsuperscript{58} The party may also be performing for the benefit of her client or colleagues. An example might be a young lawyer who acts tough in front of her clients so that they feel more comfortable that their interests are being vigorously protected. It is important to not overreact to that emotional attack.

Another tactic is to explicitly acknowledge the other side’s emotion and to validate it. For instance, one might say, “I understand that you are upset about your business. I would be upset too if I had lost my biggest contract.” This does not mean that you agree with the other party’s conclusions. But, by validating their emotions, the party will feel like you understand their situation and may have more positive feelings towards you.

**Study Questions**

- Have you ever become emotional during an important negotiation?
- Did your emotions help you or hurt you?
- How did the other party react to your emotions?
- How did you react to the other party’s emotions?

**2) Positive Emotions**

Positive emotions, on the other hand, can be conducive to creative thinking, which is important for reaching an agreement.\textsuperscript{59} They can also help the parties maintain a good working relationship. And, of course, they can help avoid the pitfalls of negative emotions.

\begin{quote}
\textit{Controlling feelings is as difficult as controlling the clouds.} (Cambodian Proverb)
\end{quote}

Notwithstanding conventional wisdom as expressed in the proverb above, positive emotions can be generated voluntarily. Emotions do not just “happen” to people. They can be created as well. Negative thoughts can create negative emotions. As an example, Leakhena might think a lot about how she lost a table tennis game to her older sister, Nin. This negative thinking can cause negative emotions. But, if she could think more about how much her sister liked the dinner Leakhena prepared after the game, she will begin to feel positive emotions. In Dr. Gottman’s research, he has found that married couples need to maintain at least a five to one ratio of positive to negative interactions to avoid divorce.\textsuperscript{60}

\textsuperscript{58} Expressing negative emotions may be a coping mechanism to help people deal with distress. Shapiro, \textit{supra} note 50, at 72, \textit{citing}, Eileen Kennedy-Moore and Jeanne C. Watson, \textit{EXPRESSING EMOTION} (Guilford Press, 1999).

\textsuperscript{59} \textit{Id.} at 75.

\textsuperscript{60} Gladwell, \textit{supra} note 55, at 26.
In negotiations, an effective negotiator can try to create positive emotions by simple actions. For example, smiling can cause the other party to smile back, thereby creating a positive emotion. Asking a few personal questions can sometimes help create a more positive emotion. As an example:

Lany would like to sell her car to Buntha. They have reached an impasse since Buntha wants to pay $2,000 but Lany wants to sell for $2,500. During the negotiations, Lany asks Buntha if he has children. Buntha replies with a smile, “Yes, I have three children—2, 4, and 5 years old.” Lany replies, “Oh, that is wonderful. I have a 2 year old also. Isn’t that a nice age? They are so cute at that age.” Now, Buntha and Lany are thinking about their children and have positive emotions. They may also feel closer to each other now that they have something in common. As a result, they might find it easier to negotiate or work harder to reach an agreement.

The discussion can be about anything, but it helps if it relates to something that is happy or positive and is something that the two people might have in common. Of course, it is important not to overdo this tactic and appear insincere or manipulative.

Finally, symbolic gestures like apologies or statements of regret, while not containing admissions, can go a long way towards creating a positive atmosphere. They make the other side feel better and can generate some positive emotions.

The best part is that symbolic gestures usually cost nothing.

Think about the question at the beginning of this chapter: what advice should Nany give Bunsang about emotions in his important upcoming negotiations? She should advise Bunsang:

- Do not ignore emotions;
- Recognize that you may have negative emotions that could be problematic;
- Remember to handle yours and your client’s emotions with great care; and
- Try to generate some positive emotions.

\[c) \text{ Communication}\]

Communication is, of course, the foundation of all human interaction, including negotiation. How a party communicates an idea, offer or solution is sometimes more

---

61 Fisher et al., supra note 31, at 32.
important than the substance of the idea itself. The two main difficulties in communication are listening and misunderstanding.\footnote{Fisher et al., identify three communication problems, but the author of this book believes they can be better understood as two main issues. Id. at 32 – 34.}

1) Listening

Often, when two parties are engaged in a heated negotiation, they only hear the beginning of the other party’s statements. Their brain completes the thought faster than the other person can say it. Sometimes, their brain’s completed thought is not what the other party actually said, and they miss the complete thought. Sometimes, a party will listen to part of a statement, and then begin to formulate a response without having heard the rest of the statement.

This type of poor listening process is problematic. First, not hearing the full story makes it difficult for the parties to have all the information to reach agreement. Second, and equally important, if one party is obviously not listening fully, the other party may feel disrespected and may respond by not listening fully as well. With neither side fully listening, communication is dysfunctional and no agreement is possible.

The way to avoid this problem is to \textit{actively} listen to what the counterpart is saying. Parties should try not to interrupt. Parties should take notes. It is helpful to periodically, say things like, “I want to make sure I understand what you are saying. Did you say XXXX?”\footnote{Resist the temptation to phrase the other party’s arguments in a demeaning, simplistic or sarcastic manner. Fisher et al., in \textit{Getting to Yes}, go one step further and suggest that you phrase the statement positively, making the strength of the other side’s case clear. Id. at 35. This is probably too difficult for most negotiators, but it is important to try to avoid re-phasing the other side’s arguments negatively.} It is also important to physically demonstrate that you are interested by keeping good eye contact and body posture.\footnote{Spoken words only account for a small percentage of the information being conveyed by the other party. \textit{See}, International Listening Association, website \textit{available at} \url{http://www.listen.org/Templates/try_new.htm}, citing, inter alia, Ray L. Birdwhistell, \textit{KINESICS AND CONTEXT}. (U. of Pennsylvania Press, 1970).} By following these rules, two goals are achieved. First, accurate information is obtained. Second, the other party feels that her voice is being heard and understood.

2) Misunderstanding

The other main communication problem is misunderstanding. As mentioned above, people perceive reality in different ways. They also perceive the spoken word differently. One party might say,

\textit{“I gave you two chances to complete the task.”}

The party is trying to show how generous, fair and patient he is. But the other party might take offense at the statement and understand it to mean:
You are really incompetent. You had two opportunities to complete this task and you failed both times.

In addition, certain words can have vague or unclear meanings, which give rise to different interpretations or misunderstandings. If the parties speak different languages, these problems become even more pronounced.

One way to avoid misunderstandings is to be careful with the words you choose to use. Another important tactic is to phrase matters in personal terms and not in terms of the other party. For instance, it would be unwise to say: “You have disrespected my family.” This is an accusation. At best, it invites a denial. At worst, it could cause offense and counter accusations. Instead, even if one feels disrespected, it is best to say something personal like, ”My family feels very hurt about what was said.” Now, the other side is less likely to challenge it or feel angry. Nobody has been accused. Yet, the same information has been conveyed.

Another example is when somebody says, “You shouldn’t do that!” Or “You cannot do that!” This is threatening to the other party and again invites a counter assertion from the other party that she indeed CAN do that. Instead, try saying, “I don’t feel comfortable when you do that.” Now you have phrased your concerns in a personal manner instead of in a manner that accuses the other party.

Study Questions

How could the following assertions be rephrased in a more effective manner?

- “You have caused my company significant damages.”
- “Your actions are illegal and breach our contract.”
- “You clearly don’t care about the community’s health and well-being, otherwise you wouldn’t have dumped that garbage.”
- “You have stolen our land.”
- “Your offer is so low that it is an insult to me.”

---

65 Fisher et al., supra note 31, at 36.
3. Focus on Interests, Not Positions\textsuperscript{66}

Consider the following story\textsuperscript{67}:

Nora and Sitha are both at the library reading books. Nora wants the window open and Sitha wants the window closed. They argue about where to leave it—halfway, just a crack, etc. But, they cannot agree.

Then, Sovannroth, a librarian, walks in and asks about their disagreement. She asks Nora why he wants the window open. Nora replies “I want some fresh air.” She then asks Sitha why he wants it closed and Sitha replies, “I want to avoid the draft. It’s not healthy and I feel sick.” Sovannroth then thinks for a minute and easily resolves the problem. She goes and opens another window farther away. She has brought in fresh air for Nora but without the draft to bother Sitha.

This illustrates the importance of focusing on interests, rather than positions. Nora’s position was he wanted the window fully open. Sitha’s position was he wanted the window fully closed. Their underlying interests, though, were different. Nora’s real interest was having fresh air in the room. Sitha’s real interest was to avoid the draft, which might make him feel more sick. Their interests and positions are shown in the table below:

<table>
<thead>
<tr>
<th></th>
<th>Positions</th>
<th>Interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nora</td>
<td>Window should be fully open.</td>
<td>Wants fresh air; the room feels musty.</td>
</tr>
<tr>
<td>Sitha</td>
<td>Window should be fully closed.</td>
<td>Feels sick and is worried that the draft of cool air might make him feel worse.</td>
</tr>
</tbody>
</table>

When Sovannroth learned about the two parties’ interests, she was able to find a solution that satisfied both of them. By contrast, in a distributive negotiation, the parties would have likely resolved the matter by leaving the window partly open. This might have left Sitha feeling sick and Nora still feeling uncomfortable and hot. Thus, when interest-based negotiations are possible, they are usually more satisfying and successful than distributive negotiations that merely focus on positions.

The interests are the parties’ hopes, fears, desires, needs, wants, etc. The positions are the parties' specific demands, requests, offers, etc. Positions are easy to determine. Parties declare their positions quite readily. They often think in explicit positions such as, “I really want 10 of these as compensation.” But, interests are more difficult to

\textsuperscript{66} Id. at 40 – 55.
\textsuperscript{67} Id. at 40.
determine. Sometimes, parties do not want to reveal them. More often, parties have not even considered their own underlying interests.

Fisher and Ury state that the most powerful interests are the basic human needs:

- Security
- Economic well-being
- A sense of belonging
- Recognition
- Control over one’s life

Even in cases where it appears that money is the only issue, there may be more at stake. For instance, Sophal, an artist, has a painting for sale, and insists on a high price for his work. Samnang is a young man with some friends who are journalists and cannot afford to pay this amount but likes the painting very much. Perhaps, Sophal is interested in being recognized as a serious artist, as much as ensuring his economic well-being. Perhaps Samnang could help satisfy this interest by agreeing to help him publish an article about his work in a magazine, in exchange for a lower price.

Another issue to remember is that most people have more than one interest. Think of the manager of a company who has the interests of his company’s finances (the company needs to save money), the interests of his personal career (he needs to look like he is meeting production quotas), the interests of his employees (they need to stay healthy and safe) and the interests of his family (they want him to take a vacation from work). The more a negotiator can understand the complexity of interests, the more likely she can find an effective solution.

One way to determine a party’s interests is to ask. As mentioned, it is possible that the party has not explicitly considered her interests. By just asking the question, it makes the questioner appear to care about the other side’s welfare. Another way to determine a party’s interests is to listen very carefully to what they say in the negotiations. They might give a hint as to their main concern by how they communicate or phrase their positions. Conversely, it is sometimes important to clearly indicate your own interests to the other side. This allows them to think about how to fulfill your needs too.

In addition, it is sometimes helpful to present the problem and the solution. When communicating in a negotiation, it is better to state the problem first and then the proposed solution. If a person calls up a neighbor and states:

“You must stop playing that music at night! It is too loud ...”

---

68 Id. at 48.
69 Id. at 52.
The person has not presented the problem, only a solution—stop the music. Before the person can explain her problem or interests, the neighbor will probably become angry and stop listening. She is likely to be formulating a reply that sounds something like:

“I have every right to play music in my own house. Besides, it is not too loud. . .”

A better approach is to present the neighbor with the problem and interests first, then the solution:

Dear neighbor, we are having difficulties with our children. They are not sleeping at night and keep waking us up. Their lack of sleep is causing them to do poorly in school. It is really bothering us. We want our children to become good students and go to the university like your son, Tek. But, at the moment, we are concerned. I think if it were quieter at night, they might sleep better. . .

Now, the neighbor understands (and possibly relates to) your problems and interests. She may listen to and consider your solution when presented this way. The neighbor might propose something that is consistent with her interests (that she has the right to play music) but also satisfies your concerns. She might propose to play the loud music at a different time of day instead of at night when the children are trying to sleep.

Back in the previous section, we discussed the different perceptions of an apartment owner and tenant. Fisher and Ury show how their interests might be similar:

1. Both want stability. The owner wants a long-term tenant; the tenant wants a long-term home.
2. Both want to see the apartment maintained well. The owner sees a well-maintained apartment important for his property value; the tenant wants it well-maintained since he lives there.
3. Both want a good relationship with each other. The owner wants consistent rent payments without problems; the tenant wants the owner to repair things without problems.70

So despite the many different perceptions between an owner and tenant, there are still some similar interests. In most negotiations, there are at least one or two similar interests that can be used to find an agreement.

A smart negotiator should focus on those similar interests as a starting point for finding a solution.

---

70 Id. at 42 – 43.
Study Questions

What interests might be similar in the following examples?

- An employer and an employee are negotiating over salary.
- A businessman has found a defect in the latest delivery of fabric from his long-time, regular supplier.
- A couple is arguing over what to do for the New Year holiday. He wants to go the city to visit friends and she wants to go to the beach.
- A developer wants to build a large hotel on his land but the government is worried about issuing the approvals because there is already too much traffic and noise in the community.

4. Invent Options for Mutual Gain\textsuperscript{71}

If parties are going to successfully settle a dispute, they need to invent options for mutual gain. However, this often seems difficult. There are four main reasons why this is difficult for parties:

- Parties sometimes make premature judgments about the option. Before it is even discussed or proposed, a party might reject it as a bad idea. Or a party might be embarrassed to suggest the option. Or, perhaps by making the suggestion, the party may reveal private information.

- Parties sometimes tend to focus on finding that single, perfect answer instead of looking for many possible answers.

- Parties too often believe that the dispute is about a certain sum of money or that it is a win-lose, zero-sum game. If one party pays the other party $100 more, then it is a gain for the receiving party and a loss for the paying party.

- Each party is only concerned with its own interests. A smart negotiator though, should think about satisfying the other party’s interests too, since that will be the only way to reach agreement.\textsuperscript{72}

\textsuperscript{71} Id. at 56 – 80.
\textsuperscript{72} Id.
There are four important answers to these problems that help negotiators create options:

- separate the act of inventing options from the act of judging options;
- try to broaden the options being considered rather than looking for a single answer;
- look for mutual gains; and
- think of ways to make the other side’s decision easy.\(^73\)

### a) Separate Inventing From Judging\(^74\)

The first answer is to separate the inventing of options from the judging of options. One way is to use the technique known as “brainstorming.” Brainstorming sessions are used throughout the business, NGO and governmental world to help people develop ideas in a quick, easy and fun manner. The process is simple: it starts by people getting together in a room with a white board, paper or other place to write. One person serves as the facilitator and asks the group to shout out ideas or solutions about a particular problem, which the facilitator writes down on the board for all to see. People are encouraged to shout out any ideas that come to mind, even if problematic. Sessions need to have at least three people present and ideally as many as ten. They also require an informal and positive environment where nobody says anything negative about any of the ideas. Nobody has any rank or authority over anybody else in a brainstorming session.

Ideally, participants sit side by side, everybody facing the white board, to emphasize that they are working together to find answers. Usually, people begin to think of new ideas after hearing somebody else’s. At the end of the session, the ideas are recorded and only later are they analyzed.

Brainstorming can even be completed jointly with the other side. This may seem like an unrealistic idea, but joint brainstorming has some significant benefits. First, the parties will come to trust each other more if they work together to brainstorm solutions. Second, they will likely come up with more options for resolution. And finally, the parties will learn to understand each other’s interests better. However, it is important that all participants understand that the brainstorming session is not a negotiation. It does not commit any party to a particular concession or position. Its explicit purpose is to generate options that might be useful for settlement later.

---

\(^73\) Id. at 60.
\(^74\) Id. at 60 – 65.
Exercise – Brainstorming

Generate settlement options using a Brainstorming Session for this case:

Kim Lun is a very valued employee at PP Mobile, a telephone and internet company. She is an expert computer programmer. She has just had her first baby. She wishes to work fewer hours so she can spend more time with her baby. But, she also needs the income so she does not want to quit her job. PP Mobile is concerned because they need her expert skills almost full time, but they cannot afford to give her a big raise to try to keep her working at the job.

What solutions would meet both parties’ interests?

b) Broaden the Options

This tactic is useful after the party or parties have developed some interesting options. The process begins by taking the interesting options and broadening them—that is, to think of other more general ideas that are related to each option. One way to do this is to look at the problem through the eyes of different experts. If the dispute relates to a business contract, look at the problem from the viewpoint of an accountant or business manager or lawyer or government official, etc. Think of solutions that might occur to this kind of expert. It does not matter if you are that kind of expert, just that you try to think like one.

Another idea is to break the problem up into smaller segments and look for solutions there. For instance, if a shopkeeper has a dispute with a supplier over poor product quality, she might agree to try one future delivery of a different product and to test its quality. Only after that would they consider a permanent solution.

c) Look for Mutual Gain

1) Shared Interests

Instead of assuming a gain for you is a loss for the other side, consider opportunities for mutual gain. As mentioned above, parties nearly always have a few shared interests that can be exploited in a settlement. Look at the following hypothetical example of a business dispute in the future:

75 Id. at 65 – 70.
76 Id. at 70 – 76.
Cam-China is an oil company that has been pumping crude oil off the coast of Sihanoukville and sending it to the Sihanoukville port for loading onto oil tanker ships that deliver the oil to Singapore, where it is refined into gasoline. The governor of Sihanoukville has informed Cam-China that he wants to raise the annual tax from one million dollars per year to two million dollars per year. Cam-China believes that it pays more than enough in annual taxes already and wants to leave the taxes at one million. If you are the lawyer for Cam-China, what can you do?

Look for shared interests. The governor wants money. This money would help pay for a new government office building, a new fire station, and new roads. But, the governor cannot pay for all of these things from taxes on Cam-China alone. Cam-China is interested in having Cam-Japan, an oil refinery company, build a new oil refinery at the Sihanoukville port. If there were an oil refinery in Sihanoukville, Cam-China would be able to conveniently sell its crude oil locally without paying to deliver it to Singapore. The governor would also like to see Cam-Japan locate in Sihanoukville since it would provide thousands of new jobs and improve the local economy. It would also provide a larger tax base.

So, the Cam-China lawyer could make some suggestions that utilize the parties’ shared interests. Perhaps Cam-China and the governor could work together to bring Cam-Japan to Sihanoukville. Perhaps, the governor could offer a special tax break for new investment in the port (like Cam-Japan’s oil refinery) and perhaps keep the Cam-China tax rate at one million, IF the parties are successful in convincing Cam-Japan to build its refinery there. This would allow for a lower tax for Cam-China, a low tax for Cam-Japan, but still enough total taxes for the governor’s plans.

Even in the most difficult situations, parties may have some mutual interests. Disputes are almost always costly and time consuming. There is the possibility of expensive lawyer fees. Even if the dispute is small, it can still be costly. For example, if an owner and a tenant dispute for too long over who is to fix a leaking faucet, the water may eventually cause permanent damage. Two neighbors who were angry over a noise issue may lose sleep and the opportunity for their children to play together. So, even in these cases, the parties have a mutual interest in ending the dispute.

2) Different Interests

Different interests sometimes present different opportunities for mutual gain. Think of the example of Phary and Socheata arguing over the orange. Phary’s interests were in finding ingredients to bake his cake, while Socheata’s interests were in using the juice for a drink. Their interests were different but they presented an opportunity for settlement. If they both had the same interest in, say, baking a cake, then they might have had a more difficult time settling their dispute. But, since they had these different interests,
settlement was easier. Therefore, even if the parties have differing interests, settlement can still be reached.

Here are two additional examples of different interests that might be used for settlement:

- **Mara needs to buy a moto immediately to go to and from work. But he doesn’t have the $500 for the moto that Sineth is selling. Sineth wants to earn as much money as possible from the sale of her moto.**

  Mara’s interest: Immediate use of a moto.
  Sineth’s interest: Maximize total money received from the moto sale.
  Resolution: The two agree that Mara will buy and possess the moto immediately and pay Sineth $600 over the next twelve months ($50 per month), instead of the $500 sales price.

- **Mara needs to cut costs because his business has expanded too fast. He occasionally orders silk cloth from Sineth. Sineth is worried that she is not selling enough product for her business to survive in the future.**

  Mara’s interest: Cutting costs and saving money.
  Sineth’s interest: Long term security for her business.
  Resolution: Mara agrees to increase his purchases from Sineth and make regular future purchases. Sineth agrees to give Mara a 20% discount on her product in exchange for a regular, long-term order.

### 3) Other Obstacles

Besides the challenges of shared or different interests, parties may have different assessments of the facts. Differing factual assessments may be an obstacle but also an opportunity. For example, in a dispute involving union leaders as to which wage proposal is most beneficial for the workers at a factory, the two leaders could settle it by submitting it to a vote among the membership.

Parties may have different levels of risk tolerance. In a dispute over a football player’s salary, the team may be worried about risking too much money for a player who does not deliver positive results. The player may be willing to risk a lower payment in exchange for some incentives. Therefore the team might propose to pay the player $1,000 per month instead of the $2,000 he is demanding. In exchange, the team agrees to pay the player an extra $2,000 in each month that the player scores two goals. In this way, the player assumes the financial risk that he may not deliver positive results for the team.
d) Make Their Decision Easy

Settling a dispute involves both sides eventually agreeing to something. Your job as a negotiator is to try to persuade the other side to agree. It is much easier to do that if you can consider the dispute from the other party’s position and try to propose a settlement that will be attractive to the other side.

Sometimes, it is just a question of how to package an option. Usually it is easier to stop something from starting than stopping something that is already occurring. Also, it is easier to stop something that is occurring than it is to start up something new. So, for example, if garment factory workers want a morning tai-chi exercise, it is probably easier for the company to agree to not interfere with an experimental union or worker-run exercise program than it is for the company to agree to start up a tai-chi program on its own.

In addition, precedence can be helpful in gaining acceptance for your proposal. If there is precedent for your proposal, it will appear more legitimate to the other side. So, try to present the solution in a way that appears consistent with what the other side said or did. For instance, in the example above, the workers might cite company handbooks that extol the virtues of a healthy workforce. Or perhaps, the factory health clinic has materials that recommend tai-chi as an important preventative measure.

One related psychological phenomena is called “extremeness aversion.” Research suggests that people evaluate an option more favorably if there are “extreme” choices presented alongside it. This was demonstrated in a study involving the hypothetical purchase of a camera. Participants were asked to evaluate which camera they would purchase. They were divided into two groups. The first group was given two options: a lower-quality, lower-priced camera or a medium-quality, medium-priced camera. The second group was given the same two options and a third option: a high-quality, high-priced camera.

In the first group, half of the participants choose the low-quality camera and half choose the medium-quality camera. But, in the second group, where the medium-quality camera was offered alongside the lower and higher-priced options, about three-fourths of the group chose the medium-quality camera.

The lesson here is that people prefer what appears to be the intermediate option, and are averse to the “extreme” options.

---

77 Id. at 76 – 80.
79 Id.
80 Id.
When presenting options for dispute resolution, it is a smart tactic to consider adding a few extreme options so that the other side views your intermediate option more favorably. Therefore, in the tai-chi example above, the workers might suggest a) the company itself (as opposed to the union) organize tai-chi sessions, or b) the company pay for employees to attend private tai-chi sessions at a community center. When compared with these two more extreme options, the idea of the company not interfering with a worker or union-organized tai-chi program might appear more acceptable.

On the other hand, there is also research indicating that presenting a person with too many options can be problematic. These phenomena, known as “Decision Aversion” and “Option Devaluation,” are discussed in the Mediation Chapter of this book.81

5. Insist on Using Objective Criteria82

Sometimes, when the negotiation becomes tense, the parties resort to a battle of wills, such as, “my best offer is $500.” This is not an ideal way to resolve disputes because a resolution on that basis means that one party must back down and lose face to reach a resolution. This might endanger the long-term relationship of the parties. The party backing down may feel injured and will hold that against the other party. Perhaps she will take a tougher position the next time. Or perhaps she will repudiate the agreement and fail to abide by the terms of the agreement.

Using objective criteria to resolve issues makes people feel that their resolution was fair. If Sethy and his building contractor are in a dispute about how deep a foundation the contractor should dig for Sethy’s house, the parties should find an objective criterion around which to structure their solution. Perhaps they could see if there is a government safety standard for that type of soil. Alternatively, they could find what the industry standard is in his neighborhood. Or perhaps they could find an expert to give an opinion. Whatever standard they use, if it is based on objective criteria, it will likely be viewed as fair by the parties. If it is viewed as fair, it is more likely to maintain the relationship. Also, the parties are more likely to agree if it seems fair.

It is easier to compromise and back down in the face of a fair, objective standard than in the face of another person’s willpower.

Fairness is an important part of successful negotiations. Studies show that people will turn down agreements, even if in their best interests, because they feel that it is not fair to them. As an example, people were given $10 in a study and told that they had to split that money with an unknown second person. The first person could choose any split she wanted and both people would be allowed to keep the money, but only if the second

81 See Chapter 3, Mediation, infra.
82 Fisher et al., supra note 31, at 81 – 94.
person agreed to the first person’s split. There could be no negotiation or additional splits—the second person could only accept or reject the proposed split. If the second person rejected the split, both people got nothing. Logically, that second person should be willing to accept any split at all (even less than $1) because she gets more money accepting any split than if she rejects (in which case she would get nothing). But, most people rejected splits of less than $5 because they did not believe it was fair.83

a) Fair Standards

There are two kinds of objective criteria, fair standards and fair procedures. An example of fair standards would be the following:

Oeung’s car hit Vong’s car and caused a great amount of damage to Vong’s car. Vong and Oeung decide to negotiate how much Oeung should pay Vong. Vong could suggest a number of objective, fair standards to determine the amount of compensation:

1. Repair cost: How much it would cost to have Vong’s car repaired?

2. Replacement cost: How much it would cost Vong to buy a similar car?

3. Lost Value: How much of a decline in value Vong’s car suffered from the accident?

b) Fair Procedures

Fair procedures are another kind of objective criteria. For instance, if two children are fighting over a piece of cake, they could agree on a fair procedure: Nany can cut the cake and Thoeun can choose which of the two pieces he wants. Another example is for two people to take turns getting the item at issue. For instance, if two founding members of a club both want to be spokesperson, they could decide that one person gets the position first, and then one year later, the other gets the position. Another idea is to have the parties choose the end result first and then decide where each one fits. For instance, if two neighbors are disputing ownership over the land in between their houses, they could agree that one party will have ownership, but the other party will hold a perpetual easement right to use the property for transportation. Once this is determined, deciding the ownership issue is not as difficult. In theory, this makes each side more reasonable.

As a matter of presentation, it is important to try to frame the negotiations as a joint search for fair or objective criteria. As mentioned above, if you and the other side can work together on finding appropriate criteria, you are more likely to reach agreement. It is good to try to have the other side agree to criteria early on in the negotiations. For instance, if the negotiation is over the purchase of a house, the seller might claim a price based upon a comparable house on the same street. This is called valuation based on “comps”. If that is the objective criteria, then the buyer might want to find some other comps on other nearby streets that point to a lower price. The seller cannot claim that this is unfair or irrelevant since she has already asserted that valuation based on comps is a fair, objective way to determine the value of her house.
H. The Stages of the Negotiation Process

Other than the proscriptions on misrepresentation or duress, the negotiation process has no formal rules. There are no laws or statutes guiding the negotiation process. However, the process can be better understood in five stages:

- Preparation Stage
- Preliminary Stage
- Information Stage
- Distributive/Interest-based Stage
- Closing Stage

Every negotiation is different. In a transaction at the market, most of these stages will be passed through in a matter of seconds. In a complex legal negotiation, the stages may take many days or weeks to complete.

1. The Preparation Stage

- Obtain the facts
- Analyze the law
- Learn the client’s interests and goals
- Determine BATNA
- Consider the other party’s case
- Develop Strategy

The first stage of the negotiation is the Preparation Stage. In this stage, the parties and their attorneys look carefully at the case and try to make some basic conclusions before proceeding. The first step for the attorney is to research and obtain all the relevant facts of the case. This usually means conducting one or more in-person interviews. It may also involve reviewing documentary evidence such as contracts or receipts.

Once the attorney understands the facts, the next step is to analyze the law, based on those facts. The law might not give a clear answer. Alternatively, the legal standard may be clear but the facts may be in dispute. At this point, it is important for the attorney to try to develop as many legal arguments as possible and objectively assess the strength of these arguments.

The next step is to learn the client’s interests and goals. This requires the attorney to ask more basic questions about things like the client’s business, relationships, fears, desires, goals, etc. The following is a list of some of the many possible interests a client might have other than money:
• Confidentiality
• Physical safety
• Preserving reputation
• Maintaining good relationship with the other party
• Continuing employment
• Recognition of the client’s efforts
• Receiving expressions of regret, sympathy or apology
• Having the client’s “day in court”
• Having the other party listen to and understand the client
• Saving face
• Publicly humiliating or shaming other party
• Wanting to belong to a culture, family or organization
• Proving the client was right

In some cases, these interests and goals may be much more important than money to a party. For example, the client may have a strong case from a legal standpoint, but the client’s interests may be in avoiding a public confrontation. Or, the client may need a quick resolution due to financial hardship or business deadlines, thereby making a speedy resolution more important than getting the maximum amount in settlement.

As discussed earlier in this chapter, once the facts, legal analysis, and interests have been learned, the attorney can compute the BATNA—the client’s best alternative to a negotiated agreement.

After the client’s BATNA is computed, the attorney should review the case from the perspective of the other party or parties. Perhaps the other party disputes the facts and believes that your party or another party is at fault. Perhaps the other party has important interests that make him more likely to want to settle the case. Note that this BATNA computation for the other party is naturally more speculative than the BATNA computation for your own party. The attorney has a client who can speak honestly and confidentially about her interests whereas the attorney cannot learn as much from the other party. So, the attorney should speak with the client and possibly others to learn what important interests might be motivating the other party. It is also very important for the attorney to exercise independent judgment about the strength of both parties’ cases. The attorney’s BATNA computations should be independent of the client’s likely bias regarding the strength of her own case and “correctness” of her own position.

Remember that the client and the attorney may be subject to egocentrism and overconfidence bias discussed earlier in this chapter.

Once these foregoing steps are completed, the attorney should develop a negotiation strategy. The strategy should focus on how to present the case to the other side; what concessions your client can eventually make; what the important interests are; possible solutions; and the BATNA/reservation price. The strategy can be determined by
answering the questions in the negotiation journal page entitled, *Planning for Negotiation*, located at the end of this chapter. The strategy should be reviewed with the client to make sure that she is comfortable with it and the client should provide the attorney with full authority to negotiate consistent with the strategy.

### 2. The Preliminary Stage

The Preliminary Stage of the negotiations is often ignored as unimportant. However, this stage can be crucial to later success. In this stage, the attorneys contact each other to discuss negotiation formalities, such as IF there should be settlement negotiations and WHEN, WHERE and HOW those negotiations should take place.

