

The Establishment of Commercial Court in Cambodia: Key issues and Challenges

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The establishment of a specialised court to adjudicate all commercial disputes is one of many commitments to legal and judicial reforms Cambodia has made in exchange for the membership of the World Trade Organisation (WTO). The preparation of law to establish the commercial court was listed as the first priority in the National Legislative Programme, and it began in earnest. The Ministry of Commerce took up responsibility for drafting this law in collaboration with the Ministry of Justice and with the assistance of the Canadian Development Agency.

The First Draft Law of August 2003 is expected to be submitted to the Council of Ministers in December 2003, and approved by the Parliament by December of 2004. The Draft Law for the Commercial Court indicates that the court will be a separate one of lower level under the Supreme Council of Magistracy. According to the time table, it is estimated that the commercial court will begin to sit in June 2005.

The commercial court cannot, however, operate alone without supporting commercial laws stipulated in the Criminal Procedure Code and Civil Code of Procedure. These are expected to be approved by the Parliament in December 2004, and June 2005 respectively. After the promulgation of the commercial court law, the must be established, within 6 months, with appointments of judges and prosecutor.

The Need for the Commercial Court

With the commercial court, Cambodia will have an opportunity to stimulate its economy by providing legal certainty in business transactions. Its commitment to legal reforms with such far-reaching economic implications would indeed help improve investor confidence. Lawyers, NGOs, and private sectors all seem to welcome the establishment of the commercial court with an expectation that this specialised court would lead to just resolution of commercial disputes.

The commercial court system would be more effective and efficient in speedily resolving commercial disputes, as the court would have expert knowledge in these specific areas. It would be able to come to a judgment faster than ordinary courts. The investors will view the commercial court as a positive development. It would help minimise business risks associated with legal uncertainty and their investments. In a survey by the World Bank, Investment Climate Assessment Survey 2003, almost 60 percent of the companies operating in Cambodia indicate that the regulatory policy uncertainty is one of the top ten major constraints to private enterprise operation and growth. Over 50 percent suggests the legal system and conflict resolution as the major factors. Therefore, the commercial court is another step forward in addressing these concerns of the private sector.

Nevertheless, given the openly widespread corruption in the country, the sceptic would suggest that the commercial court is likely to become just another layer of the corrupt practice. The Consultation Workshop with the Private Sector jointly conducted by the Asian Development Bank, the Department of International Development, and the World Bank in October 2003 indicates that the main legal issue in Cambodia lies in interpretation and "implementation".

Characteristics of the Commercial Court

A draft law in 1995 on the Reform and the Organisation of Cambodian Tribunal of the Ministry of Justice stipulates that the commercial court would be in the form of a specialised chamber that can hear commercial disputes involving an amount greater than 10 million riels. However, the current draft law indicates that commercial court will be a separate court; and it does not specify the minimal dispute amount of case that it will hear.

The form of the commercial court for Cambodia is being modeled on those operating abroad. It seems to have

mainly followed Thailand's form of commercial court (Box 1). First, the two countries share a great deal of similarity in culture, tradition, and religions. Second, with a common border, commercial activities between the two have also been very active. Thailand has been a major trading partner of Cambodia in term of importation, and is potentially a significant source of investments in Cambodia.

Box 1 : Some features of IP&IT court in Thailand

There are four specialised courts: Labour Court, Tax Court, Bankruptcy Court, and Intellectual Property and International Trade Court (IP&IT). Appeals from these courts can go directly to the Supreme Court, bypassing the appellate level. The objective of the establishment of IP&IT Court is to create a 'user-friendly' forum with specialised expertise to serve commerce and industry. Some prominent features in the IP&IT Court system are as follows:

- a. Liberal use of Rules of the Court to facilitate the efficiency of the forum. Perhaps this could be seen as a unique 'common law' approach to solve a 'civil law' problem.
- b. Exclusive jurisdiction both in civil and criminal matters on the enforcement of intellectual property rights throughout the country.
- c. Panel of three judges to constitute a quorum. Two of whom must be career judges with expertise in IP or IT matters. The third member of the panel is an associate judge who is a lay person with expertise in IP or IT.
- d. Availability, for the first time in Thai procedural law, of the 'Anton Piller Order' type of procedure, an English innovation incorporated in the TRIPS Agreement.
- e. Possibility of the appointment of expert witness as amicus curiae.
- f. Leap-frog procedure where appeals lie directly to the IP&IT Division of the Supreme Court to redress delay
- g. Possibility of extending the jurisdiction to other matters by further amending legislation.
- h. However, the protection of juvenile justice takes precedence over the protection of IP rights. Hence, a juvenile shall be charged in the Juvenile and Family Court, and not in the IP&IT Court even if in IP infringement cases.