- IF there should be negotiations
- WHEN should they take place
- WHERE should they take place
- HOW should they take place

**IF**
The “if” question—should there be any negotiations?—is very important. In some cases, the first party to ask for negotiations might be perceived as showing weakness. If that is the case, the attorney needs to think carefully about how to present that request. As a general rule, the less interested a party is in negotiation, the stronger that party’s position appears. Therefore, it is sometimes helpful to try to appear disinterested in negotiations, but still agree to engage in them.

**WHEN**
These other questions are sometimes viewed as a mere formality. However, they can also be important. Regarding the “WHEN” question, a party’s strong interest in immediate negotiations might indicate a level of need or desperation. If a party feels that negotiations must take place immediately, that party might be facing a need for money. Or, it might be facing an important business deadline. Or, it might fear that the dispute would become public, thus causing it great harm. Whatever the reasons, it is helpful to remember this and make sure that your client does not appear overly eager to have immediate negotiations.

**WHERE**
The WHERE and HOW questions are more subtle in their importance. If the negotiations take place at your attorney offices, you have the “home field” advantage. You may feel more comfortable, while the other side might feel uncomfortable in an unfamiliar setting. Furthermore, in some cultures it might appear that the visiting side is more eager for a settlement agreement since they agreed to travel. For these reasons, negotiations sometimes take place at neutral locations such as a bar association office, a court center or a private mediation center.
HOW
The HOW question relates to the negotiation process itself. Should the two parties exchange emails? Should they negotiate over the phone? Should they negotiate face to face, in person? If in person, should the clients be present at the negotiation? If your client is much stronger financially or is a naturally confident person, then having a face to face negotiation with both clients present might be helpful. Or, your client might be able to provide important factual information to you during the negotiations. Or, the client may initially have unrealistic settlement expectations and having her listen to the other side’s story may help moderate her expectations.

Conversely, if your client is intimidated by the other side or very emotional, then client participation in an in-person negotiation should be avoided. If your client is likely to give away important information or provide nonverbal clues (such as showing fear), then you might consider avoiding in-person client participation in the negotiations.

3. Information Stage
The Information Stage starts when the two parties begin actively negotiating, either directly or through their attorneys. At this stage both parties begin providing each other with information. One party may start with a recitation of the facts as his client understands them, following by a brief review of the law, and an offer of settlement. As mentioned above, this could be written in an email or letter, or could be conveyed in a telephone conversation. But, to keep matters simple, we will assume that this is taking place in a direct, face to face discussion. After the first party provides this information, the other party will do the same—discuss the facts, the law and then convey a settlement offer.

When discussing the facts and the law, the parties should provide an objective reason for their settlement positions. They should show logically why they can win the case, why they are entitled to damages or alternatively, not obligated to pay damages and why the opposition’s case is weak. At this stage, the attorneys must play a balancing act between trying to learn as much information as possible about the other party’s interests and BATNA while trying to reveal as little as possible about their own BATNA. But, they must still provide enough information so that the negotiations continue.

It is helpful for the parties to agree to have frequent breaks to pause and consider all the information they have learned. For example, perhaps the other side has presented some important evidence that was not considered by your client. Perhaps that evidence alters your assessment of the likelihood of success in court and thus alters your client’s BATNA and reservation price. If that is the case, then you should re-assess your negotiation strategy. Or alternatively, perhaps the other side has revealed that their business is suffering significant damage from other sources and needs a fast settlement. Then, your client is in a better position than you thought and you might want to adjust your settlement strategy accordingly.
Throughout the process, it is important to ask the other side questions. Challenge them to explain their positions on everything from liability to damages. It is important to try to stay positive even if matters initially appear unfavorable for your client. Try to use positive phrases instead of threats or negative statements.

Negative statement: “If you don’t continue buying product from my client, she will go to court and collect thousands from you in damages.”

Positive statement: “I might be able to compromise on our demand for compensation if you can consider continuing their business relationship.”

It is helpful to try to keep the other party talking during the negotiations. The more that the other party speaks, the more information she may reveal. A good negotiator will always try to listen as actively as possible in this stage. However, there is also a great deal of non-verbal information available to the negotiator. Here is a list of some of the non-verbal communications in Western culture that the other party may be providing without even knowing it:

- Sometimes people clear their throat just before they make a false statement.
- Words that are spoken slowly and carefully may be false.
- If the speaker’s voice becomes high-pitched or fast-paced, it may indicate anxiety or distress.
- When somebody rubs their eyes or rubs their hands over their face, it may indicate that the person cannot accept what is being said.
- Crossed arms and legs are indications that the person is feeling defensive or cautious.
- Drumming fingers on the table is often a sign of impatience.
- Sweating and frequent eye blinking is a sign of nervousness or tension.
- If the person leans back in her chair it can be a sign that the person is feeling confident.
- If the speaker uses uplifted hands, it means the speaker wants to appear sincere and honest.84

These signs may or may not be accurate for Cambodian culture. The main point here is that the negotiator should look for non-verbal communication signs that are relevant to the other party’s culture.

4. Distributive/Interest-based Stage

After the parties have had the chance to explain their understanding of the facts, their analysis of the law, and their positions and interests, the Distributive/Interest-based stage begins. This is the stage where the parties explore possible interest-based solutions first

84 Patterson et al., supra note 9, at 35.
and if none are possible, then pursue distributive-based solutions. As the section above on interest-based negotiations explains in detail, there are many different things to remember.

**Remember to:** Separate the people from the problem; Focus on interests, not positions; Invent options for mutual gain; and Insist on using objective criteria.

Unless the negotiation at hand is of a type that requires a distributive approach, such as purchasing food at the market, the interest-based approach should be attempted initially. If all possible interest-based approaches to settlement have been exhausted then the parties may want to make a final effort with a distributive negotiation.

**5. Closing Stage**

Once agreement has been reached during the negotiation, make sure that the terms are reduced to writing immediately. People’s memories fade, and if the parties wait to memorialize the terms of the agreement, they might disagree on the specific terms later when they try to write them down. Furthermore, if parties have too much time, they might reconsider their concessions and try to re-negotiate for better terms. To avoid this, the parties should always be prepared to write down the basic terms of the agreement and sign it, and then perhaps write the final terms soon after, when the lawyers have the chance to use the appropriate legal format.

In addition, it is important not to gloat or say things like “that turned out better for me than I thought it would.” This could create ill will between the parties and potentially unwind the agreement.
I. Negotiation in Practice

Now that the many theories and details of negotiation have been reviewed, this section provides two additional negotiation exercises to consider.

Exercise – Negotiation Case 1: Khmer Timber

You are a lawyer representing the Khmer Timber Company (KTC). KTC is seeking permits to log an area in the Cardamon Mountains not protected as a national park. There is a dispute as to how much timber the government will allow KTC to extract each year. You want to obtain a profitable deal for your client, but you also realize that you may have to make some compromises to achieve it. KTC has given you wide discretion and the power to complete an agreement without consulting it first.

Your goals are to ensure that 1) KTC can cut down at least 13,000 cubic meters of timber per year, 2) KTC has exclusive rights to log in the area for at least five years, 3) the government will not hold KTC liable for any damage caused by the logging.

You have heard that the government is willing to grant some of your goals, but also wants the following concessions: KTC must 1) replace any trees it cuts down by planting new ones, 2) donate $10,000 to forest conservation programs in the Cardamon region, 3) allow other companies to log in the area after three years, and 4) be liable for limited damages should it fail to replant the trees according to the agreement or any other damages in breach of their final agreement.

You find none of these claims outrageous, although KTC wishes to avoid the third one the most. You are also aware that other logging companies are talking to the government. If you do not reach an agreement soon, another company may conclude an agreement with the government, granting exclusive rights to log in the area.

- How should you proceed with the negotiation? Should you make the first offer? Should your offer include some of the concessions that you think (but cannot confirm) the government wants?
- Are there common interests between you and the government? If so, what are they?
- Are there different interests between you and the government? If so, what are they?
- Are some interests more important than others?
- How would you fulfill both sides’ interests? How would you present this idea to the other side?
Exercise – Negotiation Case 2: Barong Wood

In this case, students will divide into small teams representing either Barong Wood Corporation (BWC) or Lim Sophal, Chairman of the BWC Employees’ Union.

Barong Wood Corporation (BWC), a multinational corporation headquartered in Paris, is one of the world’s biggest producers and sellers of wood products. BWC-Cambodia is a wholly-owned subsidiary of BWC having almost 200 employees in Cambodia. Recently, BWC has noticed that the productivity of its BWC-Cambodia division has dropped. BWC sent Mr. Loup from Paris to Phnom Penh to look into ways to save money. Mr. Loup decided to reduce costs at BWC-Cambodia by terminating six key employees in the Forestry Research Department. On Friday afternoon (two weeks ago) he sent each of the six employees a letter notifying them of their immediate dismissal from the company effective the following Monday morning and advising them of the amount of their severance pay. Mr. Loup’s letters explained that the dismissal was necessary because of their low productivity and the budget cutting measures issued by the head office in Paris. In addition to the accrued retirement and other payments required by the BWC work rules, a generous severance payment was promised in the letters.

On the following Monday, a general strike was called against BWC-Cambodia by the Federation of Cambodian Workers (FCW). Although BWC-Cambodia employees have their own small union, BWC Employees’ Union (BWC-EU) and it is not a member of FCW, most of the BWC-Cambodia workers were afraid to cross the picket line and go to work. The head of the BWC-EU is Mr. Lim Sophal, a 15 year employee who is being considered for an important management position in the company after he completes his term as head of the company’s union. He has been acting as the spokesperson for the dismissed employees and the union during this dispute.

BWC-Cambodia is beginning to suffer from the strike and the bad publicity. Many employees are staying away from the office so work cannot get completed. In addition, some of BWC-Cambodia’s local customers are afraid to do business with them due to the bad publicity. A recent article in a local newspaper claimed that BWC was not treating its Cambodian employees fairly.

BWC has decided to send its best negotiation team to meet with Mr. Sophal and his colleagues and try to quickly resolve the dispute. Both sides understand that it is not in their interests to continue the strike for a long time.

Each negotiation team may be given secret information, depending on which side it represents. After reviewing the secret information, the teams will be asked to engage in a negotiation with counterparts to see if an agreement can be reached.
1. Worksheet: Planning for Negotiation

The following is a basic negotiation journal for any negotiation:

- Briefly state the issues.

- What additional information is needed to clarify or further understand the facts/issues?

- What is your goal (what do I want to achieve)?

- What are your interests (rank them in order of priority)?

- What is your BATNA and resistance point?

- What is the other side’s goal?

- What are the other side’s interests (rank them in order of likely priority)?

- What strategy will you use in the negotiations?
2. Worksheet: Engaging in Negotiation (General Issues)

<table>
<thead>
<tr>
<th>Issue</th>
<th>What my side wants</th>
<th>What my side is willing to accept</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Issue</th>
<th>What the other side wants</th>
<th>What the other side is willing to accept</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
3. Worksheet: Engaging in Negotiation (Advocacy of Issues)

<table>
<thead>
<tr>
<th>My side’s issues</th>
<th>Supporting Arguments</th>
<th>Counter Arguments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other side’s issues</th>
<th>Supporting Arguments</th>
<th>Counter Arguments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
4. Worksheet: Engaging in Negotiation (Interest-based Strategies)

- Have you considered the other side’s perspective? Have you let the other side know that you are considering their perspective?

- Have you involved the other side in your reasoning process?

- Have you given the other side a chance to save face?

- Have you acknowledged the emotions involved on both sides?

- Have you listened carefully to everything the other side is saying (verbally and non-verbally)?

- Do the two sides have any similar interests? What are they?

- Do the different interests lend themselves to possible agreements? If so, how?

- Have you tried to invent options together with the other side?

- Have you considered presenting your best options with other more extreme options alongside?

- Are you using acceptable and objective criteria?
5. Worksheet: Engaging in Negotiation (Resolution Worksheet)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Our position or proposal</th>
<th>Their position or proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
6. Worksheet: Engaging in Negotiation (the Agreement)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Resolution Terms</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
7. Worksheet: Observations of Negotiation

- Were you fully prepared? Was there any preparation you would have done differently?

- Did you change your BATNA or reservation point at any time during the negotiation?

- How effective were you as an advocate?

- How effective was the other side as an advocate?

- Did you achieve your goals?

- Did the other side achieve its goals?

- What would you do differently if you could do it over again?

- What strategies worked well for you?

- What strategies did not work well?

- Where are any strategies that the other side used that were particularly effective?
Chapter 3 – Mediation

Win over the greedy by giving them money; win over the wise with words of truth; win over the arrogant by showing them respect; win over the stupid by letting them do what they want.
(Cambodian Proverb)

A. What is Mediation

1. Introduction

Mediation can be broadly defined as assisted or facilitated negotiation. Mediation usually involves two or more disputing parties attempting to negotiate a settlement with the assistance of a third party, the mediator, who is neutral towards the parties and the outcome. The mediator does not have authority to impose a settlement. Rather, the parties retain the authority to decide whether or not to settle. If the parties do not want to settle or are not in agreement, then there will be no settlement, despite the mediator’s best

---

85 Patterson et al., supra note 9, at 53. Mediation has also been defined as a “process in which an impartial intervener assists two or more negotiating parties to identify matters of concern and then develop mutually acceptable proposals to deal with the concerns.” ALFINI ET AL., MEDIATION THEORY AND PRACTICE (1st ed. Matthew Bender 2001), cited in Steven Austermiller, Mediation in Bosnia and Herzegovina: A Second Application, 9 YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL 132, 141 (2006).
efforts. Unlike arbitration or court litigation, the mediator can only suggest solutions to the parties.

In a mediation session, the mediator typically 1) listens to each party, 2) encourages each party to listen and consider compromise, 3) assists in the exploration of creative solutions, 4) helps the parties understand the facts and law as viewed by a neutral, and when appropriate, 5) helps develop the specific items in a settlement agreement.

The term mediation and the term conciliation have been confused over the years, even by legal and judicial professionals and academics. Today, mediation and conciliation are often used interchangeably to refer to the same process. Although some have tried to draw a distinction, there is no common international legal authority defining how the terms might differ. Although the term mediation is found internationally, conciliation is the term most commonly used in international documents. For example, the UNCITRAL Model Law on International Commercial Conciliation (the “UNCITRAL Conciliation Law”) uses the term “conciliation” to refer to all types of proceedings where a neutral person or persons assists parties to reach an amicable settlement, including mediation proceedings. In contrast, mediation is the term most commonly used in the American legal system, with the term conciliation falling out of use. An example would be the American Uniform Mediation Act.

---


89 UNIFORM MEDIATION ACT (amended 2003), available at http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.pdf [hereinafter UMA]. This was the result of collaboration between the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and a drafting committee of the American Bar Association. See Diaz & Oretskin, supra note 87, at 793. It was completed and approved in 2001. The purpose of the UMA is to provide uniformity in mediation laws throughout the United States. The UMA Prefatory Note indicates that legal rules affecting mediation in the United States can be found in more than 2,500 statutes, many of which could be replaced by this Act. UMA, at Prefatory Note, § 3. Nine American states (Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington) and the
Both terms refer to a negotiation process facilitated by a neutral third party. In different countries and different traditions, there is wide variation in the process or in the level of involvement by the neutral.\(^90\) In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (called caucuses) and through suggesting specific solutions.\(^91\) In other traditions, the mediator or conciliator takes a more passive approach and allows the parties to control the process. Both approaches are valid and for the purposes of this textbook, the term mediation will be used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term will be used.
2. History of Mediation

Mediation has existed almost as long as organized human society. It is not difficult to imagine a family or tribal member helping two individuals resolve a dispute by taking a neutral role and helping facilitate a resolution. Mediation is likely older than the first formal court system and may have served as a model for the development of the law courts.\(^92\) Moreover, this informal dispute resolution model developed all over the world. Mediation has been practiced throughout pre-modern history in places as diverse as: Confucian China, rural Albania, 12th Century England, colonial and indigenous North America, and pre-colonial Africa.\(^93\) In Confucian China, for example, people considered the use of an intermediary to be the socially acceptable way to resolve disputes.\(^94\) In Anglo-Saxon England, the parties could even mediate their dispute after a law court had rendered judgment.\(^95\)

In the Middle Ages, the rise of the nation-state led to the rise of government court systems. As a result, mediation fell in popularity. However, in the twentieth century, mediation returned as an important and popular method of resolving disputes. This recent popularity is partly due to the perception that formal court systems are slow and expensive. It is also because parties to mediation, unlike in formal court adjudication, can craft their own resolution, which may better serve both parties’ interests.

---

\(^92\) Patterson et al., supra note 9, at 55.


\(^94\) Patterson et al., supra note 9, at 55. Unlike modern mediation where the parties usually meet and hold the sessions in one location, the Chinese intermediary would travel between the two sides conveying information about the dispute and its resolution.

\(^95\) Id.
3. Mediation in Cambodia

In Cambodia, mediation has always played an important role in society. According to one report, “Cambodian culture and its legal system has traditionally favored mediation over adversarial conflict and adjudication. Thus compromise solutions are the norm…”96 For example, family disputes were historically mediated by other family members or respected local leaders. Today, mediation continues to play an important role in Cambodian dispute resolution. A World Bank survey of small firms in Cambodia found that mediation was the most preferred method of dispute resolution after negotiation.97

As a result of mediation’s importance to Cambodia, the national legal framework has evolved to include many mediation options and parties to a dispute can seek assistance from a variety of sources. In family disputes, parties can seek mediation assistance from the Ministry of Interior’s officers or from the local Commune Councils. If a party is considering divorce there is a fifteen day “reconciliation” process that begins at the local commune level before the case is sent to the courts.98 The Ministry of Labor helps mediate labor disputes between employers and employees.99 If there is a land dispute, parties can request mediation from the government’s Cadastral Commission or from the National Authority for Land Dispute Resolution.100 Parties to a commercial dispute can seek mediation at the new National Arbitration Center, under the auspices of the Ministry of Commerce.101 Small civil disputes over issues such as debts, contracts, land borders, farms, slander, and violence without injury may be formally mediated at the local Commune Council level, through the government’s Justice Service Center Program (also called *Maison de la Justice*).102 Cambodian judges are also empowered under the new Civil Procedure Code to mediate between parties in a lawsuit.103

---

97 *Business Environment Scorecard*, *supra* note 10, at 40. The survey found that local firms choose mediation as their second best option, far ahead of court litigation.
99 *Labor Law of the Kingdom of Cambodia*, art. 300 – 301, 303 (1997) [hereinafter LLKC]. The Ministry’s full name was “Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation.” In 2004, the name changed to “Ministry of Labor and Vocational Training.” For purposes of this book, the Ministry in charge of labor affairs shall be referred to as the “Ministry of Labor” or the “MOL.” See the chapter on Arbitration for further details.
100 *Sub-Decree on Organization and Functioning of the Cadastral Commission*, arts. 7 – 11, Royal Government of Cambodia, #47 (2002); *Royal Decree on the Establishment of the National Authority for Land Dispute Resolution*, art. 3, 15 Official Gazette of the Kingdom of Cambodia 1190 (2006).
102 *Ministry of Justice and Interior Prakas #85*, art. 3-4 (2006).
103 *CCP-KC*, *supra* note 7, art. 97 (“The court may attempt to effect a compromise settlement at any stage of the litigation”) and art. 104 (“At the preparatory proceedings for oral argument, the court shall first seek to effect a compromise settlement . . .”). The CCP-KC’s official commentary states that these articles refer
In addition, parties can always resort to mediation outside the formal legal framework. In fact, this probably remains a more popular way to resolve disputes than through the formal system. One Cambodian legal expert found:

In rural areas where the court is perceived as remote and alien from the village point of view, the Wat (Buddhist temple) is more familiar and it is used by local people for resolving their differences with the assistance of a monk or Achar. Frequently such a settlement is conducted in daily life.104

Study Questions

- Have you ever been involved in mediation? Perhaps an informal one involving family or friends? If so, what where the results?
- Have you ever tried to solve a problem between two friends? If so, you were a mediator.
- Have you ever witnessed or heard about a more formal mediation involving a legal dispute in Cambodia? If so, what were the results?

Mediation may help address some of the problems with the justice system in Cambodia. Studies show that mediation can improve access to justice in a variety of ways. Mediation can help poorer segments of society participate in conflict resolution in cases where they could not afford an attorney for traditional litigation.105 Mediation can take place in rural areas or areas not served by a courthouse.106 It can occur on weekends or evenings so that participants do not have to take time off of work in the fields. The informal nature of mediation may also appear less intimidating to people who view the government or judicial system with suspicion or fear.107

Mediation may also improve citizens’ attitudes towards the Cambodian judicial system.

to the court mediating the dispute, include holding private caucuses (called “cross-interviewing” in the text). CCP-KC Commentary, supra note 12, at Book Three, Chapter Two, Section II (II)(3), p. 51-52. 104 Kong Pallack, Shaping Alternative Dispute Resolution System in Cambodia, Master Thesis, Nagoya University Graduate School of Law, 47 (2001). Pallack also describes an interesting Cambodian ADR tradition called the Preah Reach Savnakar (Royal Hearing), whereby the Cambodian King hears disputes and provides a non-binding opinion. This was applied before 1970, reinstated for a short period in 1994 and then suspended for unknown reasons. Id. at 54-55.
106 Fred E. Jandt & Paul B. Pedersen, Constructive Conflict Management: Asia Pacific Cases (Thousand Oaks, 1996), noting the interesting example of the over one million voluntary, village-based People’s Mediation Committees in China, which were created by the 1982 constitution.
107 Alkon, supra note 93, at 354.
Mediation’s emphasis on party-centered decision-making allows parties to resolve cases in a manner consistent with their interests. Since resolutions are voluntary, mediation eliminates the inherent coercion that a court judgment entails. Studies show that mediation tends to have a very high user satisfaction rate. As a result, mediation parties may begin to view the general judicial system more positively, which should improve the rule of law.

Mediation might eventually help strengthen Cambodian democracy. In many countries, mediation has played a role in preparing community leaders, increasing civic engagement, and developing public processes that facilitate beneficial restructuring and positive social change. For example, a leading South African politician indicated that “the success of the [various mediation services] helped redirect the country from a culture of violence to a culture of negotiation.” Perhaps the same could happen in Cambodia.

Furthermore, the increased use of mediation (with appropriate training) might help build a culture of compromise in Cambodia. With time, parties and representatives may increasingly use non-confrontational ways to address conflicts and begin to take personal responsibility for resolving them. This is crucial for Cambodia’s on-going development.

Study Questions

- What are some long-running disputes in Cambodia? Can they be solved through mediation?

---


109 Austermiller, supra note 85, at 143 (citing mediation examples in South Africa, Philippines and Ukraine).

110 Id. at 143, citing the South Africa Case Study in the ADR Guide, supra note 105.
4. Mediation Compared to Negotiation

Mediation can sometimes look like a special kind of negotiation. The two methods both allow the parties to reach a settlement between themselves. In both mediation and negotiation, there will be no resolution unless all parties are in agreement. In addition, both methods usually involve using interest-based analysis to reach a resolution. Finally, they are both non-legal processes that allow for but do not require lawyers. However, mediation and negotiation should not be confused. There are a number of important differences, which are listed below:

- In mediation, the parties to the dispute will almost always participate directly in the mediation proceedings. With negotiation, the parties generally participate indirectly, through their lawyers or other representatives, and appear in person only at the very end to sign a settlement agreement. Indirect participation in negotiation is especially applicable when the dispute involves large companies or international parties.

- In mediation, a neutral third party is always presiding over the sessions. With negotiation, there is no third party involvement. It is strictly a private process involving the parties at issue.

- Mediation is usually a single, formal event that lasts one or more days. There is a clear beginning, middle and end to the process. The parties must agree to engage in mediation and usually plan for it by selecting, among other things, a mediator, a mediation process, a schedule and a fee (if applicable). On the other hand, negotiation can take place over many months or years. It can start and stop without any warning or preparation. It can take place via telephone, fax, mail, email or in direct face-to-face discussions.

- Mediation usually occurs at the start of the dispute or at some time prior to the main hearing (trial) in a lawsuit. Negotiation, on the other hand, can take place at any time, even after a dispute has been adjudicated.

- Mediation is usually designed with an interest-based approach in mind. Negotiation, as discussed in the previous chapter, can proceed with either the positional or interest-based approach.
5. Which Disputes Are Best Suited for Mediation?

Mediation is most appropriate where the parties wish to maintain an ongoing relationship. For example, if Thida works for Bunseng’s restaurant and they have a dispute over working hours, the two parties may want to resolve it with a neutral third party who can explore their respective interests and help them reach a mutually satisfactory resolution. Another example is a married couple who have an argument over money. Because both parties love each other and wish to remain married, it is in their best interests to try to resolve matters peacefully. Sometimes a third party can mediate between the two and save the relationship, which may be more important than the actual subject of dispute.

Mediation is also useful if the parties have both expressed an interest in a quick and/or private resolution. For example, two companies may not care about their future relationship, but may have strong motivations to resolve the dispute privately and quickly, to avoid a public trial in the courts.

Mediation is also appropriate if the parties are interested in settlement but do not trust each other. A skillful mediator can help each party present its proposal to the other in an acceptable manner. This is important because the parties’ mutual suspicion may prevent them from taking each others’ proposals seriously.

Mediation is also appropriate if the case is very important and neither side can afford to lose. Arbitration and litigation tend to provide a legal decision that often results in a winner and a loser. If neither side wants to risk losing, then mediation allows the parties to resolve the case so that both sides win.

Also, if the parties wish to retain control over how the dispute is resolved, then mediation is one of the best options. For example, two brothers might fight over control of a family business and may want to resolve the issue based on certain private guidelines. Mediation allows for special arrangements and agreements that might not be possible in court litigation.

Even though mediation is a more formal process than negotiation, some small cases can still be efficiently resolved through mediation. For instance, if Socheatta and Sopheap have an argument about who should clean the dishes after dinner, their older sister, Kimsann, might intervene and help them work out an agreement. Kimsann’s mediation efforts might last no more than a few minutes but this might resolve matters where negotiation failed.
Study Questions

For the following disputes, which ADR method is better: negotiation or mediation? Explain why.

1. Soneath lives in a Kampot apartment building. The building supervisors hired some workers from a small company to clean the outside of the building with an acid solution. Because the acid can burn, they tried to seal off all of the building’s windows. However, they mistakenly did not seal off a window in Soneath’s apartment. While he was out, some acid leaked in and covered some ornaments he had placed by the window. When he returned home, he tried to grab one of the ornaments and burned his hand.

Soneath attempted to get the cleaning company to pay for the damage to his hand, but they refused. He also asked for damages from the building owner who hired the cleaners, but he refused too. The operation to repair his hand would cost $250. While he wanted to pursue his claim against the cleaners and the owner, he is worried that the costs of litigation might be higher than the actual claim. In addition, he is worried that the owner might retaliate and raise the rent or terminate his lease.

2. Sovann is an old farmer. He owns 40 ha of farmland in Kampong Speu. He has four children, two boys and two girls. When Sovann died, he left his farmland to his children, each one getting 10 ha of land. However, only the oldest brother, Chhay, knows how to run a farm. The other brother and sisters, who work elsewhere in the village and are not involved with the farm, allow him to run their share of the farm as well. They each receive some income from their share of the farm, although Sovann receives a large salary for his management.

After several years, the income from the farmland fell dramatically. Meanwhile, Chhay’s salary was increasing. In fact, he even bought a new car for his wife. The younger brother and sisters are worried that Chhay is mismanaging the farm. However, they are nervous about confronting their older brother, particularly since he may quit if they criticize his management. If that happens, they might have to sell their land.

3. Kim and Saroeun live in Kampong Thom. They have been married for ten years and have two children. They both love their children very much. However, Kim and Saroeun have had problems with their relationship. Saroeun complains that Kim works too much and never spends time with her, but Kim loves his job and does not want to leave his job. When he is promoted and sent to an office in Phnom Penh, Saroeun refuses to move. They agree to get a divorce. There are a few financial issues between them, but the largest issue is over custody of the children and visitation rights. Both Kim and Saroeun would like to see their children, but also want a resolution in their children’s best interest. They are both a little suspicious of outsiders getting involved in their personal problems.
6. When Should Mediation Occur?

As mentioned above, mediation can occur at almost any time during a dispute. Usually, the parties will try informal negotiations first. If those negotiations fail, then the parties will sometimes attempt mediation. Many dispute resolution clauses in contracts will specify that if there is a dispute, the parties agree to engage in mediation prior to filing a lawsuit. A special process called Med-Arb is sometimes specified as the dispute resolution process in commercial contracts. Under Med-Arb, the parties commit to mediation first, and if that fails to resolve the issues, the parties engage in arbitration. So, the general order is:

Negotiation → Mediation → Arbitration or Litigation

This order is logical, since the first method employed is inexpensive, fast and informal. After that, the methods become more formal and expensive as the parties move forward on that list.

Mediation can also occur after a lawsuit has been filed. Some court systems provide for court-sponsored mediation to occur after an initial complaint has been filed. As mentioned above, the Cambodian Civil Procedure Code provides that at the Preparatory Proceedings before the main Oral Argument (trial), judges shall engage in mediation efforts to help parties resolve their disputes. And, in another provision, judges are given the power to hold mediation sessions at any point in the litigation process.

Generally the earlier mediation is attempted; the more successful it is likely to be. This is for two reasons. First, early in litigation, the parties may not have spent as much money on lawyers and other costs. Early settlement through mediation results in a large savings in lawyers’ fees and other costs, assuming the parties are paying their lawyers based on the amount of time the lawyers work on the case. A mediated settlement later in the litigation process may still be possible but it does not hold the promise of a large savings in lawyers’ fees since they would already have been incurred. Earlier mediation is also more likely to succeed because as the adversarial process moves forward, parties become more entrenched in their positions and feelings.

Since every dispute is different, it is important to try to determine whether the dispute is ready for mediation before making the proposal.

Mediation may be too early and inappropriate prior to certain events. At the beginning of the litigation process, the parties may not be prepared to engage productively. They may not have fully investigated the applicable law and facts. They may not have considered

---

111 CCP-KC, supra note 7, art. 104.
112 Id. art. 97.
their interests. And they may not have engaged in the exchange of documents (called “discovery” in the U.S.) and pleadings and therefore do not fully understand the other side’s arguments. If mediation is attempted before these basic matters, it may be a waste of time and money. Even worse, it could polarize the parties by making them angry about each other’s perceived misunderstandings and stubbornness.
B. Private Mediation and Court-Annexed Mediation

Mediation can take place in one of two different settings: private mediation and court-annexed mediation. In private mediation, the parties agree among themselves to engage in mediation. That agreement might be made at the time of contracting, long before there is a dispute. Or, where the contract contains no such provision, the parties may agree to engage in mediation after a dispute arises.

Private mediation, as the name implies, is called such because it is a private agreement to mediate a dispute. There is usually no court involvement in the mediation process. The exception is where a court is asked to enforce a prior agreement between the parties to mediate. Otherwise, it is completely private. The mediator is private and the mediation forum is private. Private mediation can take place in the absence of litigation or it can take place during litigation (in which case the lawsuit is usually placed on hold until the result of the mediation is known). If the mediation results in a settlement, then the lawsuit is dismissed and, in Cambodia, a judicial compromise is entered by the judge. If the mediation does not result in a settlement, then the lawsuit proceeds in the court system with no prejudice to any party.

In court-annexed mediation, the court runs the mediation program in part or in full. It occurs during a lawsuit. There are many different kinds of court-annexed programs found around the world. Sometimes, the court-annexed mediation program is voluntary, where the judge or administrator analyzes the case and, if appropriate, suggests that the parties consider engaging in mediation. In this kind of program, mediation occurs only if all parties agree to engage in mediation. If not, they proceed with the litigation. In other programs, the mediation is mandatory, requiring parties to engage in mediation as part of the litigation process. Although the parties are required to engage in mediation if the program is mandatory, they still retain complete control over whether they reach a settlement agreement.

In some court systems, a mediation offer is a prerequisite to the filing of a lawsuit. This means that the plaintiff is required to offer mediation to the defendant prior to filing a complaint with the court. If the defendant agrees, then mediation occurs. If the defendant rejects, then there is no mediation and the plaintiff has fulfilled her requirement and can proceed with court litigation.

---

113 A court may also be called upon to rule on aspects of the mediation process or the enforcement of its outcome.

114 CCP-KC, supra note 7, art. 222.

115 Sometimes called court-sponsored mediation or judicial mediation.

116 Usually, this is a prerequisite for only certain types of cases, such as small claims or family law disputes.
Depending on the way it is organized, the mediator in a court-annexed program may be a judge,\textsuperscript{117} a lawyer, or a private industry expert that is contracted by the court system. Sometimes the mediator is not contracted by the court at all but rather hired by a private mediation company that provides mediation services on behalf of the court.

One important difference between court-annexed and private mediation is enforcement. When court-annexed mediation results in a settlement, it is usually recorded with the court and automatically enforceable like a judgment. However, private mediation is not always enforceable in that manner.

Private mediation enforcement rules vary widely throughout the world. In most Australian states, agreements reached through mediation outside the sphere of court-annexed mediation schemes cannot be registered with the court unless court proceedings are underway.\textsuperscript{118} The rules are similar in the U.S. However, if there is a U.S. court proceeding underway, the court can usually decide to enter an order that incorporates the parties’ settlement agreement into the judgment and this will be enforceable like a court order.\textsuperscript{119} If the court does not incorporate the agreement into the order, the mediated agreement is merely a contract, enforceable through a breach of contract lawsuit. One exception is family law cases (divorce, child custody, visitation and support), where mediated agreements are almost always considered court judgments.\textsuperscript{120} In Bosnia and Herzegovina, the new Law on Mediation appears to make all mediated settlements, whether private or court-annexed, enforceable like court orders.\textsuperscript{121}

In some jurisdictions, like in Germany, India, Bermuda, Hong Kong and China, a private, mediated settlement can be converted into an arbitral award, thereby enjoying the same enforceability as a court judgment.\textsuperscript{122} It is likely that mediation in Cambodia will have similar enforcement rules. Cambodia’s Law on Commercial Arbitration (“LCA”) provides that mediation services can be offered to parties to an arbitration.\textsuperscript{123} The LCA further provides that a mediated settlement made therein can be recorded as an arbitral award, which will enjoy the same expedited judicial enforcement that any other arbitral award enjoys.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{117} In the U.S., judges often mediate in informal pre-trial “settlement conferences.”
\item \textsuperscript{118} UNCITRAL Conciliation Guide, \textit{supra} note 87, at ¶ 90.
\item \textsuperscript{119} \textit{See, e.g.}, \textit{TEX. CIV. PRAC. & REM. CODE ANN.} § 154.071(a)(b) (West. Supp. 1997).
\item \textsuperscript{120} Patterson et al., \textit{supra} note 9, at 108.
\item \textsuperscript{121} \textit{ZAKON O POSTUPKU MEDIJACIJE BOSNE I HERCEGOVINE} [BIH LAW ON MEDIATION PROCEDURE], art. 25 (2004).
\item \textsuperscript{122} \textit{See, e.g.}, \textit{ARBITRATION ACT} (1986) (Bermuda); \textit{ARBITRATION AND CONCILIATION ORDINANCE}, arts. 73 – 74 (1996) (India); \textit{ZIVILPROZEßORDNUNG} [GERMAN CODE OF CIVIL PROCEDURE], Tenth Book, § 1053 (Germany); \textit{ARBITRATION ORDINANCE}, § 2C, Cap. 341 (1997) (Hong Kong); \textit{ARBITRATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA}, art. 51 (1995) (China).
\item \textsuperscript{123} LCA, \textit{supra} note 101, art. 38.
\item \textsuperscript{124} \textit{Id.} art. 38(2)-(3).
\end{itemize}
In Cambodia, a mediated settlement that occurs at a Cambodian arbitration center will be enforceable by the Cambodian Courts like a local court judgment.

And, as mentioned earlier, mediated settlements made while a Cambodian court proceeding is underway and presented as a judicial compromise will also enjoy expedited enforcement like a local court judgment.\textsuperscript{125}

\textsuperscript{125} CCP-KC, \textit{supra} note 7, art. 222.
C. Advantages and Disadvantages of Mediation

1. Advantages

- **Speed**
  Mediation allows parties to resolve difficult disputes within a short period of time, usually in one day or less.\(^{126}\) Litigation or arbitration can take months or even years. Negotiation also has the potential to resolve matters quickly, but since it often occurs with no deadline or urgency, it can drag on for a long time. Mediation, in contrast, is usually a single event that takes place over a short period of time, thus resolving matters quickly.\(^{127}\)

- **Cost**
  While private negotiation is usually the most inexpensive dispute resolution technique, mediation costs are generally lower than other options like litigation and arbitration.\(^{128}\) Mediation generally lasts one to two days so the lawyer costs and the mediation center’s fees are low. For simple disputes, mediation with a friend or relative can be cost-free, just like negotiation.

- **Party Control Over Outcome**
  With mediation, the parties remain in control of the result. The parties decide if there is going to be a resolution and on what terms. The parties also decide if the process is a waste of time and should be ended. Nobody can force the parties in mediation to commit to anything.

- **Preservation of Ongoing Relationship**
  As with negotiation, mediation allows the parties to craft a settlement that will preserve their ongoing relationship.\(^{129}\) This is important for Cambodian society since personal relationships are crucial for business, politics and other areas of activity. For example, if business partners have a dispute over property and are able to negotiate an agreement, they can preserve their relationship and continue to engage in a profitable business relationship. In litigation or arbitration where a third party decides the matter, the solution may not keep both sides happy enough to allow them to continue to work together.

- **Privacy**
  The mediation process is meant to be confidential. Most jurisdictions protect any information relating to negotiations or mediations, even if they do not result in a

\(^{126}\) Patterson et al., *supra* note 9, at 57.


\(^{128}\) *Id.* at 16-17.

\(^{129}\) *Id.* at 12.
settlement and the dispute must be litigated. As an example, the UNCITRAL Conciliation Law provides the following:\footnote{UNCITRAL Conciliation Law, supra note 87, art. 9.}

**Article 9. Confidentiality**

*Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.*

This is a common provision found in many jurisdictions. Mediation works partially because the parties can be confident that their discussions and offers to settle are not going to be repeated or used against them in the future. Litigation proceedings, by contrast, are usually open to the public.

- **Flexibility**
  The parties have a great deal of flexibility to design the mediation process. The mediator can play a simple facilitative role, listening to each side and encouraging the parties. Or, the mediator can play a more active role, meeting with each party separately to learn more about their interests and positions and ultimately even suggesting possible solutions.

  As with negotiation, the results of mediation can also be very flexible. Since it is the parties themselves who are reaching a settlement, they can agree to solutions that would otherwise be impossible in arbitration or litigation. For instance, in a dispute with a terminated employee, a company might agree to give its terminated employee a consulting agreement in exchange for his promise not to compete with his former employer. While it is perfectly permissible for parties to agree to this, courts do not generally have the power to include this in a judgment.

- **Settlement Enforcement**
  As mentioned above, mediated agreements from a court-annexed process are generally enforceable like court judgments, which means that they have an expedited enforcement process. Depending on the jurisdiction, even privately mediated agreements can be enforceable like court judgments. In Cambodia, privately mediated settlements that occur at an arbitration forum should enjoy this expedited enforcement. This is a big advantage over negotiated settlements, which do not enjoy any expedited enforcement rights.

- **Compliance With Mediated Settlement**
  Mediation tends to result in high rates of compliance with the settlement agreement.\footnote{See, e.g., Betty Southard Murphy, *ADR’s Impact on International Commerce*, 48 DISP. RESOL. J. 68, 73 (1993) (referencing ninety percent compliance rates); ADR Guide, supra note 105, at app. B, *Sri Lanka Case Study; South Africa Case Study.*} In other words, the parties to a mediated agreement tend to adhere to their settlement agreement. This is partly due to the fact that the mediation...
process is usually considered by the participants to be a fair and satisfying way to resolve disputes.\textsuperscript{132} It is also due to the fact that mediation allows the parties to design their own resolution instead of a judge or arbitrator.

\begin{itemize}
  \item **Higher Chances of Settlement**
  Most mediation programs report high settlement rates.\textsuperscript{133} Based on these figures, mediation is probably more successful in achieving settlement than negotiation. Mediation is more successful than negotiation for a number of reasons. First, in mediation, the parties have the unique opportunity to meet and hear the other side’s story in an informal setting. Second, negotiation through attorneys has the risk that information will be distorted or misunderstood when passed from Party A to Party A’s lawyer then to Party B’s lawyer and on to Party B. With mediation, the communication can be direct and clear. Third, negotiation usually exacerbates the personality conflicts between two negotiating attorneys whereas mediation allows for a neutral to resolve those issues. And fourth, in cases of mutual suspicion, settlement proposals presented through a mediator may be taken more seriously and with less suspicion than if presented from the opposing party’s attorney.

  \item **The Party’s “Day in Court”**
  Sometimes it is important for a party to have had the opportunity to tell her side of the story, and to feel as though she has been heard. This can make the party feel a little better, regardless of settlement terms. In some countries, this is called having her “day in court.” Negotiation does not usually provide a structured opportunity for this to happen.

  \item **Avoid Corruption**
  The voluntary nature of mediated settlement makes participants less vulnerable to corruption.\textsuperscript{134} The mediator cannot extract an unofficial payment since she has no control or power over the parties.
\end{itemize}


\textsuperscript{134} Austermiller, \textit{supra} note 85, at 142, n. 80. A corrupt mediator, however, might still try to coerce a party into settling through subterfuge or duress.
Choice of Neutral
In a mediation session, the parties usually choose their neutral, unlike litigation where they are assigned a judge. This choice can help the parties feel confident that the mediator is not biased.
2. Disadvantages

- **Unreasonable Party**
  No party in a mediation can be forced to agree to anything. This is both an advantage and a disadvantage. If one party is unreasonable and does not want to settle, then there is nothing that the mediator can do. Mediation can turn out to be a waste of time and money if one or both of the parties are unreasonable or unwilling to settle. In some cases, this can lead to an increase in the levels of suspicion and animosity between the parties.

- **Unequal Bargaining Power**
  If the parties have very unequal bargaining power, mediation may be dangerous for the weaker party. For instance, a large company might have far greater bargaining power compared to a small family-run shop. If the two sides engage in mediation, the large company can threaten or intimidate the weaker party into an unfair settlement. In such a case, the weaker party might be better protected with the presence of a judge or an arbitrator.

- **Settlement Enforcement**
  Depending on the jurisdiction, privately-mediated settlements may or may not have expedited enforcement rules. Therefore, the parties should consider the jurisdiction where they are contracting to make sure that they understand the applicable enforcement rules. If they are in a jurisdiction that does not provide expedited enforcement rules for privately-mediated settlements, such as Australia, mediation may be less attractive.

- **Cost**
  Mediation can be free if the mediator is a family member or a friend of both parties. But, if the dispute is among two unrelated people or companies, the mediator is usually a paid neutral. The parties might not want to spend the money for mediation, but may prefer to attempt negotiation first to see if a resolution can be found without paying an outsider.  

- **Privacy**
  While the parties’ communication in connection with mediation should be protected as confidential under the law, some jurisdictions, like Cambodia, do not have a mediation law that specifically protects mediation-related communications. Thus, parties cannot be 100% sure of privacy. Even in jurisdictions where there are confidentiality protections, they still have to trust that the mediator will not disclose private information. With negotiation, there is no third party to worry about.

---

135 Although, negotiations can last a long time, which may cost a large amount of lawyer’s fees.
D. Drafting a Mediation Provision

Most business relationships involve written contracts that incorporate a dispute resolution clause. The clause is included in the contract so that the parties know exactly how they will resolve any future disputes. This protects both sides. A dispute resolution clause can select any method, for instance, litigation or mediation.

A wise attorney will consider her clients’ interests to ensure that the dispute resolution clause provides for a method best suited for that client.

If the client wants to ensure that disputes are resolved through mediation, the dispute resolution clause must specify mediation. The provision could state merely that the parties will resolve disputes through mediation. Or, in addition, the provision could also specify where the mediation would take place. It could even provide a time period within which mediation must be completed, prior to arbitration or litigation.

The following are four sample mediation clauses that can be used in a contract:

1. If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association before resorting to arbitration, litigation, or some other dispute resolution procedure.

OR

2. In the event a dispute shall arise between the parties to this [contract, lease, etc.], the parties agree to participate in at least four hours of mediation in accordance with the mediation procedures of the National Mediation Center of Cambodia. The parties agree to share equally in the costs of the mediation. The mediation shall be administered by [one of the following choices: (1) designate a specific office, including address and phone number; (2) provide a method of identifying the correct office such as "where manufacturing plant is located"; or (3) insert "a local office to be designated by National Mediation Center of Cambodia Headquarters"]').

Mediation involves each side of a dispute sitting down with an impartial person, the mediator, to attempt to reach a voluntary settlement. Mediation involves no formal court procedures or rules of evidence, and the mediator does not have the power to render a binding decision or force an agreement on the parties.
3. If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties’ mediation may be asked to serve as the arbitrator.

OR

4. Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.136

As mentioned above, in most jurisdictions, confidentiality rules will protect parties from disclosure of communications made during a mediation session. However, to be safe, the parties could add a confidentiality clause as follows:

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

This clause follows the UNCITRAL Conciliation Law137 and appears to give the broadest possible degree of confidentiality.

136 UNCITRAL Conciliation Rules, U.N. GAOR, 35th Sess., supp. 17, U.N. Doc. A35/52, ¶ 105-106 (1980) available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html (last visited Oct. 19, 2008) [hereinafter UNCITRAL Conciliation Rules]. These are model rules as opposed to the model law set forth in the UNCITRAL Conciliation Law, supra note 87. At the above-cited link, the U.N. describes these rules as follows: “Adopted by UNCITRAL on 23 July 1980, the UNCITRAL Conciliation Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.” Id. The UNCITRAL Conciliation Rules are reprinted in full in Appendix A.

137 UNCITRAL Conciliation Law, supra note 87, art. 9.
Study Questions

The Rotannak Palm Oil Company wants to enter into a contract with an Australian company to sell a large portion of its palm oil. The owner of the Australian company has a reputation for being a hard bargainer and seems to get angry very easily. The price is so high that Rotannak is worried that the Australian company might fail to take delivery or might not make all its payments in the future.

You are the lawyer for Rotannak and must draft a dispute resolution provision for this contract.
E. The Mediation Process

The typical mediation process has seven phases:

1. Initiating mediation
2. Selecting a mediator
3. Briefing the mediator
4. Opening session
5. General problem solving sessions
6. Private caucuses
7. Closure

Studies show that the mediation procedure is a critical factor in the success of the mediation. If the parties perceive the process to be fair, they are more likely to settle. Where the parties developed the procedural rules themselves, there was an even higher rate of settlement.\textsuperscript{138} With this in mind, the following phases will be reviewed in more detail.

1. Initiating Mediation

The first phase in every mediation is the initiation of mediation. As with most ADR processes, mediation will usually occur if one of the following three circumstances exist:

1. The parties have a dispute resolution clause in their pre-existing contract that chooses mediation;
2. The parties decide to engage in mediation after a dispute has arisen; or
3. A court has ordered or advised the parties to engage in mediation.

In #1 and #2, the party initiating mediation sends a written invitation to mediate the dispute. The invitation can include a suggestion about the location and rules for mediation. The other side can either accept the invitation or reject it. If the other side accepts, then the two parties would proceed to set up the rules and search for a mediator. If the other side rejects, there is no mediation and the parties may proceed in a different direction. If the parties have a mediation clause in their pre-existing contract and one party refuses to engage in mediation, the other party might seek a court order requiring mediation. Such a court order will require a party to engage in mediation but cannot order that party to agree to any settlement in that mediation.

Under the model UNCITRAL Conciliation Rules (reprinted in full in Appendix A), if the party initiating conciliation does not receive a reply within thirty days from the date he sent the invitation, or within the period of time specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he should inform the other party.

If a court has ordered mediation in connection with a court-annexed mediation program, the court will likely provide the parties with a mediator and a set of rules.

2. Selecting a Mediator

After mediation has been established as the dispute resolution mechanism, the parties must choose a mediator. If the parties have not designated a particular mediation center, they can choose anybody they like in any manner they like. If they have agreed to use a particular mediation center, such as the Singapore Mediation Centre, that center’s rules will determine which mediators are available and how they are chosen.

Most mediations involve one mediator. However, it is possible to proceed with two or even three mediators. Unless there is a very clear reason to do so, the usual advice is to proceed with one mediator. The mediation center will likely provide a list of potential mediators to the parties or, if they cannot agree or do not want to decide, the center can also appoint a mediator for the case.

The following is a list of issues to consider when choosing a mediator. Is the mediator:

- Completely neutral, having no relationship with either party?
- Knowledgeable about the subject matter of the dispute (for example, building construction industry standards and rules)?
- Experienced in mediations?
- A lawyer, judge or is somebody without a legal background?
- A government official?
- Biased in any way, such as pro-employee or anti-foreigner?
- Recommended by other parties?
- Expensive?
- A good listener?
- Persuasive?

---

139 UNCITRAL Conciliation Rules, supra note 136, art. 2 (4).
Study Questions

Ritthy and Monna live in Kampong Cham and have been married for ten years. Monna feels that Ritthy spends too much money on gambling. Ritthy complains that Monna is cold to him and does not take care of the house and children properly. Ritthy is a big, intimidating man and Monna never challenges Ritthy for fear that he might beat her. They are unhappy and are considering divorce but want to talk to a mediator to see if their problems can be worked out.

The local Commune Council has provided the couple with a list of mediators who could handle their dispute. One of the mediators is Lim. Lim is the most famous mediator in the province who is known for her professionalism and intellect. However, Lim has never been married. In fact, she has told all her friends that she does not want to get married because she believes that most men are lazy and is worried about financially supporting a husband.

Would Lim be a good mediator here? Could she remove her own views from the mediation?

3. Briefing the Mediator

Once the parties have chosen a mediator, they need to prepare for the upcoming mediation session(s). Usually, the first task is to provide the mediator with information about the dispute. The mediator may designate this information as confidential and not share it with the other party. If this information is not designated as confidential, the parties should take care in the information they provide. In simple cases, the mediator might need very little information prior to the actual sessions. But, in more complex cases, the mediator might ask the parties to submit written briefs explaining the facts (facts that are in agreement and those in dispute), the applicable law and any documentary evidence that supports each side. The mediator might want to see any court pleadings that have been filed. The mediator might also want to know about the witnesses that are prepared to testify for each side. The mediator may also ask each party to identify the strengths and weaknesses of their side, and of any prior attempts to resolve the dispute.

All this pre-mediation information helps the mediator more efficiently handle the mediation session. For instance, the mediator will not need to ask as many questions about the facts or the laws if she has read about them in the pre-mediation submissions.

---

140 See also, Id. art. 5.
This preparation is also helpful for the parties and their attorneys as they begin to explore the possibility of settlement.

The mediator will also need to choose a neutral location for the mediation sessions. If the mediation is taking place under the auspices of a mediation center, the center will likely be the location. If not, the mediation can take place at the mediator’s law office, bar association office, private home, community or government center. Any place will do, as long as it is convenient and comfortable for the parties and it provides the participants with privacy.

**Study Questions**

What information, if any, should the parties submit to the mediator before the first session in the following cases?

- A divorce case;
- A dispute between two neighbors about the property line;
- A dispute over the purchase of land by a rich politician from a local community of farmers;
- A dispute over rent payments between a landlord and a tenant;
- A dispute over pay between a secretary and her employer; and
- A dispute between two brothers over the ownership of a car that was purchased by their father who has since died.
4. Opening Session

Once the parties have provided the mediator with their pre-mediation submissions and the mediation has been scheduled, the next phase is the opening session. At the opening session, the parties meet the mediator in person. In simple or smaller cases, the parties might be participating without lawyers and the process is more informal. In more complex cases, the parties participate with their lawyers.

If the parties are represented by lawyers in the dispute, it is essential that the lawyers and the parties themselves be present for the entire mediation process.

Mediators usually prefer to meet with both parties together to save time and to reduce any feelings of suspicion or bias at the beginning. There is no record of the session kept and no outsiders are allowed in. The opening session has the following purposes:

- To introduce the participants;
- To discuss and review the process;
- To set forth the rules to be followed;
- To allow each side time to describe the dispute and their legal and factual positions;
- To exchange important information between the parties;
- To provide the parties an opportunity to express their feelings and interests; and
- To identify initial areas of agreement and disagreement.

The mediator usually begins by introducing the participants to each other. The mediator will then review the process and the rules of the session. At some point, the mediator will try to explain her role in the process so that everybody has the same expectations. When explaining the rules of the session, the mediator should explain details such as the need for everybody to stay until the end of the session or the need to listen and never interrupt. If the parties are in agreement, the mediator will explain that she might need to hold a private caucus with each side to help facilitate settlement. She should stress that there will be no imposed agreement, that everything said will be completely confidential, and confirm that each party is represented by somebody with full authority to settle. Finally, the mediator will answer any questions the parties have about the rules and the process. If the mediation is taking place at an established mediation center, the rules will likely be available to the parties in writing beforehand. Usually, a mediator will allow for some variation in the rules if all parties are in agreement.

141 Patterson et al., supra note 9, at 59.
142 Id.
After these initial, standard comments, the mediator will invite each party to present an opening statement. In the opening statement, the party will present the case as she sees it, specifying evidence and law. This is a chance for each party to show emotion and have the healthy experience of informing the other side of all their positions. This is sometimes called “venting.”

Ideally, each presenting party will also explain its interests. It is best not to make demands on the other party during opening statements. The listening party also benefits from hearing, usually for the first time, the entire case from the other side’s point of view. The party’s lawyers should provide the opening statement to ensure that it is communicated in a clear, effective and non-accusatory fashion.

Once the first party has completed its presentation, the mediator might ask some questions to clarify some of the issues. If the mediator has received and reviewed pre-mediation submissions from the parties, she will likely not need to ask too many initial questions. After the questions are answered the other party will make its opening statement under the same circumstances as the first. The mediator will usually take extensive notes during this period to make sure that she fully understands the dispute, the emotions and the interests at stake. When all parties have had the opportunity to present their case, the mediator usually calls for a short break.\footnote{In a survey of commercial lawyers who used mediation in 2007, a substantial number felt that the opening statements were a waste of time, and in some cases, could be counterproductive because of their inflammatory nature. The survey did not indicate whether this was the majority view among respondents. John Lande and Rachel Wohl, \textit{Listening to Experienced Users: Improving Quality and Use of Commercial Mediation}, \textsc{Dispute Resolution Magazine}, 18 (Spring 2007).}

\textbf{Study Questions}

- What should the mediator say if both parties want to skip the introduction and go straight to the dispute issues?
- What if one party wishes to give the opening statement herself instead of the lawyer?
- Should the mediator take any special precautions or say anything different if one party is represented by a lawyer and the other party is not?

\textbf{5. General Problem Solving Sessions}

When the parties return, the mediator begins the general problem solving session(s). This is where the mediator and the parties try to explore resolution opportunities. At this point, the mediator usually tries to clarify areas of agreement and disagreement. At some
point early on, the mediator will usually enlist the help of the parties’ lawyers to try to determine what will happen if the dispute is not settled. She will try to calculate the likely costs to the parties to litigate the case to resolution. This will help the parties focus on the consequences of failing to reach an agreement.

The mediator will also facilitate a discussion about creative solutions for how the parties might resolve matters. This is best done in a collaborative, non-adversarial manner that focuses on the parties’ interests and problems, not the parties themselves. Usually, the mediator tries to learn the parties’ priorities and looks for areas of agreement or common interests (such as avoiding long, expensive litigation).

The mediator usually avoids talk about positions or demands, which are difficult to change. Instead, the mediator asks about goals, fears, desires, and interests.

There is no set pattern that can be applied to all mediation sessions. However, the flow chart below provides a general idea of how a mediation session might proceed:

---

144 This is a way to get the parties to focus on their “BATNAs” (Best Alternative to a Negotiate Agreement).
The steps taken by the mediator are similar to the steps one might take in the middle of an interest-based negotiation. The mediator will probably try to determine the key issues in the case first. Then, she might ask the parties about their underlying interests. For instance, the parties might be two feuding neighbors, Kanha and Sapor. The issues might be the property line between them and the perception that one or both of them are trespassing on the other’s property. The interests for Kanha might be in establishing peace, quiet, and privacy. She may have plenty of land. The interests for Sapor might be to maximize her land holdings since she is hoping to sell in the next two years and move to the city with her daughter.

The mediator will, at this point, develop a simple agenda to discuss the items one at a time. The first item may be how to ensure Kanha’s peace, quite, and privacy. The parties might discuss creative options to prevent the disturbance that Kanha feels is making her life so difficult. This does not mean that Sapor will make any promises or commitments. Rather, it is an exploration to see what options are available. Perhaps
Sapor can move her outside furniture so that her parties are not near Kanha’s property. Or perhaps Sapor can plant some large bushes on her own property so that Kanha does not have to see or hear Sapor’s guests. Once these possible solutions are generally deemed agreeable to both sides, the mediator moves on to the next item; perhaps Sapor’s concerns about maximizing her sale proceeds when she sells. Once again, the mediator will explore creative solutions.

The mediator is sometimes no more active than a referee in a football game, simply watching and letting the parties work out their problems. She is there to encourage a constructive environment. She will discourage personal attacks and try to limit the damage that negative emotions can do to a negotiation. She will try to enforce any ground rules, such as no interrupting the other side, but otherwise play as limited a role as needed. Every mediator has a different style and personality and every dispute has different parties, issues and emotions. One set approach will not work for every case.

**a) Listening**

Generally, the most important skill for the mediator during this and the previous phase is listening. The mediator should actively listen to what the parties are saying and look for important interests that might be fulfilled in a settlement. The listening should not be limited to words. The mediator should also observe the body language of participants. The negotiation chapter in this book covered some of the important body language that a negotiator or mediator should consider.

**Exercise – Understanding Non-Verbal Communication**

Pair up with someone in the class that you don’t know or do not know well.

1) Spend two minutes telling the partner about yourself without talking. Act out interests, events, family, friends, sports, etc. Listeners must also remain silent.

2) Spend two minutes discussing what was communicated.

3) Then switch roles and repeat the exercise for two minutes.

4) Spend two minutes discussing what was communicated.

What kinds of information was communicated without words and how was it communicated?
b) Re-framing

Another very important skill that mediators use during this phase is called re-framing. This is often used in both private caucuses and in group sessions. Re-framing is a technique used by a mediator to re-word an unproductive statement made by one party to move the discussion in a more neutral or positive direction. Instead of inviting a counter-attack or defensive statement from the other side, re-framing encourages the two parties to reconsider their situation and move in the direction of resolution.

To understand re-framing, one needs to understand framing. Framing is a description of how people see or perceive a situation or event. The word “frame” is used because it describes the image of someone looking out through the frame of a picture to the outside world.

We can alter people’s frames and thus change how they perceive something. This can ultimately change their behavior. For example, participants in a psychology experiment were playing a game where they had to choose whether to cooperate or to defect. The participants were divided into two groups. The rules were the same for both groups, only the label was different. The first group was told that the game was called “The Wall Street Game.” The second group was told that the game was called “The Community Game.” Participants in the first group cooperated only one-third of the time, while participants in the second group cooperated two-thirds of the time. The label itself was so powerful that it impacted participants’ behavior. In other words, it provided a certain frame for participants and illustrates the power of words.

The idea behind re-framing is to force the parties to look at the situation or the facts in a different way and perhaps behave in a different way—just like the label in the psychology experiment.

---

145 Wall Street is a famous street in New York where the stock market is located. The term “Wall Street” tends to connote money, competition and wealth.

There are three main goals to re-framing in dispute resolution:

1. Calming or decreasing hostility;
2. Changing the focus from positions to interests; and
3. Changing a concern or complaint into a solvable problem.

Re-framing a party’s statement can address one or more of these aspects. Mediators should re-frame in a careful, questioning manner so as not to offend the original speaker.

Below are a few re-framing examples:

<table>
<thead>
<tr>
<th>Original Statement</th>
<th>Re-framed Statement or Response by Mediator</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Don’t you know any better than to submit a proposal that will never be accepted?”</td>
<td>“Sokunthea, you may have a good point there. How would you improve the proposal to make it more acceptable?”</td>
</tr>
<tr>
<td>“Mr. Phary lied to us and he is not to be trusted.”</td>
<td>“In the past, Mr. Phary provided them with information that turned out to be incorrect so they are perhaps hesitant to rely on his current statements.”</td>
</tr>
<tr>
<td>“You destroyed our vacation.”</td>
<td>“Sineth is having trouble enjoying her holiday because of what happened.”</td>
</tr>
<tr>
<td>“You breached the agreement.”</td>
<td>“Money was not paid on time and Sreymom believes this caused her difficulties in making her payment obligations to others.”</td>
</tr>
<tr>
<td>“Pania is a messy person.”</td>
<td>“It bothers Sras when he finds your clothes all over the house.”</td>
</tr>
</tbody>
</table>

Re-framing does not solve disputes but does provide the opportunity to move away from negative or unproductive viewpoints and statements to a more productive setting where the participants can explore possible settlement options. It is a subtle but powerful tool that can alter people’s perceptions and possibly their behavior.
Exercise – Re-framing

Try to re-frame the following statements:

- In a history class, An and Cheng must work together to give a joint presentation. An complains to a friend, “I do all the work. Cheng does nothing, even though I have asked him a hundred times.”

- In a family where two brothers share a moto, Huot says, “Mareth takes the moto every Monday night to visit his friends even though I need it to get to my school.”

- Two office workers are fighting over the use of a computer. Dara says, “He takes the computer without even telling me. He is violating company policy.”

- Two sisters are fighting about noise from each other’s bedroom. Savoeun says “Every time I ask her to be quiet, she just yells at me and slams her door!”