Source: Draft law of commercial court, August 2003

It will be most helpful, thus, for Cambodia to adapt a commercial court system that requires only minimum adjustments to support its commercial activities with major trading partners.

The commercial court is expected to be located in Phnom Penh, but will have the jurisdiction all over the country. Some observers recommend that this court be mobile as well, so that it can sit in a province where dispute cases occur. This notion of "mobile court" has emerged from a successful experience of the Canadian commercial court, which is also mobile.

Human Resources

Cambodia's judiciary system is seriously lacking both quantity and quality in human resources. Only a few currently practicing judges have proper legal qualifications; most of them are former teachers who were summarily appointed in the immediate aftermath of the Khmer Rouge regime. Only 22 percent of the prosecutors have had some formal legal education, with only 9 percent holding a full law degree.

The general level of skill and experience in commercial and financial law among judges is even lower than that for criminal and civil cases. To date, training of judges has been largely little, infrequent, and unsystematic.

If First Draft Law of Commercial Court is passed, the commercial court will cover all business cases of civil and criminal natures. The court will require top officials to be equipped with a great deal of expertise and skill in legal and commercial aspects. The Royal School of Judges and Prosecutors, established only in November 2003, will play a very import role in responding to the urgent need for well-qualified judges and prosecutors, not only for the commercial court, but the whole system. The first batch of graduates from the School, which is a maximum of 50, is expected at the end of a two year course.

It remains, however, a challenge to appoint specialist judges for the new commercial court that plans to begin hearing cases in June 2005. According to members of the Working Group of the Ministry of Justice for drafting the Civil Code and Code of Civil Procedure, it requires only a year to be ready to train

the judges and court clerks, and to prepare other administrative necessities.

Financing

The Ministry of Justice receives overall only 0.3 percent of the total national budget in 2002. Generally, the judiciary system suffers from a shortage of financial resources. The salary scale for judges and prosecutors is currently about US\$ 600 on average per month, and for other court officials their salary is comparable to that of other civil servants, which is averaging around US\$ 24 per month. It is, therefore, not hard to imagine that corruption may be a significant factor in influencing court decisions.

Independence Issue

It seems the independence of the envisaged commercial court will be subject to a severe compromise as the Executive branch can heavily influence the appointment process of the court officials. First, associate judges of the commercial court are recommended by the Inter-Ministerial Commission (IMC) (Box 2). The associate judges are specialist judges who would have expert knowledge in the intricate world of commerce and finance; their inputs and influence on all judgments, or outcomes, of dispute cases will be considerable. They are to be selected to become the associate judges by the IMC whose members are all but one in the Executive branch (Box 2). All of these IMC members, in turn, are duly appointed by a Sub-Decree issued from the Office of the Prime Minister.

Second, the IMC recommendations will go to the Supreme Council Magistracy for formal appointments of those associated judges. The Supreme Council of Magistracy can act no more than a rubber stamp, as Article 8 of the First Draft Law for the Commercial Court requires it approve the IMC's endorsements. In any case, the Article may not be so necessarily specific, because the Supreme Council Magistracy is largely perceived to be already under the influence, if not control, of the Executive branch. Besides its task to assist the King in ensuring the independence of the judiciary, the Supreme Council Magistracy is also responsible

for maintaining discipline amongst the judicial officers. In its present form and experience to date, however, the Supreme Council Magistracy has been largely ineffective in enforcing discipline amongst judges and magistrates. Although the Constitution says that rules governing judges, prosecutors, and the functioning of the judiciary shall be defined in specific laws, no such laws have been enacted since the establishment of the Constitution 1993. In the presence of political influence and in the absence of a law governing appointments and promotions in the judiciary, appointments are often made on the basis of considerations other than qualifications or merits of the appointees.

Effectiveness and Efficiency of the Commercial Court

The provision for the associate judges in the commercial court is rather significant as they are expected to act as experts in technical matters relating to disputed commercial transaction case on

Box 2 : Composition and Function of the Inter-Ministerial Commission (IMC)

Composition

1. Representative of Ministry of Commerce,
2. Representative of Ministry of Finance,
3. Representative of Ministry of Justice,
4. Representative of National Bank of Cambodia,
5. Representative of the Phnom Penh Chamber of Commerce.