The goal of re-framing and other techniques, of course, is to reach acceptable solutions. If solutions are found that meet both parties’ interests, then they are likely to propose a settlement. The mediator can help facilitate this by assisting in the process of developing settlement options. It is usually advisable that the parties both develop and propose the solutions, if possible. That way, they are more likely to be acceptable and durable. If the mediator finds that the parties are unable or unwilling to propose solutions, she may play a more active role, and may even propose solutions herself. There are some circumstances where the parties do not trust each other and a solution proposed by one side will be viewed with suspicion by the other. In that case, the mediator might want to make the proposal her own so as to decrease the suspicion.

c) Generate Options

As with negotiations, a key to success is generating options for mutual gain. The same main points are relevant here. The mediator should help the parties:

- separate the act of inventing options from the act of judging options;
- try to broaden the options being considered rather than looking for a single answer;
- look for mutual gains; and
- think of ways to make the other side’s decision easy.147

The reader should review the negotiation chapter of this book for further details about these four important tasks, which includes techniques like brainstorming. However,

---

147 Fisher, et al., supra note 31, at 4-5.
there is one specific caution for mediators. Mediators sometimes develop too many options in their search for solutions. While this may seem like a good idea, the mediator should be aware of an important phenomena known as decision avoidance.

With decision avoidance, parties with too many options are actually less likely to choose any settlement option, when compared with parties who are presented with fewer options. In an interesting study, researchers set up displays with jars of jelly in a supermarket to see how consumers would react. Customers who approached a display would be invited to sample the jelly and be given a coupon for a $1 discount on any jars that the consumer bought. One display had six different jars of jelly, while the second one had twenty-four different jars. Consumers were more attracted to the larger display but less likely to buy anything. About 30% of the 104 customers who stopped at the smaller display bought a jar of jelly, while only 4% of the 145 customers who stopped at the larger display bought jelly. In other words, 96% of the customers who stopped at the larger display opted not to decide because they were presented with too many options.

The mediator who offers too many options, like the 24 jars of jelly in the study, runs the risk of causing the parties to avoid choosing altogether and possibly missing a settlement.

While generating options is usually an essential exercise, care should be taken so as to not overwhelm the parties, particularly if they are showing signs that they are afraid to make difficult choices.

6. Private Caucuses

If the mediation is at a standstill (because of decision avoidance or any other reason), one common procedural tool that the mediator will likely employ is the private caucus. As can be seen in the flow chart, the private caucus usually takes place during the periods when the parties are discussing possible solutions to the issues. It is not uncommon for a mediator to hold five or even ten private caucuses during the course of a difficult mediation. Usually, if the mediator meets privately with one side, she will then meet privately with the other side. The mediator, after these two private meetings, could call a group session or continue to go back and forth in private meetings.

Private caucuses allow parties to share private information with the mediator that they might not be comfortable sharing in front of the other side. For example, the party might not want to reveal a particular interest (like the company is short on cash and might have to declare bankruptcy/insolvency). Or, the party might want to further explore a

settlement option that it was uncomfortable taking seriously in front of the other side, for fear of showing weakness.

The private caucus allows the parties to drop the “face” that they sometimes need to show to the other side.

From the mediator’s perspective, the private caucus allows her to gain greater trust from the participants. The mediator can show more empathy to the party during a private caucus, which perhaps, she could not do in the group session for fear of appearing biased. The private setting also allows the mediator to more aggressively challenge a party’s positions and force them to seriously consider what the other side is proposing. A mediator could even propose possible solutions in this private setting that might appear biased or inappropriate if proposed in the group meeting. The private setting also encourages greater participation from the parties themselves, since the lawyers are often the ones who speak in the group settings (lawyers sometimes tell their clients to not speak at all unless they say so).

Private caucuses are not always necessary but are often helpful to bring the parties together, especially if they appear to have reached a stalemate. The most appropriate settings where private caucuses are needed are the following:

- Where there are more than two parties to a case, such as in a property damage case where there is the plaintiff who suffered damages, the defendant who allegedly caused the damage and the insurance company.

- Where the case is very complex. For instance, when a property developer has been sued by investors for a delay in the project’s completion due to problems caused by the developer’s sub-contractors, who blame the materials suppliers and the architect.

- Where there is a significant disparity in the balance of power. For example, in the case of a large multinational employer that has terminated a poor secretary. The secretary might suffer terrible consequences if she does not get her job back. The company does not have any concern and could easily hire somebody else. In a private caucus, the mediator might be able to provide encouragement and support that would not be available in the group setting.

- When the parties are abusive to or threatening each other. This is the most common reason for private caucuses. For instance, with family disputes, the parties may have strong emotions that have become counter-productive to settlement. Or perhaps, the husband intimidates the wife in a divorce mediation and the pressure of confronting him face to face is causing her to give in to every demand. Private caucuses may help restore the balance that is ultimately in the family’s best interests.
7. Closure

The mediation will end with one of three possible results:

1. The parties have reached complete agreement;

2. The parties have not reached complete agreement but will continue mediating at a later time; or

3. The parties have reached a stalemate\(^{149}\) and the mediation is over.

In the first case, the mediator will encourage the parties to draft and sign a settlement agreement. Waiting to draft and sign an agreement until a future date is risky, since the parties may reconsider their compromises. They might be pressured by family, friends or colleagues to keep fighting for a better deal. As a result, they might try to ask for a final concession from the other side and risk destroying the agreement.

The parties themselves should draft the agreement. If the mediator drafts the agreement, she risks helping one side or the other in the words she chooses. It is better for her to write down the basic points of agreement at the end of the session, have the parties sign them, and then give the parties some time to draft the full agreement themselves. The mediator can review the agreement, but even then, she needs to be careful about helping one side over the other. It is a very delicate situation when two feuding parties compromise and try to memorialize their agreement. Therefore, the mediator must be extra careful to make sure that she does nothing to upset the balance.

If the second result happens (mediate more later), the mediator should stress the progress made and provide some suggestions for consideration for the next session. The next session should be scheduled relatively soon to help retain any of the momentum gained in the last session.

The third result can happen at any time. One of the parties may end the mediation session early if they are angry or unwilling to continue discussions. There is nothing the mediator can do if one party absolutely refuses to discuss settlement further. The mediator may also choose to end the session if it appears that no settlement can be reached. While mediation is an excellent tool for settlement, it is ultimately up to the parties and some disputes cannot be successfully mediated. When the mediation ends in this way, the parties are free to continue their dispute in other forums such as arbitration, private negotiations, or even litigation.

\(^{149}\) This is sometimes called an “impasse.”
F. The Role of the Mediator

In general, the mediator needs to be comfortable with all kinds of people. The mediator has to be a good listener. She must be willing to understand the strengths and weakness of each side’s case and be able to help the participants fully understand them. She has to encourage the parties even if the situation looks bad. Finally, she has to be creative in her thinking to allow the parties to consider a variety of options for settlement. These are the general requirements of a successful mediator. The following is a list of some of the more specific attributes common to successful mediators.150 The mediator:

- must remain neutral, no matter what happens;
- should ultimately be an advocate for the mediation process (not for any of the parties or any particular position or solution);
- is generally sympathetic and empathetic with the parties;
- focuses the discussion on parties’ interests instead of positions;
- tries to keep the process moving forward (by focusing on options and issues, not the parties);
- remains positive and encouraging even in the face of difficult situations;
- is persistent;
- is willing to try different approaches based on the nature of the dispute and the personalities; and
- always searches for possible resolution options.

One last issue relates to whether a mediator should play a role beyond mere facilitation. Should the mediator offer opinions on options, legal points or other matters? Should the mediator provide suggestions for solutions? These are sometimes called “evaluative” roles. ADR professionals have differing opinions on these matters. It depends on many factors, including the legal and wider cultural norms, the parties’ expectations, the mediator’s personality and even the local legal rules. Some jurisdictions might consider a non-attorney mediator to be engaging in the unauthorized practice of law if she were to provide legal opinions to parties in mediation. The best practice is for the mediator to raise this issue in the opening discussion and determine whether the parties are comfortable with the mediator playing an active, evaluative role. If both parties are uncomfortable with this, the mediator should remain in a more passive, facilitative role.

150 Partially found in Patterson et al, supra note 9, at 67-69.
Study Questions

In your opinion, which of the two mediator roles (*facilitator* or *evaluator*) is generally more effective for the following disputes:

- A dispute between a dominating husband and submissive wife over money.
- A dispute between two sophisticated business partners.
- A dispute between a Cambodian national and an Australian national.
- A dispute between an employer and employee.
- A dispute between a community of local farmers and a government official over the granting of land concessions.
- A dispute between two neighbors.
- A dispute between a driver of the moto and the pedestrian that he has hit.
G. The Role of the Lawyer

As mentioned above, some mediations proceed without attorneys. An example of such a mediation is a small dispute between husband and wife. Often, community mediation services, such as those at the local Commune Council are free of charge and very informal. However, if the party is represented by an attorney, then the attorney should participate in the mediation. If one party is represented by an attorney, it is advisable that the other party be represented by an attorney as well.

Whether with or without an attorney, the parties to a mediation session must have full authority to settle the dispute.

This does not mean that the attorneys must run the process. In fact, the parties have more control in mediation than during negotiation. Unlike negotiation, the parties themselves are always present at the mediation session and parties must agree to any settlement or compromise. They can speak in the group or private sessions and will often be encouraged by the mediator to do so. So, what should the lawyer do?

Initially, the lawyer should decide whether to insist on a mediation clause in the parties’ contract. In some cases, mediation might help save time and money. If the lawyer is involved in the dispute after the relevant contract has already been signed and there is no dispute resolution clause, the lawyer might consider mediation if basic negotiations do not resolve the problem.

Mediation is usually more costly than negotiation and, as mentioned above, can only work if both sides are willing to sincerely try to resolve the dispute.

Other initial roles include helping the client find a competent and neutral mediator, choosing a mediation center, if appropriate, and providing the mediator with the pre-mediation submission of documents. One of the most important roles a lawyer plays prior to mediation is preparing the client. The lawyer must prepare the client to think about settlement strategies before the mediation sessions begin. This means reviewing the BATNA, reservation price, facts, laws, interests, possible compromises and the “bottom line” with the client. The client may not have thought explicitly about her interests, since she has likely only considered how the other side has harmed her. The lawyer should encourage the client to think objectively about the weaknesses of her case and set forth the consequences of a failure to settle.
Finally, there are considerations for the mediation session. Who will give the opening statement? Usually, that is the lawyer’s job. Who will speak during the group discussions? Perhaps both the lawyer and the client will speak, but they should decide which issues they will each address so that there is no confusion. The client also needs to understand that the mediator is not a judge and cannot force the client to do anything. Everything is voluntary. The client should also be encouraged to listen to everything that the mediator and the other side say.

Finally, the lawyer should discuss his behavior during the mediation session. The client might become confused or worried if the lawyer acts tough and adversarial in group sessions but then seems to side with the mediator and against his client in private sessions. The lawyer should explain that the mediator might try to help the client understand her weaknesses in the private session. He might even strongly suggest a particular settlement, but he is always acting in the client’s best interests.

At the opening and group sessions, the lawyer should be careful to strike a balance between appearing as a strong advocate while also appearing open to compromise. This is not a court, and while the lawyer’s job is to advocate for the client, he also wants the mediation session to be productive. If he offers a compromise, perhaps the other side will offer an even bigger compromise on something else.

During the breaks and during the periods when the mediator is in private caucus with the other side, the lawyer can help the client assess the progress and consider the options. They might need to reassess their strategy based upon the statements made by the other side. The lawyer should not merely sit back and let the client figure out how to resolve matters.

The lawyer should play an active role in searching for and analyzing solutions with the client.

At the end of the process, the lawyer must take the lead in drafting the settlement agreement with the other side. One way to do this is to allow one party’s lawyer to draw up the first draft and then submit to the other side. Another way to do it is for the two lawyers to sit down together and write the agreement. In both cases, the lawyers will need to explain each provision to their clients, making sure that they understand and agree with the provision. If there is a dispute about the terms of the settlement, the lawyers can ask the mediator to help, although the mediator should be careful to not appear biased in favor of one party.
H. Mediation Ethics

Mediation raises important ethical questions that are important for the mediator, the parties, and the judicial system. Mediators, like judges or arbitrators, potentially hold a great amount of power over people. That power can be used for good or bad purposes. While judges and arbitrators tend to stand aloof from parties, meeting them only in limited, formal settings, mediators have much richer, more intense interactions with parties. Unlike judges and arbitrators, mediators can have numerous private meetings with parties to discuss their feelings, their interests, their concerns and their fears. They can sometimes try to persuade parties. While this is often for everybody’s best interests, there are many important ethical concerns that can arise.

The easiest way to summarize the main ethical concerns is to list the nine standards identified in the American Bar Association’s Model Standards of Conduct for Mediators.151 The full text is provided in Appendix B of this textbook.

STANDARD I. SELF-DETERMINATION
A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

STANDARD II. IMPARTIALITY
A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST
A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.

STANDARD IV. COMPETENCE
A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

151 MODEL STANDARDS OF CONDUCT FOR MEDIATORS, American Bar Association, American Arbitration Association and Association for Conflict Resolution (2005), available at http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf (last visited Oct. 19, 2008). This is the most influential ethics code for mediators. The full text of the Code can be found in the Annex to this book.
STANDARD V. CONFIDENTIALITY
A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

STANDARD VI. QUALITY OF THE PROCESS
A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

STANDARD VII. ADVERTISING AND SOLICITATION
A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.

STANDARD VIII. FEES AND OTHER CHARGES
A mediator shall provide each party or each party’s representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE
A mediator should act in a manner that advances the practice of mediation. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

Exercise – Mediator Ethics
While these mediation standards may appear simple and logical, it can sometimes be difficult to apply them to real world situations. For each of the hypothetical scenarios on the following pages, review the Model Standards of Conduct for Mediators (reprinted in full in Appendix B) and circle the best course of action among the three choices provided, A, B or C. Assume that you are an independent mediator and are presented with the facts in each box.152

---

152 Adapted from Patterson et al., supra note 9, at 53.
<table>
<thead>
<tr>
<th>Question or problem</th>
<th>Ethical Response</th>
</tr>
</thead>
</table>
| 1 You have heard that a relative of yours will possibly be named as an expert witness in a case that you have been asked to serve as mediator. | A. Inform the parties and proceed with mediation if they consent.  
B. Withdraw from mediation.  
C. Ask relative to withdraw and if she refuses, then withdraw from mediation. |
| 2 The parties tell you that they cannot afford to pay your standard mediation fee but they really want you as mediator. | A. Withdraw from mediation.  
B. Negotiate a lower fee, so long as it does not prejudice you against the parties.  
C. Tell parties not to worry about fee until result. Then, depending on outcome attempt to work out a fair fee. |
| 3 The parties really need to settle their case. They offer you double your fee if there is a settlement, but only your normal rate if there is no settlement. | A. Withdraw from the mediation.  
B. Insist on only your normal rate regardless of the outcome.  
C. Agree to the offer and then at the conclusion, refuse to accept more than your normal rate if the result is a settlement. |
| 4 One of the parties is concerned that you are a friend of the judge that is assigned to the case. | A. Explain to the party that you are still neutral in the mediation (just like the judge). Proceed with mediation if they consent.  
B. Disclose the friendship to all parties and proceed with mediation if they consent.  
C. Withdraw from the mediation. |
| 5 One of the parties has learned that you have never mediated a dispute relating to the garment industry and questions whether you are qualified to mediate his garment business dispute. | A. Withdraw from the mediation.  
B. Explain to the parties why you feel that you are qualified and if one still questions your abilities, then withdraw.  
C. Explain to the parties why you feel that you are qualified and proceed with mediation. |
| 6 One of the parties says that both participants are sophisticated and asks you to skip most of the opening session to save time. | A. Probe to find out how sophisticated they really are and then consider skipping a portion of the opening session.  
B. Decline the suggestion, the opening session is too important and the mediation process must be protected.  
C. Accept the suggestion to build trust, so long as both parties consent. |
| 7 Before the session begins, you learn that one of the parties does not have full authority to settle. But, she claims that her boss is waiting by the phone if she needs to call him. | A. Call the boss and insist that he be available for frequent calls from his representative. If he is willing and all parties consent, then proceed with mediation.  
B. Proceed with the mediation if all other parties consent to this arrangement.  
C. Do not convene the mediation until all parties present have settlement authority. |
<table>
<thead>
<tr>
<th></th>
<th>Question or Problem</th>
<th>Ethical Response</th>
</tr>
</thead>
</table>
| 1 | In a private caucus, the attorney for one side insists that the client not speak a word and that he do all the talking. | A. Terminate the mediation.  
B. Try to convince the attorney that the mediation process requires all parties to participate and if he still doesn’t agree, then terminate the mediation.  
C. Try to convince the attorney that the mediation process requires all parties to participate and if he still doesn’t agree, then continue with the mediation if all parties consent. |
| 2 | During your private caucus with one party, she admits to stealing the property of the other party. | A. Tell the parties that you must inform the court or police authorities that one of the parties has committed a crime. Terminate the mediation.  
B. Tell only the admitting party that you must inform the court or police authorities that he has committed a crime. Terminate the mediation.  
C. Continue with the mediation, you don’t need to inform anybody about past crimes. |
| 3 | You are near the end of a long mediation and you learn that your law partner represented one of the parties in the past during the time of your partnership. | A. Inform the parties and continue the mediation only if they all consent.  
B. Inform the parties and terminate the mediation.  
C. Terminate the mediation and do not reveal the reasons, just indicate that you recently learned about a conflict.  
D. Continue the mediation and do not inform the parties. There is no conflict since the representation ended prior to the mediation. |
| 4 | During a private caucus, one of the parties, who does not have an attorney, asks you whether she should accept the other side’s offer. | A. Provide an answer but state that it is only what you would personally do in that situation. It is her decision to make.  
B. Decline to provide an answer, you must stay neutral.  
C. Provide information such as the pros and cons of the offer but do not advise what to do. |
| 5 | Both parties are represented by lawyers. During a private caucus, you learn that one side has seriously misrepresented a fact on which the other side is relying in its consideration to settle. | A. Continue with the mediation, say nothing, stay neutral.  
B. Terminate the mediation.  
C. Try hard to convince the offending side that it must reveal the misrepresentation. If it refuses, continue the mediation. |
| 6 | During the mediation, you learn that one of the parties has substituted improper building materials at a construction project. You believe that this will make the building unsafe but the other side does not know about this substitution. | A. Inform both parties of what you have learned, that you intend to contact the authorities and terminate the mediation.  
B. Inform both parties of what you have learned and try to mediate a solution that includes a resolution to the safety problem. If unsuccessful, inform the authorities.  
C. Inform the parties that you must terminate the mediation, but do not say why. Inform the authorities immediately. |
## Exercise – Mediator Ethics: After the Mediation

<table>
<thead>
<tr>
<th></th>
<th>Question or problem</th>
<th>Ethical Response</th>
</tr>
</thead>
</table>
| 1   | When you report to the judge or arbitration panel that the case did not settle, the judge (or panel) asks why. | A. Decline to give details.  
B. Provide details only if all parties consent.  
C. Provide details so long as the court or panel agrees to keep the information confidential. |
| 2   | The parties are not able to reach a resolution so they ask you to arbitrate the case with a binding decision. | A. Refuse the request since you have been made privy to confidential information.  
B. Inform the parties about the potential dangers and agree to the request if all parties consent. |
| 3   | You have successfully mediated a domestic relations case between a husband and wife. The husband drafts the settlement and you realize that the agreement is not exactly the same as was agreed to in the final session. They are both without attorneys. | A. Let the written agreement stand if the wife reads it and agrees.  
B. Raise the issue immediately to both parties (so that the wife notices the difference) and let them decide what to do.  
C. Raise the issue immediately to both parties (so that the wife notices the difference) and insist that the written settlement reflect the agreement that everybody made at the end of the session. |
| 4   | Two months after you have successfully mediated a land dispute case, one of the parties contacts you and asks if you are interested in investing in his next land development project. | A. Refuse to invest since you must maintain the appearance of propriety.  
B. Agree to invest, but only if the other parties consent in writing that this is unrelated to their dispute.  
C. Agree to invest if you want to. There is no conflict of interest with the old case since it is unrelated to this project. |
I. Licensing and Qualification

As mentioned earlier, mediation does not require a law degree. Many kinds of community-based mediations can take place with non-legally educated mediators. Some countries do have mediation licensing requirements. In the U.S., there is no general license but some local mediation programs require licenses. Many private mediation companies and court-annexed programs have minimum standards and continuing education requirements. The International Mediation Institute\textsuperscript{153} is developing the first international mediation license.\textsuperscript{154} The goal is to provide quality assurances in domestic and international mediations, particularly in areas of the world where mediation is not as common.\textsuperscript{155}

In Cambodia, there is no mediation law and no general mediation license or minimum standard. However, individuals serving as mediators at the National Arbitration Center need to be qualified first as arbitrators under the law.\textsuperscript{156}

\textsuperscript{153} The International Mediation Institute (IMI), based in The Hague, Netherlands, was formed by the American Arbitration Association, the Singapore International Arbitration Centre and the Netherlands Mediation Institute. \textit{See IMI website, available at} \url{http://www.imimediation.org/} (last visited Oct. 19, 2008).


\textsuperscript{155} \textit{Id.}

\textsuperscript{156} The Ministry of Commerce’s Sub-Decree on the Organization and Functioning of the NAC sets forth qualification standards for arbitrators at the National Arbitration Center. Those would, in effect, become the standards for mediators at that same institution. \textit{See} Sub-Decree on the Organization and the Functioning of the National Arbitration Center, arts. 28-38, 45-53, Royal Government of Cambodia, #124 (2009) [hereinafter NAC Sub-Decree].
J. Sample Mediation Exercises

The participants can be grouped into teams of three. Each team will have one person play the mediator and the other two people will play the actors in the dispute.

1. The mediator’s first task is to introduce the process and rules. The mediator should make sure the participants understand:

- The process is confidential
- The process is voluntary
- Nobody can interrupt
- The mediator might hold group sessions and private caucuses
- The parties are here to resolve their conflict

2. Next, the mediator should invite the parties to briefly tell their sides of the story. The mediator should listen carefully and try to learn the parties’ issues as well as their interests in the dispute. She should generate a list of interests and issues, using the interests and issues worksheet on the next page. The parties should help the mediator in this process and explain if the mediator has made a mistake or missed or misstated anything.

3. Once she has a list of issues, the mediator should direct a series of discussions on each specific issue with the parties. The mediator introduces each issue and tries to frame it in a positive manner. The parties will engage in the discussion, directed towards each other, while the mediator facilitates the process, making sure emotions are handled and matters are framed in a positive light. The purpose of the issues discussion is to make sure that all issues are understood by both parties.

4. Next, when the parties have had a chance to explain their views on all the issues, the mediator directs collaborative, problem-solving sessions. They can be in the form of brainstorming or other option-generation techniques. The goal is to develop options that satisfy the parties’ interests. The mediator should work to resolve the issues by playing an encouraging role and re-framing any non-productive statements when appropriate.

5. If the dispute is resolved, the parties should write down the basic terms of the agreement, using the settlement sheet provided.
One week ago, Remy and some of his friends were walking back to his house after a night at the karaoke bar and they walked through Mr. Ratanak’s yard. They jumped over Mr. Ratanak’s wooden fence. Remy accidentally broke about three meters of the fence when he stepped on the top. Mr. Ratanak was sitting on his porch and saw what happened. He ran over and grabbed Remy, but the others ran off. Mr. Ratanak insisted that Remy pay for the repairs. Remy said he would. They exchanged phone numbers.

The next day, when Mr. Ratanak called Remy with an estimate of $300, Remy said he did not have the money and thought it was an “outrageous” amount. Mr. Ratanak says he will take Remy to court if he does not pay, but agreed to try mediation first.

Remy is worried because he has already gotten in trouble for his drinking in the past. He would like this problem to go away but he does not have $300. He also wonders if Mr. Ratanak has inflated his price to punish him. Mr. Ratanak is very frustrated because the boys seem to run through his yard all the time, which kills his plants and flowers. Mr. Ratanak feels that Remy is lucky since he did not call the police and have him arrested.
Exercise – Mediation Case 2: Administration Argument

The Rector of the Southeast Asia Law School in Phnom Penh (SALS) has been called in to mediate a dispute between two of his employees, the Director of Administration and one of her newer employees. The Director of Administration, Sopheary, has been working at SALS for over ten years and is responsible for supervising a staff of ten people. Hay works for Sopheary and has been at SALS for six months. Recently, Hay requested a change to his work schedule to work late on Mondays and Tuesdays and to come in to work late on Thursday mornings. Sopheary rejected this request. Hay seeks mediation by the Rector.

In Hay’s last job, he had a lot of input into decision making and had flexible hours. However, he feels that in this job, Sopheary does not even listen to his ideas. Hay proposed the schedule change because:

1. He wanted to take a special French language class on Thursday mornings;
2. Monday and Tuesday are the busiest days; and
3. Students might appreciate having extended appointment hours at the office.

However, he feels that he didn’t even have the chance to give his reasons for the schedule change. Sopheary seemed very short with him, immediately saying that it wouldn't be possible, and as a result, Hay has been reluctant to bring it up again.

Sopheary is regarded as a serious and respected director. She feels that staff can make suggestions but once a decision is made, it needs to be respected. Sopheary thinks Hay is a little strange and believes that Hay’s suggestions are sometimes a little crazy. She is not opposed to change, as long as it is well thought out and well reasoned. She has been under a lot of stress lately because work has been very busy and she has not had enough time with her family. She knows that sometimes she is short-tempered with people. She is skeptical about mediation and afraid it could undermine her power as the director. What if people reacted to all of her decisions this way and everything had to be mediated? She wouldn’t be able to run her department. And besides, French class is not more important than Hay’s job at the school.
**Exercise – Mediation Case 3: Joint Project Argument**

Two graduate student employees at the Cambodia University of Science are now avoiding each other after a heated interchange about one week ago. Their responsibilities in the department require them to work together on projects and until recently, they worked well together. The dispute involves who gets credit for work that was done as a team. Thavary feels that Ry, her coworker, has been taking too much credit for work she performed. Ry feels that Thavary’s position was an unfair attack on him, and he has been avoiding contact with Thavary ever since.

Thavary is concerned about her working relationship with Ry. On the last four joint projects, she feels that Ry took credit for ideas that were hers. During reports to the faculty committee, Thavary has heard that Ry often presents the results of their projects without mentioning her involvement. She believes that he also says “I” rather than "we." For some reason, Ry was always the one the director asked to report the results to the faculty committee.

Thavary was upset the last time she heard about Ry’s presentation. She confronted him in the laboratory, but he yelled at her and has avoided her ever since. Thavary and Ry are old friends from Kampot, and both would like to remain friends. Thavary is worried about her own advancement at the University, and feels that she cannot trust Ry. She has worked hard in the department and she is not getting the recognition that she deserves. Ry does not seem to care.

Ry is very upset that Thavary complained to their director that he was misrepresenting their joint work. She knows that her name was on all the reports. He also feels that during joint projects, ideas merge and become shared. The responsibility of presenting completed projects has always fallen on him. Giving these presentations is difficult and takes extra work. Why should she be surprised if other people give him the credit?

He feels that Thavary was too tough on him and since Ry hates conflict, he decided to avoid her after that. However, he knows that Thavary is very smart and they make a good team at the office. He is worried that this dispute makes him look bad to the University and feels that she should apologize for making this such a big issue.
Exercise – Mediation Case 4: Movie Star

Leng Chenda is a beautiful young actress. A few years ago, she graduated from RUPP acting school and started to perform in Phnom Penh. She played minor roles in a few small movies and then got a big break when she met Mr. Lay Yem at a party. Mr. Yem is a famous movie producer and director in Cambodia. He agreed to let her read for a supporting role in a Cambodian movie called “My Crazy Family.” The director gave her the part. The movie was a hit and people loved her.

Last month, Mr. Yem announced that he would produce the biggest movie in the history of Cambodian cinema. This movie was called “Jayavarman VII, the Great King.” He was going to spend over $10 million producing this and already had offers to show the film at the famous Cannes Film Festival in France later this year. An American film distribution company also expressed interest in the film.

A few days after the announcement, Mr. Yem called Ms. Chenda and asked her to come to his office. He told her that he wanted her to co-star as the great king’s wife. This would make her the most famous actress in Cambodia. She might even become famous in Europe and America. He asked Ms. Chenda if there was anything embarrassing or controversial in her past. She said no. He offered her one million dollars for this part. This would include promotional obligations and possibly a world tour. She agreed and signed a contract that day. This news was announced to the public the following day.

A few weeks later, the casting director, Mr. Song Mara, visited Ms. Chenda and showed her a letter he had received from an anonymous source claiming that Ms. Chenda was not ethnically Cambodian, but rather Vietnamese. She confirmed this but didn’t understand why this mattered. Mr. Mara explained that Mr. Yem was very unhappy about this. They could not allow a Vietnamese actor to play the role of Jayavarman’s wife. He said this could be controversial in Cambodia. Mr. Yem is also upset that Ms. Chenda did not say anything about this when he asked her if there was anything controversial or embarrassing about her. Mr. Yem instructed Mr. Mara to terminate Ms. Chenda’s contract.

Ms. Chenda’s is very upset. Her entire career is now in jeopardy. She feels that it shouldn’t matter whether she is ethnically Vietnamese or Cambodian. She would be acting a part and would do it well. She wants to play the role, but at the very least wants to be famous and feels that she deserves better than this. However, she does not want to get a reputation for being difficult. As such, she asked to privately mediate this matter.

Mr. Yem cannot afford to cast somebody controversial who might ruin the entire project. When he cast her for the role, he did not know she was Vietnamese. He feels that she should have told him. Mr. Yem would like to avoid public controversy and needs to resolve this quickly so he can begin producing his movie. The producer has not named a new lead role and Ms. Chenda’s termination has not yet been made public.
1. Worksheet: Interests and Issues

<table>
<thead>
<tr>
<th>Interests</th>
<th>Party A</th>
<th>Party B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Issues</th>
<th>Party A</th>
<th>Party B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
2. Worksheet: Mediation Settlement

<table>
<thead>
<tr>
<th>Issue</th>
<th>Resolution Terms</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Chapter 4 – Arbitration

When you understand the law, you do not fear lawsuits; when you understand religious rules, you do not fear the monks. (Cambodian Proverb)

A. What is Arbitration?

Arbitration is the third major ADR (alternative dispute resolution) method. In arbitration, the parties submit their dispute to a neutral third party (usually called the “arbiterator” or if more than one, then called the “arbitration panel” or “tribunal”). This third party considers the evidence the disputing parties have submitted and renders a decision called an “award.” As will be discussed later in the text, the award is usually binding on the parties, however, in some cases, the award can be non-binding.
1. History of Arbitration

Arbitration has a long history. It is mentioned in ancient Greek writings as well as in the Christian Bible. Modern commercial arbitration originally developed in Europe during the Middle Ages. Merchants would often travel long distances to markets where they would buy and sell goods and services. Since travel was dangerous and expensive, disputes needed to be resolved quickly and near the location of the markets. However, the standing courts at that time were unable to resolve those disputes quickly and had no knowledge of the merchants’ industry standards. This was important since these industry standards were developed to facilitate trading relationships among parties from different countries and cultures. As a result of the courts’ limitations, merchants developed private arbitration tribunals that were able to resolve disputes efficiently, often involving industry experts and industry standards.

When English settlers moved to America in the seventeenth and eighteenth centuries, they brought these arbitration models with them. As a result, arbitration played an important role in resolving commercial disputes in the English colonies of America. In 1768, the first permanent arbitration organization was established by the New York Chamber of Commerce. It is even reported that America’s first President, George Washington, inserted an arbitration clause in his will to govern any disputes among the beneficiaries. However, at that time, courts in the US, as in most countries, could not enforce arbitration awards, thereby keeping arbitration outside the formal judicial system.

In the twentieth century, as case backlogs began to grow, the courts of many nations began to accept arbitration as a legitimate method of resolving disputes. In the U.S., the 1925 Federal Arbitration Act (FAA) made arbitration clauses in commercial contracts valid and enforceable. Other countries soon followed, leading to the rise of arbitration forums all over the world. In 1923, the International Chamber of Commerce in Paris founded the International Court of Arbitration, which has become one of the best-known arbitration forums in the world. Other important arbitration forums include the

159 Id.
160 Boston, like many colonial American communities, passed laws encouraging arbitration. Patterson et al., supra note 9, at 118.
161 Bennett, supra note 157, at 9.
162 Patterson et al., supra note 9, at 118.
American Arbitration Association in New York City\textsuperscript{166} and the London Court of International Arbitration.\textsuperscript{167} In the past decade, Asia’s economic rise has led to the impressive growth of Asian arbitration forums. The three largest Asian forums today are the China International Economic and Trade Arbitration Commission (CIETAC),\textsuperscript{168} the Hong Kong International Arbitration Centre (HKIAC),\textsuperscript{169} and the Singapore International Arbitration Centre (SIAC).\textsuperscript{170} There are also arbitration forums in Japan, Thailand, Vietnam, Malaysia, Taiwan, India and Indonesia. And, as discussed later in this chapter, Cambodia joins the list with its new National Arbitration Center.\textsuperscript{171}

2. Arbitration for Many Kinds of Disputes

While most of the forums mentioned above focus on handling commercial disputes, it is important to understand that arbitration can and is applied to other areas of the law. In many countries, labor disputes are now handled by arbitration. Collective bargaining agreements often have arbitration clauses that require parties to send disputes to arbitration. Many professional sports use arbitration to resolve salary issues. Even the Olympics uses arbitration to resolve disputes.\textsuperscript{172} Construction contracts between builders and owners often have arbitration clauses. In addition, arbitration clauses have become standard in securities contracts, intellectual property agreements, and many types of consumer sales contracts.

3. How Arbitration is Different from Litigation and Mediation

\textbf{Litigation:} Arbitration looks and feels similar to traditional court-sponsored litigation. Both methods involve parties submitting evidence to a neutral party that then renders a decision. Both methods usually involve the assistance of lawyers or legal representatives and both usually involve a binding decision (which is enforceable by the courts), by which the parties must abide. However, there are a number of important differences between arbitration and litigation:

\textsuperscript{171}See Chapter 4 (E) herein, \textit{infra}.
\textsuperscript{172}See Tribunal Arbitral du Sport (Court of Arbitration for Sport) website, \textit{available at} http://www.tas-cas.org/ (last visited Oct. 19, 2008).
In arbitration, the parties decide the conditions of the arbitration proceedings. Among other things, the parties decide where and when the arbitration will take place, what procedural and substantive legal rules apply, who will serve as the arbitrator, what issues are subject to arbitration, and what remedies are available. In litigation, the parties have virtually no choice in these matters.

Arbitration tends to be faster than litigation. In many countries, litigation can drag on for years. This is usually because of case backlogs and heavy caseloads in the courts. However, with arbitration, the parties can choose a forum that is ready to hear their dispute quickly.

Arbitration tends to be less expensive than litigation. This is partly a result of arbitration being a more streamlined process. Compared to litigation, parties involved in arbitration devote less time presenting evidence and witnesses. Therefore, the parties can avoid court-mandated formalities and rules and are able to reach a resolution of the dispute much easier.

Arbitration is usually closed to the public while court litigation is usually open to the public.

Unlike litigation, arbitration decisions cannot generally be appealed.

Finally, arbitration remedies are more flexible than court remedies.

**Mediation:** Arbitration does have some similarities with mediation. Both are private alternatives to public litigation. Both can take place in private conference rooms or other locations outside of the courts. Both tend to be cheaper and faster than litigation. But, arbitration is also quite different from mediation:

- The arbitrator, after considering the evidence, makes a decision and has the power to award damages to a party. The mediator has no such power and can merely suggest possible resolutions. In other words, with arbitration, the decision making power is in the hands of the arbitrator, with mediation, the decision making power is in the hands of the parties.

- In arbitration, the arbitrator must review the facts and the law like a judge and must employ logic and legal reasoning in order to reach a decision. As such, the focus is on finding a legally sound result. However, in mediation, the mediator may have to employ social skills and subjective analysis to reach a resolution. With mediation, therefore, the focus is on finding the result that best meets both parties’ interests.

- In arbitration, the center of attention is on the arbitrator(s). The parties seek to convince the arbitrator that they should prevail. In mediation, the center of attention is on the parties. The mediator listens to the parties and tries to explore ways in which their interests can be met.
4. Different Kinds of Arbitration

Arbitration is generally considered a binding method of dispute resolution. The parties present their evidence and the arbitrator provides a binding decision. The parties must abide by this decision. They have very limited rights to appeal. The decision can be enforced by the public court system. This is the traditional and most common form of arbitration and it is given the technical term, “binding arbitration”.

However, more recently, non-binding arbitration has also become a popular option. Non-binding arbitration is similar to binding arbitration except that either party can reject the arbitrator’s decision within a short period of time following the decision. Non-binding arbitration is sometimes used to help maintain party relations. Instead of forcing a decision on the parties, the arbitrator(s) provide an optional decision. The parties use it as a bargaining tool in their negotiations. They can accept it if it meets both parties’ interests. However, the disadvantage is that it can be a waste of time and resources if the parties reject the decision and decide to continue their fight in court or elsewhere.

Non-binding arbitration resembles mediation more than litigation since it tends to be part of a negotiation process, the outcome of which the parties ultimately control. In contrast, binding arbitration tends to resemble litigation more than mediation since it involves a final decision made by the neutral party. For purposes of this chapter, when arbitration is discussed, it refers to the traditional model of binding arbitration, unless otherwise noted. Non-binding arbitration will be explored in detail at the end of this chapter as part of the discussion on Cambodia’s highly successful Arbitration Council.173

It should be noted that parties generally decide at the time of contracting whether the arbitration they agree to use will be binding or non-binding. This detail is specified in the arbitration clause in the parties’ contract. This arbitration clause will be explored further in this chapter.

Arbitrations can also be classified as either administered arbitrations or ad hoc arbitrations. Administered arbitration refers to arbitration that is conducted at an arbitration center such as the ICC in Paris or Cambodia’s Arbitration Council. These arbitration centers provide a room for the hearings, a list of arbitrators, a set of procedural rules and various other services, usually for a fee. Ad hoc arbitration refers to the parties’ choosing to develop their own forum for the specific purpose of resolving just one dispute. Usually, the decision between administered and ad hoc arbitration is made at the time of contract formation.

---

173 See Chapter 4 (G) herein, infra.
When negotiating a contract, if the parties want to resolve their dispute through arbitration, they should agree to one form or the other and state it in an arbitration clause in the contract.

The obvious advantage of *administered* arbitration is that most of the details of the process are already determined; the parties merely have to follow the chosen forum’s procedures to begin arbitration. This is why the vast majority of parties choose *administered* arbitrations. In the case of *ad hoc* arbitration, the parties must decide the details (procedural rules, fees, arbitrators, etc.) either at the time of contracting or after a dispute has arisen, and will likely need a lawyer to draft these rules. However, *ad hoc* arbitration does allow the parties to have greater flexibility on the details since they do not have to follow a particular arbitration center’s rules, including fees.

*Administered* and *ad hoc* arbitrations can be either binding or non-binding.

---

174 76% of corporations prefer *administered* arbitration over *ad hoc* arbitration. See Mistelis, *supra* note 164, at 561.
**Study Questions**

In the following disputes, choose which kind of arbitration is most appropriate:

Option 1. Binding *Administered* Arbitration
Option 2. Non-binding *Administered* Arbitration
Option 3. Binding *Ad Hoc* Arbitration
Option 4. Non-binding *Ad Hoc* Arbitration

A. Vutha sells photocopy services and Sras wants to sign a contract to purchase $1,000 of photocopy services each month for a one year term, renewable at the end of the year.

B. Nin is an architect and is offering her services to a Korean builder that will need her to help design a shopping mall to be constructed in Siem Reap.

C. Nany wants to purchase a special car from Sophal.

D. Cambo Oil Company is interested in engaging a Malaysian drilling company to perform services off the coast of Kampong Som.

E. The new Cambodian Professional Football League is asking you to design a contract that it will offer to all football players in this new league.
B. Advantages and Disadvantages of Arbitration

1. Advantages

- **Cost.** Arbitration is less expensive than litigation. This is partly because the process is usually streamlined compared to court rules. It is also because arbitration usually has no appeals process.

- **Speed.** Arbitration tends to be much faster than litigation. As mentioned above, arbitration, unlike litigation, generally does not allow for appeals. With litigation, however, parties can appeal at least once and sometimes several more times. In addition, many court systems have very large case backlogs, forcing parties to wait a long time for hearings.

- **Finality.** Because arbitration has no appeals, the arbitrator’s decision is usually final. Often, this is a big advantage to the parties.

- **Domestic Enforcement.** Now that Cambodia has passed its Law on Commercial Arbitration, Cambodian Courts can directly enforce arbitration awards. Negotiated or mediated settlements are not as easily enforceable.175

- **International Enforcement.** Under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), which Cambodia has signed, any arbitration award made in a signatory country is automatically enforceable in all the other signatory countries.176 This is a big advantage for international disputes since there is no similar international enforcement regime for court decisions.177

- **Preservation of Relationships.** While arbitration does have adversarial aspects, it is generally less adversarial than court litigation. This may help preserve relationships between parties.

---

175 However, there is an exception as mentioned in the preceding chapters on negotiation and mediation. Parties that are already in a lawsuit in the Cambodian Courts may attempt settle their cases. If they reach a ‘judicial compromise’ that is recorded in the court protocol (court record), it has the same force and effect as a court judgment and can be enforced through the courts. CCP-KC *supra* note 7, art. 222.

176 Over 140 countries have signed the New York Convention.

• **Privacy.** Unlike court litigation, arbitration is usually a private process. This can be a big advantage if the parties do not want the public to learn the details of their dispute.

• **Flexible Remedies.** Arbitrators often have the flexibility to award creative remedies that the courts cannot, such as awarding attorney’s fees to the prevailing party.

• **Expertise of Arbitrator.** The parties can choose arbitrators that have expertise in their area of business, for instance, in garments or oil extraction. Most court systems, on the other hand, do not have expert judges for specific areas of law and so the parties may have a presiding judge with no specific knowledge of their industry. Thus, in cases where specific knowledge in an area of business or law is important, the arbitration process may yield a more just and well-informed result.

• **Impartiality of Arbitrator.** Parties to international disputes often worry that the judges in the home country of a party might favor that party—sometimes called “home court advantage.” But with arbitration, the parties can choose the arbitrators and thus eliminate potential national bias.

• **Flexible Procedures.** Parties can often choose whether they want a complex procedure that looks like litigation or a more simple procedure. With court litigation, the parties must follow the legal procedures, even if they do not like them. In a 2004 survey, this advantage was cited as the top reason why international corporations chose arbitration.178

---

178 Mistelis, *supra* note 164, at 543.
2. Disadvantages

- **Costs.** Although arbitration is generally less expensive than litigation, it can still become expensive. The parties must pay for the arbitrator’s time, the courtroom, the fee of the arbitration forum, as well as all the normal litigation fees like attorney’s fees and related costs. This is usually more expensive than negotiation and sometimes more expensive than mediation.

- **Speed.** Although arbitration is generally faster than litigation, it can be slower than negotiation and mediation. The parties usually need more time to prepare their case for arbitration than if they were pursuing mediation or negotiation.

- **Lower Compliance.** Because the arbitrator’s award is not the product of negotiation and compromise, there is a greater likelihood of non-compliance with the award. Therefore, the parties may have to spend more on extra lawyer costs required to pursue judicial enforcement.

- **No Public Hearing.** In some situations, a party may prefer a public hearing, for instance, to publicly defend herself against claims or to punish the other side with possible public embarrassment. Since arbitration does not allow this, it is a potential disadvantage to parties in certain situations.

- **Preservation of Relationships.** While arbitration can potentially better preserve the parties’ relationship than litigation, the other two forms of dispute resolution, negotiation and mediation, are even more effective at this.

- **Uncertain Results**
  If the arbitrators are acting in the role of *amicable compositeur*, they will judge the case based on principles of equity, not necessarily the governing substantive law. This may lead to uncertain results.
C. Arbitration Agreement

Under Cambodia’s new Law on Commercial Arbitration,179 (“LCA”) reprinted in full in Appendix E of this book, a commercial dispute is subject to arbitration if the parties’ contract has a written arbitration clause or if they agreed to arbitration in a separate written arbitration agreement.180 This agreement to submit to arbitration must be in writing, but this requirement can be fulfilled by a written exchange of communications that demonstrates an agreement to arbitrate.181 For instance, parties may send emails or letters to each other stating that they agree to arbitrate any disputes between them but fail to actually include such a clause in their agreement. Under LCA Article 7, this might suffice as an agreement to arbitrate.

1. The Basic Arbitration Clause in a Contract

Usually, parties agree to arbitration at the time of signing their original contract. Below is a standard arbitration clause offered by the American Arbitration Association (AAA). This and other standard clauses are offered only as examples and the parties are free to develop their own arbitration clauses:

**AAA Arbitration Clause**

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

In this example, the parties have agreed to have their dispute resolved by AAA-administered arbitration.

Where the parties do NOT have an arbitration agreement but a dispute has arisen and they wish to resolve it through arbitration, the AAA offers the following standard clause:

**Post-Dispute Arbitration Clause**

*We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.*

---

179 See note 101, supra.
180 Id. art. 7.
181 Id. art. 7 (2).
2. Drafting an Arbitration Clause

In order to arbitrate their dispute, the parties should have a valid, enforceable arbitration clause in their contract. For the clause to be valid, it must be in writing. It must also be unambiguous. That means that an arbitration clause must clearly state that the parties wish to engage in arbitration in the event of a dispute. But, beyond these simple requirements, it is up to the parties or their lawyers to add any important details. In some situations, the basic arbitration clauses set forth above will suffice. But, in other situations, more detail may be necessary. In either case, the arbitration clause is the key to a successful arbitration.

When determining what details should be added to any basic arbitration clause, the parties need to consider a number of key issues. These issues will arise during the arbitration process (to be discussed in more detail below). A good lawyer should anticipate these issues and, during the initial contracting process, pay particular attention to them to help her client gain an advantage if the need for arbitration should arise. These are the key questions to consider:

a) Should the arbitration be binding?

Usually, an important reason that parties choose arbitration is to have a fast, efficient method of dispute resolution. If the arbitration is not binding, then neither party has finality from the award, and the award functions more like a recommendation offered at the conclusion of the mediation process. In that case, the process may not be fast and efficient.

This is an example of a clause that makes clear that the arbitration is binding:

\[ \text{Binding Arbitration} \]

Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

b) Should the arbitration be administered or ad hoc?

Ad hoc arbitrations offer the parties greater flexibility to develop procedures and rules to fit the dispute. However, administered arbitrations are usually chosen because they come with extensive support and offer a range of arbitrators and rules that the parties can quickly chose. At the time of contracting, many parties prefer to save time and effort and thus choose one of the main arbitration centers for administration.
c) Where will the arbitration take place?

The location of the arbitration is important, particularly for international disputes. The location can determine the cost of the dispute resolution process. If parties, witnesses, evidence, documents, etc. are far away, it can become very expensive. The location can also determine whether the local court will intervene in the process. Additionally, parties should consider whether a pool of qualified and unbiased arbitrators is available in the location. Finally, the location may affect enforcement of awards. If the location is in a country that is not a signatory to the New York Convention, then the arbitration award may have enforcement problems. Here is an example of a clause that sets forth the location of the arbitration:

**Arbitration Location**

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association’s Asia/Pacific Center for Resolution of International Business Disputes in San Francisco in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

**Simple Location Clause**

*The place of arbitration shall be Phnom Penh, Cambodia.*

d) What is the number and method of selecting arbitrators?

One of the most crucial questions is who will be the arbitrator(s). Typically, the parties agree on either one or three arbitrators. The standard AAA method is to give each party a list of AAA-approved arbitrators and allow each party to strike out those who are unacceptable. The remaining arbitrators are then ranked. The AAA then chooses a tribunal based on the parties’ choices. Another common method is to allow each party to choose one arbitrator and have those two arbitrators choose a third. Alternatively, the parties could also identify a specific person in the arbitration clause. This is risky because the person may be unavailable should a dispute arise years later. The parties could also choose to identify the kind of person that the arbitrator must be, for example, a judge or a Cambodian citizen.

Here are some examples:

**Arbitrator Selection**

*The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within ten days of their appointment, select a third*
neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

Or

In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.

Or

The arbitrator shall be a certified public accountant.

Or

The arbitrator shall be a citizen [or national] of Cambodia.

Or

The arbitrator shall not be a citizen [or national] of either Cambodia or Vietnam.

e) Should the parties engage in negotiation or mediation first?

Sometimes, parties should attempt negotiation or mediation prior to pursuing arbitration. The parties might benefit from that effort before submitting to a more adversarial process like arbitration. The following is an example of a clause setting forth negotiation first, arbitration second:

Negotiation/Arbitration Clause
In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules.
Alternatively, the parties may wish to engage in mediation first, and only if that is unsuccessful, then engage in arbitration. The Cambodian Law on Commercial Arbitration explicitly contemplates this possibility in Article 38 entitled, “Settlement.” The AAA offers the following standard clause for this strategy, sometimes called “Med-Arb”:

Med-Arb
If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties’ mediation may be asked to serve as the arbitrator.

f) Will the tribunal have the power to grant interim relief?

Sometimes the parties will want the arbitration tribunal to provide interim or preliminary relief, prior to the full adjudication of the dispute. For instance, a party may want the other party to stop printing documents that are false or misleading. If, in this example, the parties have to wait six months for a full adjudication, that might be too late. So, to prevent ongoing damages, the arbitration tribunal might order the other party to stop printing the documents immediately (sometimes called an “injunction”) until the tribunal can make a full decision on the merits.

Interim Measures
Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal’s determination of the merits of the controversy).

\[^{182}Id.\, art.\, 38.\]
g) Can the parties consolidate their arbitration with others?

In large, complex cases there are often more than two parties. For instance, in a construction case, the parties to a dispute may include the property owner, the bank that lent the money to the owner, the general contractor, the subcontractor hired by the general contractor, the material supplier, and perhaps the company planning to lease the space from the owner upon completion. In these situations, consolidation of the disputes and parties might save time and money.

Consolidation

The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

h) To what extent will the parties be required to disclose information?

In some court systems, such as in the U.S., extensive pre-trial disclosure of information is required between the parties, including documents and statements from witnesses and parties. In common law systems, this is called “discovery.” However, under the civil law systems, such as in France, this requirement to share information is more limited. Similarly, under most arbitration rules, the pre-trial disclosure requirements are also limited. However, the parties can determine to what extent they want pre-hearing disclosure in their arbitration.

Disclosure

Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration tribunal], which determination shall be
conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

**i) What remedies can the arbitrator grant?**

The parties should consider whether there are any specific remedies that they may want the arbitrator to be able to impose. Alternatively, they should also consider any specific remedies that they do NOT want the arbitrator to be able to impose.

**Remedies**

The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party’s actual damages, except as may be required by statute.

Or

*In no event shall an award in an arbitration initiated under this clause exceed $________.*

Or

*Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.*

Or

*If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of $________.*

**j) What rules will govern the proceedings?**

The procedural rules are completely up to the parties. The parties could draft their own rules, but this is rarely done because of the level of effort required and because most arbitration centers have developed a range of procedures from which to choose. Most arbitration centers will also allow parties to use another center’s rules. For instance, the AAA will allow parties to chose AAA as the administrator but use the UNCITRAL Model Arbitration Rules. Parties can also modify any of the set procedures to fit their specific needs—for instance the need for greater speed.

**Governing Procedural Rules**

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry*
Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

k) What language will be used in the arbitration proceedings?

In contracts involving international parties, it is helpful to include a provision specifying which language will be used during the arbitration proceedings.

Choice of language
The arbitration shall be conducted in the Khmer language. At the request and expense of a party, documents and testimony may be translated to and from the English language.

l) What substantive law will govern the proceedings?

The parties must identify which jurisdiction’s substantive law will govern. This is called a “choice of law provision.” It is important for the parties to know this at the time of contracting. Otherwise if a dispute arises, the court or arbitration’s conflict of laws provisions will be used to determine which jurisdiction’s substantive law applies. This creates uncertainty for the parties. As a result, a choice of law provision is almost always included in an international contract.

Choice of Substantive Law
This agreement shall be governed by and interpreted in accordance with the laws of the Kingdom of Cambodia.

The parties might also want to consider empowering the tribunal to act as an amiable compositeur (deciding based on what is just) instead of a judge (deciding based on the law).

Amiable Compositeur
The parties hereby give their express and unequivocal authorization for the Arbitral Tribunal to act in the role of amiable compositeur (ex aequo et bono).

Or

The Arbitral Tribunal shall act in the role of amiable compositeur (ex aequo et bono) only if all parties provide express and unequivocal written authorization for such a role.
m) Are the proceedings confidential?

Usually, arbitrations proceedings are confidential. Most of the major arbitration centers provide for confidentiality. However, if the parties are very concerned about confidentiality or if they are drafting their own *ad hoc* arbitration, they might want to highlight this point in their agreement.

Confidentiality

*Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.*

In addition, the parties could choose to modify the language to restrict disclosure of certain subjects, such as, restricting the disclosure of trade secrets.

n) Does the arbitrator have to prepare a written explanation?

Most international arbitration centers have rules requiring that the arbitral tribunal prepare a reasoned decision. But, some domestic arbitration centers do not have this requirement. One advantage of having a reasoned decision is that the parties will better understand the decision and be less likely to claim bias or unfairness in the result. One disadvantage is that it provides a possible basis for a court review in the event one party wishes to avoid the decision.

Written Decision

*The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.*

*or*

*The award shall include findings of fact and conclusions of law.*

o) Who pays for the fees and expenses?

Typically, the parties pay for their own attorney’s fees and costs while they split the arbitration bill. However, if the parties wish to encourage settlement prior to arbitration, they can agree to award the attorney fees and costs and/or the arbitration bill to the “prevailing party” in the arbitration. Including this type of provision in the arbitration agreement makes arbitration more risky for the parties and might encourage settlement.

Fees and Expenses

*Each party shall bear its own costs and expenses and an equal share of the arbitrators’ and administrative fees of arbitration.*
The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. “Costs and fees” mean all reasonable pre-award expenses of the arbitration, including the arbitrators’ fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys’ fees.

Exercise – Drafting an Arbitration Clause

You are the lawyer tasked to draft an arbitration clause in the following cases. Review each of the 15 issues discussed above and determine which ones, if any, need to be included in your arbitration clause. Then, draft an arbitration clause for each case below.

A. You represent Vimean. He would like to buy $20,000 in gold jewelry from a local supplier.

B. You represent Mathoura. She would like to sell her land in Siem Reap to a Korean investor.

C. You represent the Southern Rice Company. Southern Rice would like to purchase $10,000 worth of rice every month for one year from a local merchant.

D. You represent the Battambang Telephone Company. Battambang Telephone would like to sell mobile phone services to Cambodian citizens and is drafting a standard contract for each service agreement it sells.

E. You represent a Japanese company called J-Car. J-Car would like to build a factory in Sihanoukville. J-Car needs to enter into a construction contract with a local construction company.

F. You represent Noro. Noro is a famous singer and is interested in contracting with a Phnom Penh company to record and promote his new CD.

G. You represent Air Cambodia, a new airline. Air Cambodia has asked you to draft an employment contract for each of its new employees.
D. The Arbitration Process

There are six stages to the typical arbitration process. This section will address each stage and briefly discuss their significant aspects. The six stages are:

1. Initiation of Arbitration
2. Selection of Arbitral Tribunal
3. Pre-hearing Procedure
4. Arbitration Hearing
5. Decision Making
6. Appeal and Enforcement

This section will often refer to provisions of Cambodia’s new Law on Commercial Arbitration (LCA). In June 2006, Cambodia’s LCA came into force. Cambodia was obligated to enact the law when it joined the World Trade Organization (“WTO”) in 2004. The LCA largely follows the UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Arbitration Law”), with a few interesting departures. As a result, Cambodia’s arbitration rules are now harmonized with approximately 50 nations, including important trading partners such as Japan, South Korea, Singapore, Thailand and Australia.

---

183 Id. However, other international models will be discussed where there is a significant difference.
184 Key commercial laws yet to be enacted at the time of this writing include, the Secured Transactions Law, Commercial Leasing Law, Law on the Issuance and Trade of Non-Government Securities, Insolvency Law, Commercial Contracts Law, Competition Law, and Law Establishing a Commercial Court.

the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration . . . It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.


The LCA covers the landscape of arbitration matters including: arbitration agreements, composition and jurisdiction of the tribunal, conduct of the proceedings, recognition and enforcement of the award and a section entitled “National Center of Commercial Arbitration.” The law governs only commercial disputes but that term is given the same wide interpretation in the definitions section as can be found in the Model Law.187

Accordingly, this section will focus on the arbitration process set forth in the LCA.

It is important to note that the LCA is an arbitration law that provides for arbitration standards. The parties can deviate from these standards, especially with regard to the arbitration rules. For example, if the parties chose AAA or ICC as the arbitration administrator, they will likely also chose the AAA or ICC arbitration rules. Those rules are slightly different from the LCA rules, but the LCA allows the parties to do this.

The LCA follows the UNCITRAL Arbitration Law in limiting court intervention in arbitration proceedings.189 However, there is some confusion regarding the supervisory role of the courts. Article 6 of the LCA indicates that a range of supervisory functions (such as arbitrator appointment, challenge, termination, failure to act and tribunal jurisdiction) is to be “performed by the Court (Commercial, or Appeal, or Supreme) or the National Arbitration Center.”190 This language could be read to indicate that a party can appeal directly to any of these four bodies for supervisory assistance.191 Or it could indicate that there are only two appeal choices: 1) the “Court,” which means the court system generally, or 2) the National Arbitration Center. Since the language is unclear, there may be some confusion and inconsistent practices. Given the current situation, the best practice may be to petition the Cambodian Court of Appeals192 when seeking supervisory assistance from the courts. Future revisions to the LCA should address this matter.

187 LCA Article 2(h)(iv)(i) states “the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not, relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction of the supply or exchange of good [sic] or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passenger by air, sea, rail or road.” LCA, supra note 101, art. 2(h)(iv)(i).
188 With the likely exception of the Cambodian Arbitration Council.
189 Id. art. 5.
190 Id. arts. 6, 19(3), 19(4), 19(5), 21(3), 22 and 24(3).
191 The Commercial Court referenced here has not yet been established.
192 The Court of Appeals is the lowest national court currently in operation that is listed in Article 6.
1. Initiation of Arbitration

There are three ways that arbitration can be initiated: 1) request for arbitration under an existing arbitration agreement; 2) agreeing to arbitrate at the time a dispute arises; and 3) complying with court-ordered arbitration. The first of these, requesting arbitration under an existing arbitration agreement, is the most common.

a) The Claimant’s Submission

If the parties have a pre-existing arbitration agreement, which is usually part of the original contract, one party must present the other with a written request (sometimes called a “notice”) for arbitration. Under the LCA, that written request should be delivered to the other party personally or to his place of business, habitual residence or mailing address. The party initiating the arbitration is known as the “claimant” and the party receiving the request is known as the “respondent.” The arbitral proceedings commence on the date on which the respondent receives the request.

If the parties have chosen the UNCITRAL Arbitration Rules (reprinted in full in Appendix C), the AAA International Arbitration Rules, or ICCC Arbitration Rules in their arbitration agreement, then their request or notice must set forth, among other things:

1) The names and details of the parties;
2) A description of the dispute;
3) A statement of the relief sought; and
4) All relevant agreements, including the arbitration agreement.

If the parties have chosen the National Arbitration Center (“NAC”), they would have to follow those NAC arbitration rules, which have not yet been adopted as of the time of this writing. This author speculates that the NAC arbitration rules will likely be similar to the international standards found in the UNCITRAL, AAA and ICC rules.

---

193 LCA, supra note 101, art. 3.
194 Id. art. 29.
198 The three sets of rules also include the number and choice of arbitrators in the Claimant’s submission. AAA Arb. Rules, art. 2 (3)(g); UNCITRAL Arb. Rules, art. 4(3)(g) and ICC Arb. Rules, art. 3(3)(g) and art. 4 (a)-(b).
However, if no such rules have been chosen by the parties in their arbitration agreement, the LCA provides for default provisions whereby the parties must submit a statement of claim which must contain: 1) the facts supporting the claim; 2) the points at issue; and 3) the relief sought.

b) The Respondent’s Submission

Once this initial submission is made, the respondent must file a statement. Under the LCA and the UNCITRAL Rules, the respondent files a Statement of Defense, which is a response to the particulars in the claim and includes any documents and counterclaims.\footnote{\textit{UNCITRAL Arb. Rules, art. 19.}} There is no time limit unless the arbitrators provide one. Under the AAA Rules\footnote{\textit{AAA Arb. Rules, art. 3.}} and the ICC Rules,\footnote{\textit{ICC Arb. Rules, art. 5.}} the respondent has 30 days from receipt of the original notice to file a Statement of Defense (the ICC calls this the “Answer”) and any counterclaims.

2. Selection of and Challenges to the Arbitral Tribunal

a) Selecting the Arbitrators

After submitting the initial claim, the parties must select the arbitral tribunal. Under the LCA, the parties are free to determine the number of arbitrators, but it should be an odd number.\footnote{\textit{LCA, supra note 101, art. 18.}} In the absence of such a determination, the number will be three.\footnote{Interestingly, the default number of arbitrators under the AAA Arb. Rules and ICC Arb. Rules is one, unless the case warrants three. \textit{AAA Arb. Rules, art. 5; ICC Arb. Rules, art. 8(2).}}

The parties are free to choose any method to select the arbitrators. Usually, they will follow the selection method of the chosen arbitration center, such as the AAA\footnote{\textit{AAA Arb. Rules, art. 6.}} or, in the future, the NAC. In the event that they do not choose a method, the LCA provides that each party shall appoint one arbitrator and the two arbitrators shall appoint the third.\footnote{\textit{LCA, supra note 101, art. 19 (3)(a).}} If the appointment of the third arbitrator is not made within 30 days of the first two appointments, the Cambodian Courts or the NAC will, upon request of one of the parties, make the appointment.\footnote{\textit{Id.}}

If there is to be only one arbitrator and the parties have not designated an arbitration center as the administrator and they cannot agree on the arbitrator, the Cambodian Courts or the NAC will, upon request, make the appointment.\footnote{\textit{Id. art. 19 (3)(b).}}
b) Challenging the Selected Arbitrators

Under the LCA, the arbitrator must disclose prior to appointment any circumstances “likely to give rise to justifiable doubts as to his impartiality or independence.” 209 This might include conflicts of interest with one or more of the parties.

An arbitrator may be challenged for two reasons: 1) “if circumstances exist that give rise to justifiable doubts as to his impartiality or independence,” or 2) “if he does not possess qualifications agreed to by the parties.” 210 During contracting, the parties are free to agree to any challenge procedure, including those found in the ICC Rules 211 or the AAA Rules. 212 In the absence of such an agreement, the LCA provides its own. First, the challenging party must send a written statement providing the reasons for the challenge within 15 days of learning of the problematic circumstances or the problematic appointment. 213 Then the arbitral tribunal considers and decides whether to agree with the challenge. If it agrees, a new arbitrator is appointed. If it does not agree, the arbitrator in question remains on the tribunal. The challenging party can then appeal the tribunal’s decision within 30 days to the Cambodian Courts or the NAC. 214 For example:

The Kandal Tool Company and the Blue Sky Garment Factory are involved in an arbitration proceeding. Kandal has appointed an arbitrator that Blue Sky believes is not impartial due to his family’s past business dealings with Kandal. Under the LCA rules, Blue Sky has 15 days from the time it learned of the appointment or learned of the arbitrator’s past dealings with Kandal to file its challenge. The challenge must be filed with the arbitral tribunal itself. If the arbitral tribunal rules against the challenge, Blue Sky then has 30 days to file its appeal to either the Cambodian Courts or to the NAC.

c) Challenging the Arbitral Tribunal’s Jurisdiction

LCA Article 8 states that the Cambodian Courts shall refer cases to arbitration if there is a valid agreement. 215 However, the parties can also challenge the arbitral tribunal’s jurisdiction to hear part or all of the case. For example, a party may argue that it never agreed to arbitrate a certain dispute and might prefer to take that claim to a court of law. The party must first raise the claim with the arbitral tribunal. The arbitral tribunal “may rule on its own jurisdiction, including any objections with respect to the existence or

---

209 Id. art. 20.
210 Id. art. 20.
211 ICC Arb. Rules, art. 11.
212 AAA Arb. Rules, art. 8 – 9.
213 LCA, supra note 101, art. 21 (2).
214 Id. art. 21 (3).
215 Id. art. 8(1). The referral mandate is not limited to Cambodian arbitrations. This is a welcome development in that Cambodian Courts will be required to give full recognition of arbitration agreements, even of those that choose arbitration outside of Cambodia.
validity of the arbitration agreement.”\textsuperscript{216} This is similar to the UNCITRAL, AAA and ICC Arbitration Rules.

The challenging party must raise the issue at or before the deadline for the submission of the statement of defense.\textsuperscript{217} The tribunal’s decision on jurisdiction can then be appealed to the Cambodian Courts within 30 days of the tribunal’s decision.\textsuperscript{218}

3. Pre-Hearing Process

The pre-hearing process forms the next stage. Once the arbitrators have been selected and jurisdiction has been determined, the parties have a number of important issues to resolve and this is usually achieved during a pre-hearing conference where procedures, locations, and evidentiary and other issues are decided to the extent that the arbitration clause in the contract was silent or unclear on these issues.

a) Rules of Procedure

As with most other areas, the LCA provides that the parties can determine their own procedural rules. The various arbitration centers have developed many different kinds of rules and the parties generally adopt the rules of the center where they are appearing. However, they can also agree to their own rules if they choose. In the absence of agreed procedural rules, the LCA provides that the arbitral tribunal shall conduct proceedings in such a manner as it considers appropriate.\textsuperscript{219}

b) Place of Arbitration

The parties are free to determine the place of arbitration in their agreement or elsewhere. If they fail to agree, the place of arbitration shall be determined by the tribunal, “having due regard for the circumstances of the case…”\textsuperscript{220} Unless otherwise agreed by the parties, the tribunal can:

\begin{quote}
meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or to conduct inspection to \textit{[sic]} equipment, property or other documents.\textsuperscript{221}
\end{quote}

The place of arbitration is important because the arbitration laws of the host country will vary.

\textsuperscript{216} \textit{Id.} art. 24 (1). It should also be noted that a decision by the tribunal that the contract between the parties is null and void does NOT entail \textit{ipso jure} the invalidity of the arbitration clause. \textit{Id.}
\textsuperscript{217} \textit{Id.} art. 24 (2).
\textsuperscript{218} \textit{Id.} art. 24 (3). The Cambodian Court’s decision on jurisdiction is NOT appealable to the next court level.
\textsuperscript{219} \textit{Id.} art. 27.
\textsuperscript{220} \textit{Id.} art. 28.
\textsuperscript{221} \textit{Id.}
c) Language

The parties are free to agree on the language(s) of the proceedings. If they do not agree, then the tribunal will make that determination.\(^{222}\)

d) Mediation

As noted, the LCA provides for the possibility of mediation. LCA Article 38 states:

```
Upon request by both parties, prior to commencement of formal arbitration proceedings, the arbitral tribunal may confer with the parties for the purpose of exploring whether the possibility exists of a voluntary settlement of the parties’ dispute:

1) if the parties determines [sic] that it does, the arbitral tribunal shall assist the parties in any manner it deems appropriate. . . \(^{223}\)
```

This is an interesting article. It allows the arbitral tribunal to explore a mediated settlement, but only if both parties request it. The idea of pursuing mediation first and followed by arbitration is sometimes called “med-arb.”\(^{224}\)

Med-arb raises one important issue that must be considered, namely, whether the same mediator can serve as an arbitrator in the event that the parties fail to resolve all issues in mediation. In most cases, it is NOT advisable to have the mediator serve as an arbitrator in the same dispute. First, if the parties know that the mediator might become an arbitrator, they may not be as candid about their settlement positions, thus inhibiting the mediation process. Second, the arbitrator may become improperly influenced by \textit{ex parte} communications made by the parties, which the arbitrator would not ordinarily receive had she not previously served as a mediator. For these reasons, it is usually advisable to make sure that the arbitrator(s) in a med-arb proceeding be a different person(s) from the mediator. This can be ensured by placing proper language in a med-arb clause.

e) Interim Measures

Interim measures are very important. In some situations, important evidence may be subject to deterioration or destruction unless it is properly secured by a third party. Or perhaps one party may need to have the other party stop certain activities immediately.

\(^{222}\) Id. art. 30. Once the language is established, the tribunal can order that documentary evidence be translated into that language.

\(^{223}\) Id. art. 38.

\(^{224}\) The NAC Sub-Decree does not provide much clarification for this option but does hint at it when it says that one of the NAC’s roles is “providing extra-judicial commercial dispute resolution services.” See NAC Sub-Decree, \textit{supra} note 156, art. 2.
Similar to most other arbitration center rules, the LCA grants the arbitral tribunal the power to award these interim measures. The tribunal may also require a party to provide appropriate security in connection with such measures.

A party may also seek interim relief from the Cambodian Courts. Under the LCA, it is “not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court, an interim measure of protection and for a Court to grant such measure.” This clause could be potentially problematic for a foreign party that wishes to avoid the local court system. One way to avoid this is to insert appropriate language into the arbitration clause barring any party from petitioning the courts for interim measures.

f) Disclosure of Information or Discovery

As mentioned above, in some court systems, such as the U.S., extensive pre-trial disclosure of information is required between the parties, including documents and statements from witnesses and parties. In common law systems this is called discovery. However, under civil law systems, this requirement is more limited. Under most arbitration rules, the pre-trial disclosure requirements are limited. However, the parties can determine their preferred level of pre-hearing disclosure in their arbitration.

Under the LCA, the parties must disclose to each other “all statements, documents or other information” supplied to the arbitral tribunal. Prior to any arbitral hearings, the parties have the opportunity to inspect “materials, goods, other property or documents.” There is, of course, the freedom to adopt other, more extensive discovery rules. This agreement should be in writing in case the parties need to prove to the tribunal what items should have been disclosed but were not.

More extensive discovery rules will result in the lengthening of the arbitration process and higher attorney fees. On the other hand, inadequate or very limited discovery exchanges could lead to surprise and delays during the hearing when one party will need to ask for additional time to respond to unanticipated issues and evidence.

g) Experts

The LCA gives arbitrators the power to appoint experts, unless the parties have agreed otherwise. The parties are to provide the expert with all relevant information and have

---

225 LCA, supra note 101, art. 25. However, the LCA “Interim Measures” section omits the extensive regime relating to preliminary orders and recognition and enforcement of interim measures found in the UNCITRAL Arbitration Law. See UNCITRAL Arbitration Law, supra note 185, arts. 17 – 17(j).
226 Id.
227 Id. art. 9.
228 Id. art. 9.
229 It is unclear whether, in practice, a Cambodian Court would follow the parties’ preference on this point. The Cambodian Constitutional Council recently ruled that at the request of a party, the courts can intervene and that the LCA “does not limit the jurisdiction of the Court[s].” The meaning here is not entirely clear. Const. Council No. 103/00 (2006).
230 Id. art. 32 (3).
231 Id. art. 32 (2).
the right to examine the expert at a hearing after the expert’s conclusions are submitted to the tribunal.231

4. Arbitration Hearing

Typically, the arbitration process involves a hearing that resembles the trial in a common law court. The parties usually present opening statements, setting forth the facts and the law. Then the claimant presents its witnesses and documentary evidence. Witnesses should be sworn in just as in a court proceeding. The tribunal will decide if non-party witnesses can stay during the arbitration.

For live witnesses, the claimant or its attorney pose questions before the tribunal. The tribunal will sometimes ask additional questions, similar to a judge in a civil law court. The respondent also has the right to pose questions to the claimant’s witness.232

After the claimant has presented all of its evidence, the respondent then has the opportunity to present witnesses and documentary evidence. Again, the tribunal and the claimant can also pose questions to these witnesses. Then, the parties will take turns presenting a closing statement, after which the tribunal will discuss and decide the case.

The arbitration hearing is generally less formal than a court proceeding. Procedural or evidentiary issues are more flexible than in a court. If the parties agree, they do not have to have an oral hearing. The parties can choose to present solely documentary evidence and written submissions for the tribunal to consider. However, if one party wishes to have an oral hearing, then there must be an oral hearing.233 The LCA also requires that the parties have sufficient notice of any such hearing.234

The various arbitration centers such as the AAA and ICC have their own sets of rules which can be modified by agreement between the parties.

5. Decision Making

Once the arbitration hearing has been completed, the tribunal has to turn its attention to the decision. As mentioned above, under the LCA, the parties can choose to apply any jurisdiction’s substantive law.235 This is sometimes called a choice of law provision in the parties’ agreement. In the absence of a choice of law provision, the tribunal is free to choose any substantive law it considers appropriate.236

231 Id. art. 34.
232 This is called “cross-examination” in common law courts.
233 Id. art. 32.
234 Id.
235 Id. art. 36(1)
236 Id. art. 36(2)
a) Judge or Amiable Compositeur?

The parties can agree that the tribunal will be empowered to act as an *amiable compositeur* (deciding based on what is just) instead of a judge (deciding based on the law). Under the *amiable compositeur* rules, the tribunal is required to reach a decision by reference to equitable and fair principles rather than legal principles. This can result in a decision that looks more like a compromise, where each party wins something. It can also result in decision making based upon the individual arbitrators’ sense of justice, and not necessarily the law. While this is perhaps a good course of action for the party that feels it has been wronged, it creates greater uncertainty in the outcome. This option is only available if all parties agree, otherwise the tribunal will decide based on the applicable substantive law.

b) Industry or Trade Standards

The LCA also provides that in all cases, “*the arbitral tribunal shall take into account . . . the usages of the trade and customs applicable to the transaction.*” This language seems to indicate that this would apply even if the parties’ chosen substantive law does not consider industry trade and customs.

c) Majority Decision

If the tribunal has more than one arbitrator, then a tribunal decision can be made by a majority of members.

d) Default Rules

The LCA does provide for default in the event that a party fails to abide by the rules. If the claimant has failed to communicate his statement of claim in accordance with the rules, then the tribunal shall terminate the proceedings. In contrast, if the respondent fails to communicate his statement of defense, the tribunal shall continue the proceedings and not construe that failure as an admission.

---

237 *Id.* art. 36(3). The provision does not indicate that this authorization must be in the parties’ original agreement. It should be made clear at the start of the process whether the arbitrator is empowered to act in this capacity or not. *Amiable compositeur* is sometimes referred to in the Latin language as *ex decide et bono*, which literally means “according to what is right and what is good.”


239 *Id.*

240 *Id.* art. 36(4).

241 This is a potential area of uncertainty. The arbitrators may have a conflict between the substantive law and this LCA requirement.

242 *Id.* art. 37.

243 *Id.* art. 33(1). It is unclear whether this would act as a bar to reassertion of the same arbitration claim in the future.

244 *Id.* art. 33(2)
If either party fails to appear at a hearing or fails to produce documentary evidence, then the tribunal *may* continue proceedings and make the award on the available evidence.\(^\text{245}\) The use of the word *may* in this sentence and not *shall* implies that, in such a situation, the tribunal could choose not to continue the proceedings.

It should also be noted that arbitration centers have their own set of default rules which can be chosen instead of these LCA default rules.

e) Form of the Award

To be binding and enforceable through the courts, the tribunal’s award shall:

- Be made in writing and shall be signed by the majority of arbitrators.\(^\text{246}\)
- State the reasons upon which it is based.\(^\text{247}\)
- Allocate among the parties the costs of the arbitration as the tribunal deems appropriate, unless otherwise agreed to by the parties. The reasonable attorneys’ fees of prevailing party can also be awarded against the other party.\(^\text{248}\)
- State the date and location of the arbitration.\(^\text{249}\)
- Be given to each party, signed.\(^\text{250}\)

Any settlements reached under LCA Article 38 must follow these same requirements to have the force and effect of a judgment.\(^\text{251}\) The settlement must also state that it is an award.\(^\text{252}\)

6. Appeal and Enforcement

a) Recourse Against Arbitral Awards

Under the LCA and most international arbitration laws, the arbitration award is NOT appealable except in very limited circumstances. Allowing a party to easily appeal an

\(^{245}\text{Id. art. 33(3)}}\)
\(^{246}\text{Id. art. 39(1)}\) A majority of signatures (instead of all signatures) is allowed provided there is a reason for the omission of any signatures.
\(^{247}\text{Id. art. 39(2)}\). There are two exceptions: unless the parties have agreed that no reason is required or unless the award is based upon a settlement under Article 38.
\(^{248}\text{Id. art. 39(3)}\).
\(^{249}\text{Id. art. 39(4)}\).
\(^{250}\text{Id. art. 39(5)}\).
\(^{251}\text{Id. art. 38(3)}\).
\(^{252}\text{Id.}\)

167
arbitration award would take away one of the main advantages of arbitration, i.e., its ability to deliver relatively fast, cost-effective, professional dispute resolution. In other words, parties would find no real incentive to engage in arbitration if decisions could be easily appealed to the courts.

Therefore, the LCA provides only very limited grounds for the setting aside (nullification) of an arbitration award. None of these grounds involve a review of the merits of the evidence and decision. However, the Cambodian Courts may set aside an arbitration award if:

- A party to the arbitration agreement was incapacitated at the time of the agreement, or the agreement is not valid under the governing law; or
- A party was not given proper notice of the appointment of arbitrators or of the arbitral proceedings, or was otherwise unable to effectively present his case; or
- The award deals with a dispute not falling within the terms of the arbitration agreement; or
- The composition of the tribunal or the procedure was not in accordance with the arbitration agreement; or
- 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.253

The first four grounds must be raised and proved by a party. The reviewing court may consider the last two grounds, *sua sponte* (on its own accord).254 Note that the LCA states that Cambodian Courts may set aside an award under these grounds but it is not required that they do so. The party seeking to set aside an award must file an application to the Appellate Court of the Kingdom of Cambodia within 30 days of notice of the award.255 Appeals from the Appellate Court to the Supreme Court of the Kingdom of Cambodia within 30 days of notice of the award.

---


254 *Id.* art. 44(2)(b); art. 46. The language is unclear as to whether the party seeking recourse can raise one or both of these last two grounds. However, as a practical matter, the court is probably duty-bound to consider these questions, especially if it intends to enforce the award.

255 *Id.* art.42 and 44(3). This is more restrictive than the UNCITRAL Arbitration law, which provides three months to file the application to set aside. UNCITRAL Arbitration Law, *supra* note 185, art. 34(3).
Cambodia must be made within 15 days of the Appellate Court’s decision. In appropriate circumstances, the Cambodian Court may suspend court proceedings to allow the arbitration tribunal to resume proceedings or otherwise take such action to eliminate the grounds for setting aside so that it can complete the process in accordance with the law.

b) Recognition and Enforcement of Awards

After an award is issued, the prevailing party may have to enforce it if the losing party fails to abide by the award. Arbitration tribunals have no enforcement powers of their own. There are no arbitration police. Accordingly, parties must rely on the judiciary to enforce an arbitration award. Under the LCA, an arbitration award is, in effect, like a court judgment for enforcement purposes.

The LCA says:

\[\text{An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced . . .}\]

As a matter of procedure, the party seeking recognition and enforcement must supply the court with an original or certified copy of the award and arbitration agreement, as well as a certified Khmer translation, if not originally in the Khmer language. This is a simple matter and once properly submitted, the court must recognize and enforce the award as if it were a final and enforceable judgment.

However, the court may refuse to enforce the award under the following limited circumstances:

- A party to the arbitration agreement was incapacitated at the time of the agreement, or the agreement is not valid under the governing law; or

- A party was not given proper notice of the appointment of arbitrators or of the arbitral proceedings, or was otherwise unable to effectively present his case; or

- The award deals with a dispute not falling within the terms of the arbitration agreement; or

- The composition of the tribunal or the procedure was not in accordance with the arbitration agreement; or

---

256 Id. art. 43.
257 Id. art. 45(1).
258 Id. art. 45(2). See also, CCP-KC, supra note 7, art. 353, which largely mirrors the LCA’s enforcement provisions.
• The award is not yet binding on the parties; or

• 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. 259

The first five grounds must be raised and proved by a party. The last two grounds may be raised by the court, *sua sponte*. Note that these grounds for refusing recognition or enforcement of awards are almost exactly the same as the grounds for setting aside an award mentioned above. The only additional ground for refusing enforcement is that the award is not yet binding on the parties in the country in which the award was made. Also note that the language used is similar in that Cambodian Courts *may* refuse enforcement of an award under these grounds but are not *required* to do so.

A court may suspend enforcement proceedings pending the outcome of an action in a different court under which a party is seeking to set aside the award. A court may also order the party seeking enforcement to provide appropriate security. 260

c) Enforcement of International Arbitration Awards

The LCA applies to both domestic and international arbitrations. An arbitration is considered “international” if:

(i) the parties to an arbitration agreement have their places of business in different states at the time of the conclusion of that agreement; or

(ii) one of the following places is situated outside the state in which the parties have their places of business:

• the place of arbitration, if determined in, or pursuant to, the arbitration agreement;

• Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(iii) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. 261

For the purposes of this paragraph:

259 *Id.* art. 46(1) – (2). With regard to the last circumstance, public policy, the UNICTRAL notes state that this is to be understood as “serious departures from fundamental procedural justice.” UNICTRAL Explanatory Note, *supra* note 253, at ¶ 46.

260 *Id.* art. 46(3).

261 *Id.* art. 2(h)(i) – (iii).
If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; If a party does not have a place of business, reference is to be made to his habitual residence.\(^\text{262}\)

In connection with international arbitration, the passage of the LCA has brought Cambodia into full compliance with the requirements of the New York Convention on the Recognition of Foreign Arbitral Awards of 1958 ("New York Convention"). The New York Convention provides the main international framework for the recognition and enforcement of foreign arbitral awards and awards of an international character. It was passed under the auspices of the United Nations, prior to the creation of UNCITRAL. Cambodia signed the New York Convention in 1960 and it entered into force in Cambodia in 2001.\(^\text{263}\) Over 142 countries have ratified the agreement, including all of Cambodia’s main trading partners.\(^\text{264}\)

Under the New York Convention, Cambodia was required to enforce foreign arbitral awards. However, until the LCA was passed, there was no clear method of enforcement. Now that the LCA is entered into law, there is a clear Cambodian legal framework for this enforcement process. As Article 45 states, "an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and . . . shall be enforced . . . ."\(^\text{265}\) Unless one of the limited grounds for refusal are present, the Cambodian Court must enforce the award.

So, not only does the LCA provide for enforcement of Cambodian arbitration awards, but it also provides for the enforcement of international arbitration awards. For example, a dispute between a Korean business and a Thai business can be arbitrated in Hong Kong and enforced against either party in Cambodia, if either party has assets here.

This convention and international enforcement regime is one of the reasons why international businesses prefer arbitration. In the event of a dispute, they can be assured that the award will be enforceable almost anywhere in the world. Now that Cambodia is part of this enforcement regime, international businesses may be more willing to invest in Cambodia.

\(^{262}\) Id. art. 2(iv).
\(^{264}\) Id.
\(^{265}\) LCA, supra note 101, art. 45.
E. The National Arbitration Center

The LCA’s most significant departure from the UNCITRAL Arbitration Law is found in Chapter III, which establishes a National Arbitration Center (“NAC”) inside the Ministry of Commerce.266 The NAC has potentially difficult responsibilities as both an arbitration forum and as a licensing and supervisory authority for all arbitrators in Cambodia, even those who might serve in other forums.267 The NAC should pay careful attention to this dual role so that it maintains the confidence of the business and legal community. The Cambodian Chamber of Commerce and other professional associations are also authorized to establish arbitration centers and may do so in the future.268 The Ministry of Commerce has completed its Sub-Decree on the Organization and Functioning of the National Arbitration Center [NAC Sub-Decree], which will set forth the rules of operation for the NAC.269 The NAC Arbitration Rules, which are not in the Sub-Decree but will be in a separate set of rules, may resemble the UNCITRAL Model Rules that have been discussed above.

In late 2009, the NAC began choosing arbitrators and it is expected that this institution will succeed and become an important alternative to the courts in the future. If it can gain the confidence and respect of the business community, it will help encourage foreign investment and help bring arbitration of international disputes to Cambodia. The World Bank/International Finance Corporation notes:

> The [NAC] has the potential to make a significant improvement to the business environment by giving businesses a much needed alternative to existing dispute resolution mechanisms. The [NAC] may also improve Cambodia’s business environment by improving business confidence, increasing certainty and demonstrating a willingness on the part of the government to foster a better legal and regulatory environment.270

In time, it may become a serious competitor to its regional counterparts in Singapore, Kuala Lumpur and Bangkok. With the NAC, the Ministry of Commerce has an exciting opportunity to positively impact the legal and commercial communities in Cambodia.

266 Id. arts. 10 – 17.
267 Id. However, under Article 11, the parties to arbitration outside of the NAC are still allowed to choose arbitrators outside the official NAC list.
268 Id. art. 13. These centers would only be available if one or more of the parties to the dispute were a member of that organization. For instance, if the Cambodian Chamber of Commerce were to establish its own arbitration center, it would only be able to hear cases where at least one party to the dispute was a member of the Chamber of Commerce.
269 Those organizations involved in this effort include the Asian Development Bank (ADB), the United States Agency for International Development (USAID), which funds the American Bar Association (ABA) and East West Management Institute (EWMI), the International Finance Corporation--Mekong Private Sector Development Facility (IFC-MPDF), the United Nations Development Programme (UNDP) and the Cambodian Chamber of Commerce.
**F. Ethical Issues**

Arbitrators, like judges, have ethical issues. Poor ethics are fatal to any arbitration center. In 1996, the American Bar Association and the American Arbitration Association developed a Code of Ethics for Arbitrators in Commercial Disputes. Below is a list of the titles of each Canon in the Code. The Code is reprinted in full in Appendix D. The list is helpful to illustrate the kind of challenges that arbitrators face:

- **Canon I** An arbitrator should uphold the integrity and fairness of the arbitration process.
- **Canon II** An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.
- **Canon III** An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.
- **Canon IV** An arbitrator should conduct the proceedings fairly and diligently.
- **Canon V** An arbitrator should make decisions in a just, independent and deliberate manner.
- **Canon VI** An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.
- **Canon VII:** An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.
- **Canon VIII:** An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.
- **Canon IX:** Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon x.
- **Canon X:** Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.  

Attorneys representing clients in international arbitration should also be aware of ethical considerations. For instance, if an American business is forced to engage in international arbitration in Cambodia, can that American business employ its American lawyers to represent it? Or would this be considered illegal under Cambodian law? If that arbitration agreement chooses Japanese substantive law, for instance, but the arbitration...

---

takes place in Cambodia, which jurisdiction’s ethics rules apply to the attorneys in the arbitration: Japan’s or Cambodia’s or America’s? Which jurisdiction’s rules apply in areas such as confidentiality, duty to report unethical behavior, conflicts of interest, non-disclosure of evidence and attempts at influencing arbitrators?

There are sometimes no clear answers to arbitration ethics questions, particularly in the international context. However, it is important to at least consider these when drafting and preparing for arbitration.
Exercise – Arbitrator Ethics

A. You are the lawyer representing Nany in an employment case where she claims that her employer, PP Hotel Company, unjustly terminated her. Her employment agreement requires arbitration. The rules require each side to choose one arbitrator and then the two arbitrators chose a third. The arbitrator chosen by PP Hotel, Veata, is a well-respected international arbitrator. But, you learn through private research that Veata’s niece is employed by an American company that holds a 10% ownership interest in PP Hotel.

- Should you seek to disqualify Veata as an arbitrator?
- How should the arbitral tribunal rule?
- Does it matter that the party-chosen arbitrators have agreed to be neutral and independent?
- Would it matter if Veata’s niece was a low-paid cleaner?
- Would it matter if Veata’s niece was a high-paid manager who owned stock in the company?

B. You are the sole arbitrator in a case filed by a group of citizens against the Mekong Chemical Company. The citizens live near Mekong’s factory and claim that the factory is discharging harmful waste into the air causing breathing problems for the nearby citizens. You do not live near the factory so you do not believe that you have any conflict of interest in the case. However, during the final proceedings, you learn from some documents that Mekong could completely eliminate the air pollution by installing a water discharge system that would direct the waste into the nearby river. The result would be cleaner air, but pollution in the river.

You live about twenty kilometers downstream and right on the river. You like to go fishing on the river on weekends. You are concerned that if you rule against Mekong, they will have to install the water discharge system and pollute the river. Neither party has mentioned the water discharge system in the arbitration and you suspect that the citizens do not even know about this option. You cannot be sure that Mekong will install the water system in the event of losing the arbitration, because they may have other options that you do not know about. You also feel that Mekong has a strong defense case and even if you weren’t concerned about the river, you would probably rule in favor of Mekong and against the citizens anyway.

The arbitration has taken place over six months and the parties have already spent a great deal of money, including the poor citizens who live nearby. You are concerned that if you withdraw now, it will cause a great deal of extra costs to both sides since they will have to start over—costs that the citizens especially cannot afford to pay.
What should you do?

- Inform the parties that you are withdrawing due to a possible conflict that you cannot mention?

- Inform the parties that you are withdrawing due to a possible conflict and explain the conflict: there is a river discharge system that Mekong could install but it would harm the river that you live on?

- Inform the parties that you have a possible conflict of interest, explaining the conflict and wait and see if either party seeks your disqualification?

- Say nothing and rule in favor of Mekong. The costs of withdrawal are so high and you believe that you can honestly and correctly rule in favor of Mekong regardless of your concerns about the river. Why force both parties to incur extra costs of starting over again with the arbitration when a new arbitrator would probably rule the same way?
G. The Cambodian Arbitration Council

1. Jurisdiction

The Cambodian Arbitration Council (the “AC”) was established in 2003 and is part of the ADR framework for labor disputes. The easiest way to understand where the AC fits into the framework is to understand each step.

First, the parties must have a labor dispute. If it is an *individual* dispute (discussed below), either party may request mediation at the Ministry of Labor (the “MOL”).\(^\text{272}\) This is a voluntary process. If neither party is interested in conciliation/mediation at the MOL, then either party may file a complaint in the Cambodian Courts and resolve matters this way. However, if one of the parties does request MOL mediation, then the other party is required to attend and participate. If that effort does not result in a settlement, then either party may file a complaint in the Cambodian Courts within two months.\(^\text{273}\)

If the dispute is a *collective* dispute (discussed below), then MOL mediation is mandatory.\(^\text{274}\) If that effort does not result in a settlement, then the parties are required to participate in arbitration at the AC.\(^\text{275}\) Thus, the AC has jurisdiction to hear collective labor disputes, but only after MOL mediation efforts in those disputes have failed.

Under the law, the parties (employer and employees) may agree to a different method of dispute resolution in their collective bargaining agreement, and thereby bypass the AC. However, many collective bargaining agreements in Cambodia now provide for the dispute resolution process mentioned in the paragraph above. It has a strong reputation for fairness and has produced excellent results. The process is also desirable because both the conciliation and arbitration processes are free to the parties.

The graph below shows the basic legal framework for labor disputes:

---

\(^{272}\) Labor Law of the Kingdom of Cambodia, art. 300 – 301 (1997) [hereinafter LLKC]. The Ministry’s full name was “Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation.” In 2004, the name changed to “Ministry of Labor and Vocational Training.” For purposes of this book, the Ministry in charge of labor affairs shall be referred to as the “Ministry of Labor” or the “MOL.”

\(^{273}\) LLKC, art. 301.

\(^{274}\) Id. art. 303.

\(^{275}\) Id. art. 302 – 316. See also, MOL Prakas #317-01 (2001).
Labor Dispute Flow Chart

Labor Dispute

Individual Disputes

- Voluntary conciliation/mediation by Ministry of Labor
  - OR
  - Cambodian Court

Collective Disputes

- Mandatory conciliation/mediation by Ministry of Labor
  - Mandatory arbitration at Arbitration Council
  - See next flow chart in this chapter
The main question to determine is whether the dispute is “individual” or “collective.” As can be seen in the graph, the process for individual disputes differs from collective disputes. Only collective disputes can go to arbitration at the AC. Only collective disputes have mandatory MOL conciliation/mediation. The Labor Code defines what is required for a dispute to be considered “collective.” The following three conditions must be met:

1. The dispute is between the employer(s) and a group of workers;
2. The subject of the dispute relates to working conditions, professional organizations’ rights/recognition, or problems in the relationship between employers and workers; and
3. The dispute could lead to the disruption of the enterprise or threaten social peace.

**Study Questions**

Do the following disputes qualify for AC arbitration?

1. San works at the Great Moon Hotel. He is accused of stealing some hotel property and is disciplined. He feels that he was wrongly accused because he is trying to organize a union at the hotel. The hotel says that the accusation has nothing to do with his organizing efforts.

2. Socheata complains to the Star Factory that the ink used in some of the garments gives off a bad smell that is making her feel sick. She feels that other workers might also feel the same way but are afraid to say anything for fear of losing their jobs, so she is the only person complaining.

3. Thea and several other friends have quit their jobs at the King Hotel. They have taken better jobs elsewhere. After leaving, they complained that the hotel wrongfully denied them a portion of the service fee charged to customers and would like to go to arbitration on the issue even though they are no longer King Hotel employees.

**2. The AC Process**

The arbitration process at the AC is set forth in the Arbitration Council Procedural Rules.276 The rules are similar to most arbitration procedures. The parties each choose an arbitrator from a list (one list for employers and one list for employees) and the third is

---

276 See generally, Arbitration Council Procedural Rules, appendix to MOL Prakas #99 (2004), [hereinafter AC Rules]. The rules were originally issued as an annex to MOL Prakas #338 (2002) and were then re-issued under MOL Prakas #99.
chosen by the first two arbitrators.\textsuperscript{277} Even though they are chosen by the parties, those first two arbitrators have the same duties as the third one to be impartial. All AC arbitrations have a three-person \textit{panel}.\textsuperscript{278}

The AC panel is then empowered to decide on only two kinds of issues:

- Issues specified in the non-conciliation report (submitted by the MOL in the event that MOL mediation/conciliation is unsuccessful), and

- Issues arising from events occurring after the report that are a direct consequence of the dispute.\textsuperscript{279}

It should be noted that the panel can hear what it calls \textit{rights} and \textit{interests} disputes. \textit{Rights} disputes are the technical legal issues that are based upon collective bargaining agreements, contracts, and the laws and regulations of the Kingdom of Cambodia. \textit{Interests} disputes relate to benefits or policies that are not based on the laws or contracts, or other legal rights. An example would be when workers demand a pay raise not contemplated in their contracts. The AC makes its decisions about \textit{interests} disputes based upon the principal of equity and fundamental fairness.\textsuperscript{280}

This distinction between \textit{rights} and \textit{interests} disputes is important. Cambodian Courts can exercise jurisdiction over \textit{rights} disputes, but cannot exercise jurisdiction over \textit{interests} disputes because \textit{interests} disputes do not relate to a legal right.

\textbf{The fact that the AC can hear and decide on interests disputes is important since it can help to resolve all issues between the parties, not just the technical, legal ones.}

\textsuperscript{277} AC Rules, 3.1 – 3.14.
\textsuperscript{278} The AC Rules use the English term \textit{panel} to refer to the three arbitrators that decide a case. In contrast, the ICC, AAA and UNICTRAL Rules all use the term \textit{tribunal}. The LCA also uses the term \textit{tribunal}. The two terms are interchangeable and refer to the same body—the group of arbitrators that together decide a case.
\textsuperscript{279} See e.g., \textit{Raffles Le Royal} (AC #22/04).
\textsuperscript{280} LLKC, art. 312(2).
Study Questions

Are the following disputes rights or interests disputes?

- Older employees at a garment factory seek seniority supplement pay similar to those earned at other factories.
- Workers at a large hotel demand overtime pay of 1.5 times the normal pay.
- Workers demand a standard bonus pay at Khmer New Year.
- Factory workers threaten to strike due to harassment by management agents.
- Female workers at a hotel claim that management discriminates against them when it comes to promotions.
- Workers at a chemical factory complain about headaches and other medical problems they believe are the result of exposure to harmful chemicals inside the factory.

After jurisdiction is established and the arbitration panel is chosen, the arbitration panel must conduct a hearing. At this hearing, the parties may be represented by a lawyer or another person. The proceedings are in the Khmer language, although a party may choose to speak in another language as long as it is properly translated by an interpreter. The proceedings are private.

The parties may provide documentary and other evidence to the panel. The panel may also require the production of certain evidence, like documents, from a party. The panel may also obtain evidence from an expert. Finally, the panel and the parties may question witnesses at the hearing.

The arbitration panel may also engage in mediation efforts between the parties. If the mediation is successful, the parties may agree to make the settlement part of a consent order, which has the same effect as an AC award.

281 MOL PRAKAS #99, art. 18 (2004).
282 Id. art. 19.
283 Id. art. 23.
284 Id. art. 29.
285 Id. art. 24.
286 Id. art. 26.
287 Id. art. 30.
288 Id. art. 34 (F).
During the AC process, parties must abstain from any strikes or lockouts or any other actions that might aggravate the situation between the parties. The parties can also agree at the start to change the process so that it is binding arbitration, instead of the normally non-binding nature of AC arbitration. All parties must consent in writing for this change to take place.

3. The AC Award

After the hearing, the panel must provide an award. The award is the final written decision of the panel. The award is publicly available and provides a summary of the procedure, a description of the claims, and reasons for the decision. Unless both parties agree to an extension, the AC is required to hear the case and make an award within 15 days of referral from the MOL. The law gives the AC panel the power to award any “civil remedy or relief which it deems just and fair,” including:

- Orders to reinstate dismissed employees;
- Orders for back pay;
- Orders to cease industrial action (such as strikes);
- Orders to cease illegal or prohibited conduct;
- Orders to bargain;
- Orders relating to a settlement between the parties; and
- The establishment of terms for a collective bargaining agreement.

If the parties have agreed to binding arbitration or if their collective bargaining agreement requires binding arbitration, the AC award is immediately enforceable. However, in all other cases (and this is more common for the AC), the arbitration award issued by the AC is non-binding. This means that either party may file an Opposition with the AC Secretariat within eight days of the award. The filing of an Opposition makes the award unenforceable. At that point, the parties are free to pursue other remedies to resolve their dispute, including filing a lawsuit in the Cambodian Courts (in the case of rights disputes) or taking industrial action such as strikes or lockouts (in the case of rights or interests disputes). The legal system requires that parties go through these various ADR steps of MOL mediation and AC arbitration before they can take more drastic actions like strikes.

This non-binding process often results in awards that the parties accept. Even if they file an Opposition, the award is a very useful piece of information for the parties to consider in their dispute. It tells them what is likely to happen if they were to file a lawsuit in the

289 MOL PRAKAS #338, art. 20 (2002).
290 See MOL PRAKAS #99, art. 42.
291 Id. art. 38.
292 LLKC, art. 313; MOL PRAKAS #99, art. 39.
293 MOL PRAKAS #99, art. 34.
294 Id. art. 42.
295 Id. art. 40.
Cambodian Courts. In essence, it helps encourage the parties to settle the case privately, even if one side files an Opposition, and makes the award unenforceable.

If neither party files an opposition within eight days, the award becomes final and enforceable.\textsuperscript{296} If the award becomes enforceable and one party refuses to abide by it, the other party may petition the Cambodian Courts for enforcement. Under the law, the Cambodian Courts must enforce the AC award just like a court award unless the award was unjust due to significant procedural irregularities or because the AC rendered an award that exceeded its legal authority.\textsuperscript{297}

Any part of the AC award that relates to interests disputes has the status of a collective bargaining agreement that cannot be altered for one year.\textsuperscript{298}

The following flow chart illustrates the enforcement regime for collective labor disputes:

\textsuperscript{296} LLKC arts. 313 - 314; MOL PRAKAS #99, arts. 40 - 41.
\textsuperscript{297} MOL PRAKAS #99, art. 47
\textsuperscript{298} Id. art. 43 – 44.
Mandatory arbitration at Arbitration Council

Parties choose or CBA sets forth binding arbitration

Parties choose non-binding arbitration

AC Award issued

AC Award is issued

Opposition filed within eight days of award?

AC Award is binding on the parties

No

AC Award is non-binding and parties are free to take other actions

Yes

Cambodian Courts enforce award (rights disputes)

Rights Disputes

Parties may file lawsuit in Cambodian Courts

Interests Disputes

Parties may take industrial action such as strikes and lockouts
Exercise – Arbitration Case: Workplace Harassment

You are the attorney for Lee Ling. She has told you the following story: She worked at an office in Phnom Penh that manufactures and sells paper products to other businesses. She was hired by Mr. Sou Phen, the general manager. At first, she was a receptionist but eventually worked her way up to a salesperson position because of her hard work.

Mr. Phen helped Ling with her sales technique since she had no sales experience. He often worked into the evenings with her and she considered him her friend. She became an excellent employee and sold far more products than the other sales people.

One night at the office, Mr. Phen surprised her by telling her that he loved her. He wanted her to come back to his house and stay with him. Ling rejected the request, telling him that she already had a boyfriend and that she was friends with Mr. Phen, nothing more. Besides, Mr. Phen was already married.

The next day at work, Mr. Phen announced that he was creating a new position, “Sales Manager.” This would be a big promotion and provide twice the salary of the regular sales person. Naturally, Ling thought that she would get the job. Later that day, Mr. Phen asked Ling if she would reconsider his proposal. He said that he would make her Sales Manager if she agreed to be his girlfriend. He then tried to kiss her, but she pushed him away saying, “no thank you”.

The following day Mr. Phen announced that Suy An, another sales person with much lower sales figures than Ling, was being promoted to Sales Manager. Ling was very angry. Ling had earned the top sales position every month for the past year. How could Mr. Phen pass her over in favor of An?

A week later Ling was 30 minutes late for work due to bad traffic. Although the company rules required everybody to start work at 8:00 am, it was common for people to be late on occasion due to traffic or other issues. The late person would stay extra or work over the lunch hour to make up for the lost time. When Ling walked in, Mr. Phen told her that her job was terminated for violating the company policy on working hours. She was immediately escorted out of the building.

Ling has no family in Phnom Penh and is worried about money. She cannot get a good job like this from another company without at least a recommendation from Mr. Phen, which seems very difficult now. She thinks that her story would be very embarrassing for Mr. Phen and the company if it became public. During your investigation, you have discovered that three other former employees have similar stories about Mr. Phen before they were fired for technical reasons like being late. And, there is evidence that Mr. Phen may have forced Suy An to become his girlfriend in exchange for giving her the promotion. Ling has also learned that some of the other salesgirls have been propositioned by Mr. Phen.
- Assuming that the employees are members of a union and the union has a collective bargaining agreement that provides for arbitration of collective disputes at the Arbitration Council (AC), would the AC have jurisdiction to hear this particular case? Why?

- Assuming that the case went before the AC, would you propose, as lawyer for the employees, that the arbitration be binding or non-binding? Why?

- Assuming that you represent the employer in this case, would you propose that the arbitration be binding or non-binding? Why?

- Considering the two sides’ interests in this case, what are the advantages and disadvantages of binding arbitration as compared to court litigation? Or is there no difference?

- What are the possible awards that the AC could give the employees in this case?

- What award(s) should the AC give the employees in this case? Why? What additional information would help you decide?

- If, after non-binding arbitration, the AC awarded each dismissed employee reinstatement and back pay for the time out of work, would you recommend that they:

  1) file an Opposition or
  2) accept the award or
  3) try to negotiate a better settlement and if unsuccessful, file an Opposition or
  4) try to negotiate a better settlement and if unsuccessful accept the award?

  Why?
Chapter 5 – Conclusion

As evident from the chapters in this book, disputes can be resolved in many different ways. This book focuses on the three main alternatives to court litigation: negotiation, mediation and arbitration. Each process has been explained in detail in individual chapters. This chapter will briefly compare the three processes to allow the reader to decide which process is best suited for a specific dispute. The illustration below provides a basic comparison of the three ADR forms and traditional litigation:
A. Comparing ADR Using Common Criteria

One way to compare the various forms of ADR is to understand how they differ based upon the most commonly used criteria:

- Party control
- Level of Formality
- Speed
- Privacy
- Cost

The following chart compares the various dispute resolution techniques based upon these common criteria:

<table>
<thead>
<tr>
<th>Ignoring the Problem/Take No Action</th>
<th>Self-Help</th>
<th>Negotiation</th>
<th>Mediation</th>
<th>Arbitration</th>
<th>Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private decision made by party</td>
<td>Private decision made by party</td>
<td>Private decision made by both parties</td>
<td>Semi-private decision made by both parties</td>
<td>Semi-private decision made by third party</td>
<td>Public decision made by third party</td>
</tr>
</tbody>
</table>

- More party control
- Less formality
- Fast process
- More privacy
- Less expensive

- Less party control
- More formal
- Slow process
- Less privacy
- More expensive
As can be seen, all forms of ADR provide the parties with greater control over the process than traditional litigation. However, some ADR forms, like arbitration, still require parties to relinquish a substantial amount of control over the process. Those on the left provide the greatest level of party control over the process. Those forms on the right tend to be the most formal and the slowest forms of dispute resolution. The two forms farthest on the left, taking no action and self-help, provide the party with the most control and tend to be the quickest and most inexpensive.
B. Comparing ADR on Outcome Flexibility

Some forms of ADR are more flexible than others in their ability to craft a mutually acceptable resolution.

### ADR Methods Compared – Outcome Flexibility

<table>
<thead>
<tr>
<th>Method</th>
<th>Mediation</th>
<th>Negotiation</th>
<th>Self-Help</th>
<th>Arbitration</th>
<th>Litigation</th>
<th>Ignoring the Problem/Take No Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation</td>
<td>Third party works with parties to find a mutually acceptable solution</td>
<td>Parties work together to find a mutually acceptable solution</td>
<td>Parties work separately on conflict resolution</td>
<td>Mutually chosen third party resolves dispute based on agreed rules</td>
<td>Judge resolves dispute based on applicable laws</td>
<td>No actual resolution</td>
</tr>
</tbody>
</table>

Mediation is perhaps the most creative and flexible process for finding resolutions. All parties to the process, including the neutral, search for possible settlements. The open discussion helps facilitate maximum creativity. Negotiation is also flexible but without a third party neutral involved, the parties sometimes do not have the opportunity to explore as many creative solutions. Arbitration and litigation are limited in their creativity and flexibility since the court or arbitrator must follow legal principles in resolving the dispute.
C. Comparing ADR on Preservation of Parties’ Relationship

Another area of comparison is the ability of each ADR method to preserve the parties’ relationship. For some disputes, the most important criterion is whether the process and outcome will preserve the parties’ relationship. As evident in the chart below, some methods are better than others:

<table>
<thead>
<tr>
<th>ADR Methods Compared – Preservation of Parties’ Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Negotiation</strong></td>
</tr>
<tr>
<td>Parties work together to find a mutually acceptable solution</td>
</tr>
</tbody>
</table>

Negotiation is likely the most effective ADR method for preserving the parties’ relationship. When two parties come together privately to resolve their differences, the chances of preserving their relationship are high. Mediation is also strong in this category, but the presence of an outsider helping the parties resolve their dispute makes this form slightly less effective for relationship preservation. Nevertheless, mediation is usually an excellent way to maintain the parties’ relationship. Depending on the circumstances and the dispute, mediation can sometimes be more successful than negotiation.

Taking no action is in the middle because while it might preserve the relationship in the short term, it may affect the relationship in the long term. For instance, if a wife decides not to complain about her husband’s gambling, the relationship may be preserved for the short term, but in the long term, she may grow increasingly discontent and eventually express her frustration in unhelpful or even destructive ways.

Self-help is weak in preserving relationships since it is considered a unilateral action, taken without consulting the other party. Depending on the form that self-help takes (like
physical violence), it is potentially the most problematic in terms of relationship preservation. Similarly, arbitration and litigation are highly competitive and result in a winner and a loser, which may make preserving the relationship difficult. Arbitration at least allows for a more informal and flexible procedure that might “soften” the experience.
D. Comparing ADR in Disputes about Principle

Some disputes are not about money, but instead about a principle. They might relate to human rights or defamation. For instance, a party might feel that a newspaper has improperly accused him of some kind of wrongdoing.

### ADR Methods Compared – Disputes about Principle

<table>
<thead>
<tr>
<th>Litigation</th>
<th>Arbitration</th>
<th>Mediation</th>
<th>Negotiation</th>
<th>Self-Help</th>
<th>Ignoring the Problem/Take No Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Third party decides publicly who is right/wrong</td>
<td>Third party decides privately who is right/wrong</td>
<td>Third party helps parties reach resolution and private vindication</td>
<td>Private vindication and resolution</td>
<td>Private act. No vindication, no decision on who is right/wrong</td>
<td>No vindication, no decision on who is right/wrong</td>
</tr>
</tbody>
</table>

When dealing with disputes over a principle, such as who is right and who is wrong on an issue, litigation is the best option because it provides a public decision on the issue. Arbitration provides a private decision, which may be enough for some disputes. Mediation and negotiation do not decide matters of principle but the parties may nevertheless reach an understanding and agreement. Self-help and taking no action usually provide no relief on issues of principle.
E. Comparing ADR in Cases of Power Imbalances

Some disputes have an imbalance of power. One party is much stronger than the other. The strength might be due to the size and wealth of the parties. Or, it might be due to the circumstances. For instance, consider a large company and an individual. There might be an imbalance in favor of the company due its wealth and large team of lawyers. In that case, the individual might want some protection against the powerful company. On the other hand, the imbalance might be in the opposite direction. The company might desperately need this person because he has a great deal of knowledge about the company’s computer system. In a dispute over his salary, the individual has far more power than the company. In that case, the individual does not need any protection.

ADR Methods Compared – Cases of Power Imbalances

<table>
<thead>
<tr>
<th>Litigation</th>
<th>Arbitration</th>
<th>Mediation</th>
<th>Negotiation</th>
<th>Self-Help</th>
<th>Ignoring the Problem/Take No Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Third party decides publicly who wins</td>
<td>Third party maintains procedural and outcome fairness</td>
<td>Third party helps prevent strong side from intimidating weak side</td>
<td>Powerful side can force weak side to capitulate</td>
<td>Powerful side wins</td>
<td>Powerful side wins</td>
</tr>
</tbody>
</table>

As the chart shows, litigation provides the strongest protections for a weak party in a dispute. A judge will make sure that both parties play by the same rules and will resolve the dispute based on the law, with no regard for the parties’ respective powers. Negotiation, by contrast, is just between the two parties. Therefore, the one with the greater power can take advantage of this to force the other into a settlement favorable to the powerful party. For example, in the case mentioned above, the employee with the specialized computer knowledge can force the company to raise his salary because he can leverage his greater power to arrive at a favorable settlement.
Exercise – The King’s Table

This exercise is designed to help demonstrate the difference in outcome and process between mediation and arbitration.

Instructions:

You will be assigned the role of either Sitha, Heang or Arbitrator/Mediator. Meeting in groups of three, you will first have twenty minutes to ARBITRATE the case. (Remember, in an arbitration each party presents his/her best arguments to persuade the arbitrator of the rightness of his/her position. The arbitrator may ask questions, but does not encourage settlement discussions.) Do not announce your decision to the parties.

The Arbitrator then moves to another group where s/he has twenty minutes to MEDIATE the case. (Remember, in a mediation, the neutral’s role is to facilitate discussion between the parties to help them reach a resolution which is mutually acceptable.)

The Facts:

Sitha and Heang are old friends. They have also practiced law together for almost 15 years. Due to some management differences, they have decided to end their law partnership. They have negotiated a division of all their assets, except for the King’s Table. Sitha and Heang had no trouble dividing their clients, the library, the computer equipment, the office lease, or their staff. But neither will compromise on the King’s Table.

The King’s Table is an antique table which had been in the Royal Palace of the Khmer King in the 1800s. When Sitha and Heang began practicing law together, Sitha’s wife, who goes to many antique stores and auctions, had looked for a long time for the perfect table for the lawyers’ main conference room. She had purchased several old desks, chairs and lamps – which Sitha and Heang had no trouble dividing – but had not been able to easily find the perfect table for Sitha and Heang’s main conference room.

The King’s Table was found in a small shop near Phnom Penh. It had not been purchased by other buyers because it had been painted over with several coats of very ugly paint and it had cracks and bruises and one side was lower than the other. But Sitha’s wife recognized it immediately as the King’s Table. When Sitha and Heang saw the table, they knew at once that she had done well.

Heang, a woodworker, carefully removed the old paint, healed the table’s cuts, balanced the surface by adding some matching, high-quality wood to one leg, refinished the table surface and restored it to its original beauty.

Both Sitha and Heang have proudly used and cared for the table for the past 15 years. Their clients, other lawyers and visitors to their office have always commented on the rarity and beauty of the table. Sitha and Heang believe the table is priceless. As a result, neither Sitha nor Heang is willing to part with the table and neither will sell it to the other, no matter the price.
<table>
<thead>
<tr>
<th>Question</th>
</tr>
</thead>
<tbody>
<tr>
<td>What were the results of the arbitrations?</td>
</tr>
<tr>
<td>What were the results of the mediations?</td>
</tr>
<tr>
<td>How did they differ?</td>
</tr>
<tr>
<td>How was the experience different?</td>
</tr>
<tr>
<td>How did you feel about your partner after each round?</td>
</tr>
</tbody>
</table>
F. Choosing the Best Process

There is no one single method of dispute resolution that is superior to all others. The best approach a lawyer or party can take when choosing among different dispute resolution methods is to consider the various criteria discussed above and try to determine which one is in the parties’ best interest. The following is the list of criteria to consider:

- **Party Control**
  Does the party want the flexibility to develop his/her own rules? Or are standard rules better?

- **Formality**
  Is she better off with formal court rules with which her company is familiar? Or does she need an informal process, given her low level of sophistication?

- **Speed**
  Is there an urgent need to resolve the matter? Or would she be better off forcing the other side to fight for several years?

- **Privacy**
  Does the dispute involve sensitive information about the party that would be embarrassing to have publicized?

- **Cost**
  Is the party a large multi-national company or a poor individual? Is the dispute over one million dollars or does it involve, for instance, a broken mobile phone?

- **Outcome flexibility**
  Are the standard court outcomes like money damages sufficient or would the party prefer a larger choice of outcomes?

- **The parties’ relationship**
  How important is it that the parties’ maintain their relationship?

- **Dispute over principle**
  Is this a dispute over a principle such that the party wants a decision on who is right and who is wrong?

- **Power balance**
  Is there a power imbalance such that the party might need protection?
• **Public interest**\(^{299}\)
  Is this a case about the public interest? An example would be a lawsuit to prevent the granting of a logging concession in a protected forest.

• **Durability**\(^{300}\)
  Durability is about whether the party needs the resolution to be “durable,” that is, to stay in force. For instance, a privately negotiated settlement agreement might resolve matters today, but tomorrow, one of the parties might breach the agreement. The party might need to have a binding decision that is enforceable.

It is important to recognize that the best dispute resolution method for one party to a dispute may not be the best method for another. For example, in a dispute with a large power imbalance, the strong party might prefer private negotiation so as to take advantage of its power. The weaker party however, might prefer litigation so that the judge is there to protect her. However, in many other cases, one ADR method is appropriate for both parties.

---

\(^{299}\) This criterion was not covered above because it does not fit well into the chart format.

\(^{300}\) This criterion was not covered above because it does not fit well into the chart format.
Study Questions

The following is a list of disputes. For each dispute, identify which of the six ADR methods is most appropriate for each party. In some of these disputes, the parties will both want the same method, while in other disputes, they will want different methods. There may be more than one correct answer. For instance, negotiation and mediation may be equally appropriate for a particular party.

The six ADR methods are: 1) Self Help, 2) Take No Action, 3) Negotiation, 4) Mediation, 5) Arbitration and 6) Litigation

1. Vuth thinks that his father is too strict with him. His father disagrees.

Best ADR method for Vuth: __________________________________________

Best ADR method for Vuth’s father: _________________________________

2. Beijing-based Four Star Manufacturing Company owes the Mondolkiri Rubber Company $50,000. Mondolkiri is worried about recovery because Four Star has no assets in Cambodia.

Best ADR method for Mondolkiri: _________________________________

Best ADR method for Four Star: _________________________________

3. Sapor does not like the fact that her boss Phyreak refuses to give her four days off during the Pchum Ben Holiday.

Best ADR method for Sapor: _________________________________

Best ADR method for Phyreak: _________________________________

4. Thirit is the coach of the Cambodian national football team. Bunsang is the best player in Cambodia. But Bunsang and Thirit do not like each other and each one refuses to participate if the other is on the team.

Best ADR method for Thirit: _________________________________

Best ADR method for Bunsang: _________________________________
5. The Happy Hunting Food Company has contracted with the Big Meal Restaurant to supply the restaurant with chicken meat. After Happy Hunting delivered the second truckload of chicken, Big Meal informed Happy Hunting that it could not pay for the chicken because it was having financial problems.

Best ADR method for Happy Hunting: ________________________________

Best ADR method for Big Meal: ________________________________

6. The Megabucks Development Company decided that it wanted to build a large hotel on land that poor people were using for their homes. The poor people did not have formal title to the land but claimed to have been occupying the property for more than five years. Megabucks purchased title to the property but now must consider what to do about the poor people who refuse to leave since they claim rights to the land.

Best ADR method for Megabucks: ________________________________

Best ADR method for the poor people: ________________________________

7. The Saphon Sewage Company has received a complaint from some residents of Phnom Penh that the sewage is polluting the water in the river that residents use for drinking, washing, fishing and recreation.

Best ADR method for Saphon: ________________________________

Best ADR method for the local residents: ________________________________

8. A policeman hit Sisovanna in the head with a stick when she rode by on a moto. The policeman says it was an accident. She was severely injured and had over $2,000 in hospital bills.

Best ADR method for Sisovanna: ________________________________

Best ADR method for the policeman: ________________________________
9. Kunthea is very angry with Sophal. Sophal borrowed her moto and refused to give it back. Then, he sold it to a third party and the moto disappeared.

Best ADR method for Kunthea: _______________________________________
Best ADR method for Sophal: _______________________________________

10. The Brilliant Diamond Company bought some stones from Rethy that turned out to be fake. Brilliant wants to recover its losses from Rethy and is worried that Rethy is not trustworthy and has hidden his money.

Best ADR method for Brilliant: _______________________________________
Best ADR method for Rethy: _______________________________________

11. Movie star “Sina” feels that the Morning Star Magazine has published a false and misleading story about her personal life.

Best ADR method for Sina: _______________________________________
Best ADR method for Morning Star: _________________________________
G. New ADR Methods

In addition to the three traditional ADR methods, there are a number of new methods of dispute resolution that have developed in different places. The following is a list of some of these methods:

- **Mini-trial**
  In the mini-trial, the parties engage in a short trial before a neutral, presenting key evidence and witnesses and short opening and closing statements. The neutral provides an advisory opinion based on the evidence. The opinion helps the parties predict how a court would rule in the case if the parties’ negotiation fails and they must go through the litigation process. The parties take this information back to the negotiation and use it in their negotiation discussions. This is an expensive process that is usually reserved for large, complex disputes.

  A variation is called the Summary Jury Trial, which is similar to the mini-trial, but uses a jury instead of judge to render the non-binding decision. This is used for large cases that will go in front of a jury if the parties cannot settle.

- **Early Neutral Evaluation (ENE)**
  ENE is similar to the mini-trial but is much shorter and usually part of a court-annexed ADR program. The parties each make a presentation to a neutral that then provides a short, non-binding prediction of the case’s outcome if it goes to trial. This helps the parties in negotiation. It can be performed early or late in the litigation process.

- **Settlement Conference**
  This was originally found in the U.S. but is gaining in popularity elsewhere. In the settlement conference, a judge or magistrate associated with the court system conducts an informal facilitative style mediation where she tries to determine whether the case can be settled. It is always a court-annexed procedure and usually takes place shortly before a trial. The Cambodian Civil Procedure Code provides for something very similar at the Preparatory Proceedings for Oral Argument. In Cambodia, it appears that the same judge presiding over the case will engage in the mediation. In the U.S., this is sometimes true, but often the judge or magistrate serving as mediator will be different from the judge or magistrate serving as the judge in the trial.

301 CODE OF CIVIL PROCEDURE OF THE KINGDOM OF CAMBODIA, 55 Official Gazette of Kingdom of Cambodia 5296, 5336, art. 104 (“At the preparatory proceedings for oral argument, the court shall first seek to effect a compromise settlement . . .”) (2006). The CCP-KC’s official commentary states that this article refers to the court mediating the dispute, include holding private caucuses (called “cross-interviewing” in the text). CCP-KC Commentary, supra note 12, at Book Three, Ch. Two, Sect. II (II)(3), p. 51-52.
• **Med-Arb**302
This is short for mediation-arbitration. The concept, as discussed briefly in the arbitration chapter, allows parties to attempt mediation first. If that fails to resolve all matters, then they move on to arbitrate the case, whereby the arbitrator makes binding decisions. There is some disagreement about whether the same person can serve as both mediator and arbitrator. The advantage to having the same person is that he/she can conduct the arbitration in a short time, since she already knows the issues. However, concerns about conflicts and disclosure of confidential information have led many practitioners to recommend a different person to serve as arbitrator.

• **Neutral Fact Finder**
In this procedure, the neutral investigates the dispute and usually considers party submissions and evidence he obtains independently. The neutral issues a report (sometimes with recommendations) that the parties then consider in their settlement negotiations. This method is most appropriate when there are significant factual disputes in the case.

• **Baseball Arbitration**
In Baseball Arbitration, the parties present evidence in a manner similar to a standard arbitration, but at the end, each party submits a proposed monetary award to the arbitrator. The arbitrator must choose one of the proposed awards without making any modification. The process forces parties to present reasonable proposals and limits the arbitrator’s discretion. The method gets its name from the American sport of baseball, where this procedure was first developed. It is sometimes called “Final-Offer” Arbitration. This method works best when there is a single, discrete point at issue, like salary level or amount of damages.

• **Ombudsman**
The Ombudsman is usually found inside a large institution. She usually serves as a neutral who researches and hears complaints and tries to facilitate solutions like a mediator. The Ombudsman is usually appointed by the institution and tries to prevent conflicts from becoming too serious or large. She usually has no power to decide disputes, but can often publish a report or a finding that the institution may or may not choose to follow.

• **Court-Annexed Non-binding Arbitration and Non-binding Mediation**
In many countries, court-annexed programs allow for the parties to engage in a short, non-binding arbitration or mediation. This is meant to facilitate settlement and reduce case backlogs. The mediation method may be obvious but the arbitration needs explanation.

With the non-binding arbitration programs, the arbitrator usually renders an award that, like ENE, helps the parties in their negotiations. But, the decision is binding

---

unless a party rejects it within a short period of time. Many court-annexed programs create settlement incentives whereby the party that rejects the award must achieve a better result in the future court trial, or else has a monetary penalty imposed against it.

- **Collaborative Law**
  Collaborative law is an alternative method of resolving family law disputes. It was developed in the U.S and has become popular in other countries in recent years. In collaborative law, the parties’ lawyers all agree to withdraw from representation in the case if they fail to reach a settlement prior to trial. This four-way agreement encourages settlement because the parties will have to start over with new lawyers if they cannot reach agreement. At the moment, collaborative law is largely limited to divorce cases.

- **Online Dispute Resolution**
  Since the late 1990s, online dispute resolution (ODR) services have become popular in the U.S. and elsewhere. ODR services can be pure online dispute processes, offered by companies like Cybersettle and SquareTrade, where the parties exchange all information and offers online. Or, ODR can refer to more mixed processes, offered by traditional providers like the American Arbitration Association, where the parties submit some information via email, web forms and web-based video conferences, but still meet face to face or on the phone at other times.

---

303 The Cambodian Arbitration Council has a similar system.
304 Collaborative law is growing very fast among family law practitioners in the U.S. because it is very successful in helping settle cases. *See Collaborative Counselors, ABA Journal, 52* (June 2006). However, at least one state ethics committee has found it to be in violation of the Rule of Professional Responsibility. *A Warning to Collaborators, ABA Journal, 22* (May 2007). The article notes that five other jurisdictions in the U.S. have found collaborative law to not violate ethics rules. *Id.*
305 *See, e.g., Settling It On The Web, ABA Journal, 40* (October 2007).
Glossary of ADR Terms

The following is a glossary of terms commonly used in connection with alternative dispute resolution techniques.

**Alternative Dispute Resolution (ADR).** ADR refers to a variety of techniques that can be used to resolve disputes outside of court litigation. The most common are negotiation, mediation and arbitration.

**Arbitration.** Arbitration is a process that looks similar to a court proceeding. The parties present limited evidence to the arbitrator, and then the arbitrator makes a decision. The process can be very limited or very lengthy, depending on the agreement of the parties. The decision can be either binding or non-binding and is usually only appealable in limited circumstances. Participation in arbitration can be either voluntary or mandatory, depending on the circumstances.

**Award.** An award is the term often used to describe the arbitration panel’s decision in a case. Under most laws, arbitration awards are in writing. Under the Cambodian LCA, an arbitration award is considered enforceable like a court judgment. In addition, under that same law, parties can settle their case before or during the arbitration process and agree to call the settlement an award.

**Binding.** A binding agreement or decision is something that the parties must follow because it is legally enforceable. A binding arbitration decision is legally enforceable like a court judgment.

**Caucus.** A caucus is a private meeting during a mediation session between a mediator and party. It is used to help discuss issues out of the presence of the other parties. Parties are sometimes more honest and reasonable in a caucus than when they are talking in front of the other parties.

**Conciliation.** Conciliation refers to all types of proceedings where a neutral person assists parties to reach an amicable settlement. In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (called caucuses) and through suggesting specific solutions. In other traditions, the neutral takes a more passive approach and allows the parties to control the process. Both approaches are valid.

Conciliation is generally used interchangeably with the term *mediation*. For the purposes of this book, the term mediation is usually used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term is used.

**Conciliator.** The conciliator is the neutral person in a conciliation proceeding.
**Confidentiality.** Information shared during an ADR process is generally considered confidential and not to be revealed to the outside world. This is one important reason why parties favor ADR over other dispute resolution methods.

**Court-Annexed ADR.** A court-annexed ADR program is one that is sponsored in some way by an official court. Court-annexed ADR programs can be voluntary or mandatory for the parties.

**Defendant.** The defendant is the party in a dispute against which the plaintiff has filed some form of claim or complaint.

**Hearing.** A hearing is a proceeding in which factual evidence is given to the neutral so that the neutral can form a decision. Hearings can include live witness testimony, documents and other forms of evidence being presented to the neutral.

**Mediation.** Mediation is assisted or facilitated negotiation. Mediation usually involves two or more disputing parties attempting to negotiate a settlement with the assistance of a third party, the mediator, who is neutral towards the parties and the outcome. The mediator does not have authority to impose a settlement.

In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (called caucuses) and through suggesting specific solutions. In other traditions, the neutral takes a more passive approach and allows the parties to control the process. Both approaches are valid.

Mediation is generally used interchangeably with the term conciliation. For the purposes of this book, the term mediation is used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term is used.

**Mediator.** The mediator is the neutral person in a mediation proceeding.

**Negotiation.** Negotiation is an informal dispute resolution process where two or more parties discuss their respective positions and try to work out an agreement. This is the most common form of ADR.

**Neutral.** A neutral is a person that is independent of the parties to a dispute and is empowered in some way to help resolve the dispute. The neutral might serve as a mediator, conciliator, facilitator or arbitrator. The neutral’s role may be active or passive depending on the circumstances.

**Non-binding.** A non-binding agreement or decision is something that the parties are not legally obligated to follow because it is not legally enforceable. For instance, a non-binding arbitration decision is not legally enforceable.
Panel. The panel is the group of arbitrators, usually numbering three, who serve as the neutrals in an arbitration. Their role is similar to that of a judge in traditional litigation. At the end of the process, the panel usually issues an award to one or more parties. Sometimes, an arbitration panel is called an arbitration tribunal or arbitral tribunal. The term panel and tribunal refer to the same thing.

Parties. Parties are the people and/or entities involved in a dispute.

Plaintiff. The plaintiff is the party in a dispute that has filed some form of claim or complaint against the defendant.

Tribunal. The term tribunal usually refers to an arbitration tribunal. The arbitration tribunal (sometimes also called the arbitration panel or the arbitral tribunal) is the group of arbitrators, usually numbering three, who serve as the neutrals in an arbitration. Their role is similar to that of a judge in traditional litigation. At the end of the process, the tribunal usually issues an award to one or more parties. The term panel and tribunal refer to the same thing.
Appendix A

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

UNCITRAL Conciliation Rules

Contents

GENERAL ASSEMBLY RESOLUTION 35/52
UNCITRAL CONCILIATION RULES
Article 1: Application of the rules
Article 2: Commencement of conciliation proceedings
Article 3: Number of conciliators
Article 4: Appointment of conciliators
Article 5: Submission of statements to conciliator
Article 6: Representation and assistance
Article 7: Role of conciliator
Article 8: Administrative assistance
Article 9: Communication between conciliator and parties
Article 10: Disclosure of information
Article 11: Co-operation of parties with conciliator
Article 12: Suggestions by parties for settlement of dispute
Article 13: Settlement agreement
Article 14: Confidentiality
Article 15: Termination of conciliation proceedings
Article 16: Resort to arbitral or judicial proceedings
Article 17: Costs
Article 18: Deposits
Article 19: Role of conciliator in other proceedings
Article 20: Admissibility of evidence in other proceedings
Model Conciliation Clause
RESOLUTION 35/52 ADOPTED BY THE GENERAL ASSEMBLY ON 4 DECEMBER 1980


The General Assembly,

Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Noting that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session after consideration of the observations of Governments and interested organizations,

1. Recommends the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

2. Requests the Secretary-General to arrange for the widest possible distribution of the Conciliation Rules.

UNCITRAL CONCILIATION RULES

APPLICATION OF THE RULES

Article 1
(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2
(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3
There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.
APPOINTMENT OF CONCILIATORS

Article 4
(1)  (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2)  Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular,

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5
(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

*In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.
REPRESENTATION AND ASSISTANCE

Article 6
The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7
(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.

ADMINISTRATIVE ASSISTANCE

Article 8
In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9
(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.
(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

**DISCLOSURE OF INFORMATION**

**Article 10**
When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

**CO-OPERATION OF PARTIES WITH CONCILIATOR**

**Article 11**
The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

**SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE**

**Article 12**
Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

**SETTLEMENT AGREEMENT**

**Article 13**
(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.** If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.
(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

**The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

CONFIDENTIALITY

Article 14
The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15
The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16
The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.
COSTS

Article 17
(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the conciliator which shall be reasonable in amount;

(b) The travel and other expenses of the conciliator;

(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) The cost of any expert advice requested by the conciliator with the consent of the parties;

(e) The cost of any assistance provided pursuant to articles 4, paragraph (2)(b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18
(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.
ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19
The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20
The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force. (The parties may agree on other conciliation clauses.)

***

Further information may be obtained from:
UNCITRAL Secretariat
Vienna International Centre
P.O. Box 500
A-1400 Vienna, Austria
Telephone: (+43 1) 26060-4060
Telefax: (+43 1) 26060-5813
Internet: http://www.uncitral.org
E-mail: uncitral@unctar.org
Appendix B

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(Adopted September 8, 2005)

AMERICAN BAR ASSOCIATION
(Adopted August 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(Adopted August 22, 2005)

September 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.
Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

**Note on Construction**

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.
STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator’s actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator’s actual or perceived impartiality.
C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator’s actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator’s service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator’s competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation.

3. A mediator should have available for the parties’ information relevant to the mediator’s training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator’s ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that
was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party’s representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator’s fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator’s impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator’s ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.
Appendix C

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

UNCITRAL Arbitration Rules

Section I. Introductory rules
- Scope of application (article 1) and model arbitration clause
- Notice, calculation of periods of time (article 2)
- Notice of arbitration (article 3)
- Representation and assistance (article 4)

Section II. Composition of the arbitral tribunal
- Number of arbitrators (article 5)
- Appointment of arbitrators (articles 6 to 8)
- Challenge of arbitrators (articles 9 to 12)
- Replacement of an arbitrator (article 13)
- Repetition of hearings in the event of the replacement of an arbitrator (article 14)

Section III. Arbitral proceedings
- General provisions (article 15)
- Place of arbitration (article 16)
- Language (article 17)
- Statement of claim (article 18)
- Statement of defence (article 19)
- Amendments to the claim or defence (article 20)
- Pleas as to the jurisdiction of the arbitral tribunal (article 21)
- Further written statements (article 22)
- Periods of time (article 23)
- Evidence and hearings (articles 24 and 25)
- Interim measures of protection (article 26)
- Experts (article 27)
- Default (article 28)
- Closure of hearings (article 29)
- Waiver of rules (article 30)

Section IV The award
- Decisions (article 31)
- Form and effect of the award (article 32)
- Applicable law, amiable compositeur (article 33)
Settlement or other grounds for termination (article 34)
Interpretation of the award (article 35)
Correction of the award (article 36)
Additional award (article 37)
Costs (articles 38 to 40)
Deposit of costs (article 41)
RESOLUTION 31/98 ADOPTED BY THE GENERAL ASSEMBLY ON 15 DECEMBER 1976


The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Bearing in mind that the Arbitration Rules of the United Nations Commission on International Trade Law have been prepared after extensive consultation with arbitral institutions and centres of international commercial arbitration,

Noting that the Arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth session\(^{310}\) after due deliberation,

1. Recommends the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts;

2. Requests the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules.

UNCITRAL ARBITRATION RULES

Section I. Introductory Rules

SCOPE OF APPLICATION

Article 1

1. Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

*MODEL ARBITRATION CLAUSE
Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note - Parties may wish to consider adding:

(a) The appointing authority shall be ... (name of institution or person);
(b) The number of arbitrators shall be ... (one or three);
(c) The place of arbitration shall be ... (town or country);
(d) The language(s) to be used in the arbitral proceedings shall be...

NOTICE, CALCULATION OF PERIODS OF TIME

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee=s last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official
holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

**NOTICE OF ARBITRATION**

**Article 3**

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

   (a) A demand that the dispute be referred to arbitration;

   (b) The names and addresses of the parties;

   (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;

   (d) A reference to the contract out of or in relation to which the dispute arises;

   (e) The general nature of the claim and an indication of the amount involved, if any;

   (f) The relief or remedy sought;

   (g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

   (a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;

   (b) The notification of the appointment of an arbitrator referred to in article 7;

   (c) The statement of claim referred to in article 18.
**REPRESENTATION AND ASSISTANCE**

**Article 4**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

**Section II. Composition of the arbitral tribunal**

**NUMBER OF ARBITRATORS**

**Article 5**

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

**APPOINTMENT OF ARBITRATORS (Articles 6 to 8)**

**Article 6**

1. If a sole arbitrator is to be appointed, either party may propose to the other:

   (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and

   (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.
3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or
(c) fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfill its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

CHALLENGE OF ARBITRATORS (Articles 9 to 12)

Article 9

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.
Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

   (a) When the initial appointment was made by an appointing authority, by that authority;

   (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

   (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.
REPLACEMENT OF AN ARBITRATOR

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

Section III. Arbitral proceedings

GENERAL PROVISIONS

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.
PLACE OF ARBITRATION

Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

LANGUAGE

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defense, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defense, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.
2. The statement of claim shall include the following particulars:

(a) The names and addresses of the parties;
(b) A statement of the facts supporting the claim;
(c) The points at issue;
(d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

**STATEMENT OF DEFENSE**

**Article 19**

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defense in writing to the claimant and to each of the arbitrators.

2. The statement of defense shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defense or may add a reference to the documents or other evidence he will submit.

3. In his statement of defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

**AMENDMENTS TO THE CLAIM OR DEFENSE**

**Article 20**

During the course of the arbitral proceedings either party may amend or supplement his claim or defense unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the
amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defense or, with respect to a counter-claim, in the reply to the counterclaim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

FURTHER WRITTEN STATEMENTS

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defense, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

PERIODS OF TIME

Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defense) should not exceed
forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

**EVIDENCE AND HEARINGS (ARTICLES 24 AND 25)**

**Article 24**

1. Each party shall have the burden of proving the facts relied on to support his claim or defense.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

**Article 25**

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.
6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

EXPERTS

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.
DEFAULT

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defense without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

WAIVER OF RULES

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.
Section IV. The award

DECISIONS

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.
APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

INTERPRETATION OF THE AWARD

Article 35

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.
The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

**CORRECTION OF THE AWARD**

**Article 36**

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

**ADDITIONAL AWARD**

**Article 37**

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

**COSTS (Articles 38 to 40)**

**Article 38**

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
(b) The travel and other expenses incurred by the arbitrators;
(c) The costs of expert advice and of other assistance required by the arbitral tribunal;
(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.
Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

DEPOSIT OF COSTS

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Further information may be obtained from:
UNCITRAL Secretariat Vienna International Centre
P.O. Box 500 A-1400 Vienna, Austria Telephone: (+43 1) 26060-4060 Telefax: (+43 1) 26060-5813 Internet: http://www.uncitral.org E-mail: unctral@uncitral.org.
Appendix D

THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES

AMERICAN ARBITRATION ASSOCIATION
AMERICAN BAR ASSOCIATION
(Effective March 1, 2004)

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.
Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.
All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.
CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

**CANON II: AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.**

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
(1) any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not
substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III: AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

   (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

   (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;
(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party’s views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV: AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle
or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

CANON V: AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI: AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

**CANON VII: AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.**

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

1. Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

2. In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

3. Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.
CANON VIII: AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:
(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X: EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. Obligations under Canon I

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.
B. Obligations under Canon II

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. Obligations under Canon III

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;

(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);

(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

(4) Canon X arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;

(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. Obligations under Canon IV

Canon X arbitrators should observe all of the obligations of Canon IV.

E. Obligations under Canon V

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. Obligations under Canon VI

Canon X arbitrators should observe all of the obligations of Canon VI.

G. Obligations Under Canon VII

Canon X arbitrators should observe all of the obligations of Canon VII.

H. Obligations Under Canon VIII

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. Obligations Under Canon IX

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.
Appendix E

THE COMMERCIAL ARBITRATION LAW
OF THE KINGDOM OF CAMBODIA

(2006)

[Note: this is the Cambodia Ministry of Commerce’s translation from Khmer to English. It has been reproduced, word for word, without any edits in style or grammar.]

CHAPTER I

GENERAL PROVISIONS

Article 1: Purpose and Scope of Application

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.

This Law shall not affect any other law of the Kingdom of Cambodia by virtue of which certain dispute may be submitted to arbitration or other dispute resolution procedures, or by virtue of which certain disputes may not be submitted to arbitration.

Article 2: Definitions and Rules of Interpretation

For purposes of this Law:

(a) “Arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

(b) “Arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

(c) “Court” means a body or organ of the judicial system of a state;

(d) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(e) Where a provision of this law, except Article 36 of this Law, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
(f) Where a provision of this Law refers to the fact that the parties have agreed, or that they may agree, or in any other way refers to an agreement of the parties, such agreement includes any rules referred to in that agreement;

(g) Where a provision of this Law, other than in Articles 33(a) and 40(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defense, it also applies to a defense to such counter-claim;

(h) An arbitration is “international” if

(i) the parties to an arbitration agreement have their places of business in different States at the time of the conclusion of that agreement; or

(ii) one of the following places is situated outside the state in which the parties have their places of business:

- the place of arbitration, if determined in, or pursuant to, the arbitration agreement;
- any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(iii) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(iv) For the purposes of this paragraph (h);

- if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
- if a party does not have a place of business, reference is to be made to his habitual residence.

(i) The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement;

(ii) commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; and carriage of goods or passenger by air, sea, rail or road.
Article 3: Receipt of Written Communications

Unless otherwise agreed by the parties:

(1) any written communication is deemed to have been received if it is delivered to the addressee personally, or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or at the last known address of the addressee;

(2) The provisions of Article 3 of this Law do not apply to communications in Court proceedings.

Article 4: Waiver of Right to Object

A party who knows that any provision of this Law from which parties may derogate, or any requirement under the arbitration agreement, has not been complied with, and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

Article 5: Extent of Court Intervention

In matters governed by this Law, no Court shall intervene except where so provided in this Law.

Article 6: Court or other Authority for Certain Functions of Arbitration Assistance Supervision

The functions referred to in Articles 19(3), 19(4), and 19(5); 21(3); 22; and 24(3) of this law shall be performed by the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center.

CHAPTER II

ARBITRATION AGREEMENT

Article 7: Definition and Form of Arbitration Agreement

Arbitration agreement includes an arbitration clause in a contract or a separate submission agreement.

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, or other means of
electronic telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreed is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make the clause part of the contract.

**Article 8: Arbitration Agreement and Substantive Claim before Court**

A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Where an action referred to in paragraph (1) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued and the court shall refer the issue to the arbitration, while it is pending before the arbitration.

**Article 9: Arbitration Agreement and Interim Measures by Court**

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings from a Court an interim measure of protection and for a Court to grant such measure.

**CHAPTER III**

**NATIONAL CENTER OF COMMERCIAL ARBITRATION**

**Article 10: National Arbitration Center**

An independent National Arbitration Center (“NAC”) shall be established under the auspices of Ministry of Commerce. The objectives of the National Arbitration Center are:

1. to promote settlement of commercial disputes by means of arbitration in Cambodia;
2. to create the necessary infrastructure and rules for the administration of arbitration cases in the Kingdom of Cambodia, where an express agreement of disputing parties to refer disputes to National Arbitration Center;
3. to ensure that high quality standards of arbitration are maintained in the Kingdom of Cambodia. This objective includes setting standards for the qualification of arbitrators.
Article 11: Arbitrators

The Khmer natural person or foreigner who is arbitrator shall register with the National Arbitration Center. The National Arbitration Center shall have an obligation to determine the arbitrators’ qualification and shall make the public announcement of arbitrators’ list yearly. The list is not absolute; the parties are free to choose the arbitrator outside that list.

Article 12: Qualification of Members of Arbitrators

The natural person and legal entity to be permitted as a member of the National Arbitration Center are:

- an Arbitrator who has registered his/her name with the National Arbitration Center;
- the Chamber of Commerce;
- the Bar of the Kingdom of Cambodia; and
- the Association that comprises of businessman, industrialist, merchant and services provider.

The application to be a member of the National Arbitration Center shall be determined by the Executive Board of the National Arbitration Center that comprises not more than seven (7) members. The term of each member is three (3) years and may re-elect for one more term.

Article 13: The Chamber of Commerce and Chamber of Professionals

The Chamber of Commerce may establish an Arbitration Center in Phnom Penh. The Association that comprises of businessman, industrialist, merchant and services provider may establish its own arbitral institution for disputes arising among its members; and between its members and third party.

Article 14: Management of National Arbitration Center

The National Arbitration Center shall be governed by:

- a General Assembly; and
- an Executive Office.

The General Assembly shall have inter alia functions and duties:

- to meet one or twice per year at the request of the Chairman of the National Arbitration Center or at the request of the majority members of Executive Board;
- to elect the Executive Board;
- to inspect the annual report of Executive Board;
- to approve the financial budget of National Arbitration Center;
- to determine the fees and costs of arbitration;
- to approve the amendment of rules and regulations that related to the operation of National Arbitration Center and functioning of arbitration; and
- to fulfill other functions and duties that determined in the Sub-Decree of the organization and functioning of National Arbitration Center.

**Article 15: The General Assembly**

The General Assembly shall be attended by the members who are natural persons and a representative of each legal entity.

**Article 16: Composition of Executive Board**

The Composition of Executive Board that manages the National Arbitration Center shall be elected among its members by the General Assembly. The Chairman of Executive Board shall be the Chairman of the National Arbitration Center.

**Article 17: Organization and Functioning of National Arbitration Center**

The organization and functioning of National Arbitration Center shall be determined by implementing Sub-Decree.

**CHAPTER IV**

**COMPOSITION OF ARBITRAL TRIBUNAL**

**Article 18: Number of Arbitrators**

The parties are free to determine the number of arbitrators. The number of arbitrators shall be odd number.

Failing such determination, the number of arbitrators shall be three (3).

**Article 19: Appointment of Arbitrators**

The appointment of arbitrator shall determine as follows:

1. no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

2. the parties are free to agree on a procedure for appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this Article.

3. failing such agreement,

   a. in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of
receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law.

(4) Where, under an appointment procedure agreed upon by the parties, either party may request to the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law to take a necessary measure for any of the following:

(a) a party fails to act as required under such procedure, or

(b) the parties, or two (2) arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) A third party, including an institution, fails to perform any function entrusted to it under such procedure. This article shall not apply, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this Article to the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law shall be subject to no appeal. The Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of a sole or third arbitrator in an international arbitration, the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties as specified in Article 19(1) of this Law.

**Article 20: Ground for Challenge**

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties, unless they have already been informed of them by him.
An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

**Article 21: Challenge Procedure**

To challenge the arbitrator, the parties shall comply with the following procedures:

1. the parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this Article.

2. failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen (15) days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Article 20(2) of this Law, send a written statement of the reasons for the challenge to the arbitral tribunal and the other party or parties. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3. if a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

**Article 22: Failure or Impossibility to Act**

If an arbitrator becomes De Jure or De Facto unable to perform his functions, or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court (Commercial, or Appeal, or Supreme) or National Arbitration Center as specified in Article 6 of this Law to decide on the termination of the mandate, which decision shall be subject to no appeal.

If, under this Article or Article 21(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this Article or Article 20(2).

**Article 23: Appointment of Substitute Arbitrator**
Where the mandate of an arbitrator terminates under Article 21 or 22 of this law, a substitute arbitrator shall be appointed according to Article 19 of this law.

CHAPTER V
JURISDICTION OF ARBITRAL TRIBUNAL

Article 24: Competence of Arbitral Tribunal To Rule on Its Jurisdiction

The jurisdiction of Arbitral Tribunal shall determine as follows:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *Ipso Jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as-soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the Court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 25: Power of Arbitral Panel to Order Interim Measures

Unless otherwise agreed by the parties, the arbitral panel may, at the request of a party, order any party to take such interim measure of protection as the arbitral panel may consider necessary in respect of the subject matter of the dispute. The arbitral panel may require any party to provide appropriate security in connection with such measure.
CHAPTER VI
CONDUCT OF ARBITRAL PROCEEDINGS

Article 26: Equal Treatment of Parties

The parties shall be with equality and each party shall be given a full opportunity to present his case, including representation by any party of his choice.

Article 27: Determination of Rules of Procedure

The parties are free to agree or disagree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 28: Place of Arbitration

The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the agreement of the parties.

Notwithstanding the provisions of paragraph (1) of this Article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or to conduct inspection to equipment, property or other documents.

Article 29: Commencement of Arbitral Proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 30: Language

The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.
Article 31: Statements of Claim and Defense

Within the period of time agreed by the parties of determined by the arbitral panel, the claimant shall state the facts supporting his claim, the points at issue and the relief of remedy sought, and the respondent shall state his defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral panel considers it inappropriate to allow such amendment, having regard to the delay in making it.

Article 32: Hearings and Written Proceedings

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of materials, goods, other property or documents.

All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 33: Default of a Party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(1) the claimant fails to communicate his statement of claim in accordance with Article 31(1) of this Law, the arbitral panel shall terminate the proceedings.

(2) the respondent fails to communicate his statement of defense in accordance with Article 31(1) of this Law, the arbitral panel shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(3) Any party fails to appear at a hearing, or fails to produce documentary evidence, the arbitral panel may continue the proceedings and make the award on the evidence before it.
Article 34: Expert Appointed by Arbitral Tribunal

Unless otherwise agreed by the parties, the arbitral tribunal,

(1) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(2) may require a party to give the expert any relevant information, or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

Unless otherwise agreed by the parties, if a party so requests, or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing, at which the parties have the opportunity to put questions to him and to present expert witnesses to testify on the points at issue.

Article 35: Court Assistance in Taking Evidence

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from a competent Court (Commercial, or Appeal, or Supreme) assistance in taking evidence. The Court (Commercial, or Appeal, or Supreme) may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VII
MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 36: Rules Applicable to Substance of Dispute

The Arbitral Tribunal shall apply applicable rules during the arbitration proceedings:

(1) The parties shall be free to agree upon the rules of law to be applied by arbitral tribunal to the merits of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(2) Failing such an agreement by the parties, the arbitral tribunal shall apply the law that it considers appropriate.

(3) The arbitral tribunal shall decide *ex aegu et bono* or *as amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall take into account all the provisions of the arbitration agreement and also the usages of the trade and customs applicable to the transaction.
Article 37: Decision Making by Panel of Arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal may be made by a majority of all its members.

Article 38: Settlement

Upon request by both parties, prior to commencement of formal arbitration proceedings, the arbitral tribunal may confer with the parties for the purpose of exploring whether the possibility exists of a voluntary settlement of the parties’ dispute:

(1) if the parties determines that it does, the arbitral tribunal shall assist the parties in any manner it deems appropriate.

(2) If the parties settle the dispute prior to commencement of the formal arbitral proceedings, or in the course thereof, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, may record the settlement in the form of an arbitral award on agreed terms.

(3) An award on agreed terms shall be made in accordance with the provisions of Article 39 of this Law, and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 39: Form and Content of Award

The arbitral tribunal form and content of award shall contain as follows:

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 38 of this law.

(3) The award shall allocate among the parties the costs of the arbitration, including the arbitrator(s) fee(s) and incidental expenses, in the manner agreed by the parties, or in the absence of such agreement, as the arbitrators deem appropriate. If the parties have so agreed, or the arbitrators deem it appropriate, the award may also provide for recovery by the prevailing party of reasonable counsel fees.

(4) The award shall state its date and the place of arbitration as determined in accordance with Article 28(1) of this law. The award shall be deemed to have been made at that place.
(5) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this Article shall be delivered to each party.

Article 40: Termination of Proceedings

The arbitral Proceedings are terminated by the final award, an agreed settlement, or by an order of the arbitral tribunal in accordance with Paragraph (2) of this article. The arbitral tribunal shall issue an order for the termination of the arbitral Proceedings when:

(1) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(2) the parties agree on the termination of the proceedings;

(3) the arbitral tribunal finds that the continuation of the proceedings has, for any other reason, become unnecessary or impossible.

The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Articles 41 and 42(4) of this Law.

Article 41: Correction and Interpretation of Award; Additional Award

The correction and interpretation of award shall determine as follows:

(1) Within thirty (30) days of the receipt of the award, unless another period of time has been agreed upon by the parties

   (a) with notice to the other party, a party may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any other errors of a similar nature.

   (b) with notice to the other party, a party may request the arbitral tribunal to give an interpretation or amplification of a specific point or part of the award. If the arbitral tribunal considers the request justified, it shall provide the interpretation or amplification within thirty days of receipt of the request. The interpretation or amplification shall form part of the award;

(2) Within no later than thirty (30) days after the issuance of award by the arbitral tribunal, the arbitration may correct the errors stated in paragraph 1(a) of this Article at its own initiatives.

(3) unless otherwise agreed by the parties, within no later than thirty (30) days after receiving an award as to the claims, the party who has notified another party may
request for additional awards presented in the arbitral proceeding but omitted from the award. If the arbitral tribunal considers the request justified, it shall make the additional award within thirty (30) days of receipt of the request.

(4) if it is required and by notifying the parties, the arbitral tribunal may extend the period of time with which it shall make a correction, interpretation, amplification, or additional award under paragraph (1) and (3) of this Article.

(5) The provisions of Article 39 of this Law shall apply to a correction, interpretation or amplification, or an addition to the award.

CHAPTER VIII
RE COURSE, RECOGNITION, AND ENFORCEMENT OF ARBITRAL AWARD

SECTION I
RE COURSE INSTITUTION, RECOGNITION, AND ENFORCEMENT OF ARBITRAL AWARD

Article 42: Application for Setting Aside as Exclusive Recourse Against Arbitral Award

The jurisdiction over recourse, recognition, and enforcement of arbitral award shall rest with the Appellate Court of the Kingdom of Cambodia.

Article 43: Conclusive Jurisdiction

The Supreme Court of Cambodia shall be the final jurisdiction to try counter-claim of the party who is not satisfying with the decision of the Appellate Court within fifteen (15) days.

SECTION II
RE COURSE AGAINST ARBITRAL AWARDS

Article 44: Application for Setting Aside as Exclusive Recourse Against Arbitral Award

The party may file an application for setting aside as exclusive recourse against arbitral award as follows:

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

(2) An arbitral award may be set aside by the Appeal Court and Supreme Court only if:
(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in Article 7 of this Law 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; or

(ii) 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; or

(iii) 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; or

(iv) 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 Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Appeal Court and Supreme Court finds that

(i) the subject matter of the dispute is, not capable of settlement by arbitration under the law of the Kingdom of Cambodia; or

(ii) The recognition of the award would be contrary to public policy of the Kingdom of Cambodia

(3) An application for setting aside may not be made after thirty (30) days have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 41 of this article within thirty (30) days, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Appeal Court and Supreme Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by the Appeal Court and Supreme Court, in order to give the arbitral tribunal an opportunity to resume the arbitral
SECTION III
RECOGNITION AND ENFORCEMENT OF AWARDS

Article 45: Recognition and Enforcement

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Article and Article 44 of this Law.

The party relying on and award or applying for its enforcement shall supply the duty authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in Article 7 of this Law or a duly certified copy thereof. If the award or agreement is not made in Khmer, the party shall supply a duly certified translation thereof into Khmer.

Article 46: Grounds for Refusing Recognition or Enforcement

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(1) At the request the party against whom it is invoked, if that party furnishes to the Appeal Court where recognition or enforcement is sought proof that:

(a) A party to the arbitration agreement referred to in Article 7 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; or

(b) 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; or

(c) 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; or

(d) 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 of the where the arbitration took place; or

(e) 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; or

(2) the Appeal Court finds that

(a) the subject matter of the dispute is, not capable of settlement by arbitration under the law of the Kingdom of Cambodia; or

(b) The recognition of the award would be contrary to public policy of the Kingdom of Cambodia.

If an application for setting aside or suspension of an award has been to a court referred to in paragraph (1)(e) of this Article, the court where recognition or enforcement is sought may, if it consider it proper, adjourn its decision and may also, on the application of the party claiming recognition of the award, order the party to provide appropriate security.

CHAPTER IX
FINAL PROVISIONS

Article 47: Abrogation

Any provisions in commercial arbitration sector that are contrary to this Law shall be abrogated.

This Law is enacted by the National Assembly of the Kingdom of Cambodia on the 6th of March 2006 at its 4th Session of the 3rd Legislature.

Signed and Sealed at Phnom Penh March 7th, 2006

First Vice President

Samdech HENG SAMRIN
This book explains the fundamental concepts of Alternative Dispute Resolution (ADR) as it applies in Cambodia. The main topics include:

Basic concepts behind ADR
Distributive negotiations
Interest-based negotiations
Negotiation tactics
Prisoner’s Dilemma
Mediation
Drafting a dispute resolution clause
Arbitration
The new Cambodian Law on Commercial Arbitration
The Cambodian Arbitration Council
Comparison of different ADR techniques
Ethics in ADR
Licensing
International ADR
History of ADR
Enforcing ADR awards and agreements
The current legal framework for ADR in Cambodia
Case-based exercises and study questions
ADR worksheets and journals
Important international ADR model laws and codes