Function

- a. Members of IMC shall be appointed by Sub-Decree and the representative of Ministry of Commerce shall preside over the IMC.
- b. The IMC shall adopt rules regulating the conduct of its affairs, including rules regulating the selection process of associate judges. The rule of IMC shall be established by a Sub-Decree.
- c. The IMC shall establish the list of the person apt to be appointed as associate judges of the Court and make recommendation thereof to the Suprem Council of Magistracy (SCM).
- d. The IMC shall make recommendation to SCM on suspension, removal, and disruption of actual services of an associate judge.

Sources: Draft Law on Commercial Court
August 2003

hand. It will enhance efficiency and effectiveness of the court operations. Therefore, a main challenge for the commercial court is how to ensure that it has readily excess to such necessary expertise. Given the fact that the country as a whole has been suffering from the absence of quality human resources, it may be an insurmountable problem, at least in the short run, for the commercial court to find such pool of experts that it can rely upon to provide professional and expert advice or collaboration. Nevertheless, the issue should not prevent the final Draft Law from providing a possibility that the court can call upon experts, professionals, and academia outside the usual judiciary to serve on the bench on a temporary basis in a particular case, if and when necessary.

There is a concern that the currently assigned jurisdiction for a first commercial court may be too wide to be effective and efficient. It will cover all disputes in the field of business, finance, intellectual property (Box 3); the court also hears all commercial cases that are of civil and criminal natures. It is pointed out that the experience of Thai court system shows that due to overloaded case work and changing in demand, Thailand currently has two specialised commercial courts - one to sit on cases involving intellectual properties and international trade, and another on bankruptcy. The former was established in 1997, and the latter in 1999. The Thai experience could be appropriate for Cambodia in the long run, but for now the necessary specialisation of the commercial court seems to be far off. It should be noted that Thailand's commercial activities can be assessed to have been far more vibrant and intricate than those of Cambodia for so many decades; yet, the country has just found it necessary to have the two specialised commercial courts in the late 1990's. Cambodia has quite a long way yet in terms of its population size and volume of business activities to draw real benefits from the Thai current specialised commercial court model, which has been in operation for only a few years.

An operation of a mobile court may be effective and efficient, as it would consider a case on location. Article 54 of the First Draft Law indicates the court is located permanently in Phnom

Penh, and it may sit anywhere throughout the Kingdom as it sees appropriate. Perhaps, the mobility provision could help the court appreciate more the nature and intricacy of the dispute at hand; and it may also take less time to deliver its verdict. It would save disputing parties' travelling costs to attend the court in Phnom Penh, but the court would incur its own costs for all facilities it requires associated with being mobile. Basically, everything being equal, it would be a transfer of operating costs of the particular case from the disputing parties to the State that currently may not be willing to absorb the extra expenses. But, of course, it could always be possible for the mobile court to pass on those expenses to the parties in disputes.

The First Draft has left out the minimum amount of dispute the court will hear. This means the court will be flooded with minor cases that may be settled by a simple arbitration outside the court system. Thus it will be more efficient if the minimum amount is set, even at first arbitrarily; it could always be adjusted for an optimum level through trial and error as time goes by, and experience prevails.

It seems there is a movement away from a consensus requirement for any issue of judgments, in which a panel of judges would agree to issue only one decision with a set of reasons for any judgment. But in the First Draft Law for the commercial court, each judge in the panel must give their own reason for judgment; if there is a dissension among the judges and the associate judge, the judgment shall be based on the majority. The relaxed requirement may help improve effectiveness and efficiency as it removes an imposition of the consensus that may otherwise be difficult to reach in some cases.

Concluding Remarks

It is inevitable that the first commercial court will have teething troubles, at least in the short run. But the troubles seem to be insurmountable. Unless the current paltry budget allocation is rectified, the existing severe shortage in human and expertise resources will bring out in the open many questions on impartiality of the commercial court.

The full time two-year post graduate formal education at the Royal School of Judges and Prosecutors is absolutely necessary, but not sufficient for a long term quality enhancement. To improve and maintain the court quality, it is vital to have compulsory on-going training for judges and prosecutors in a certain professional development program.

The time table to launch the first Cambodian commercial court in June 2005 is rather ambitious unless the professional standard is not really an issue for the system. The Royal School of Judges and Prosecutors, which is responsible for educating judges for the whole country, may not be able to meet the deadline for the start of the commercial court operation.

Perhaps the most crucial issue that needs rethinking at this stage is the compromise of judicial independence of the commercial court that reinforces a violation of the doctrine of Separation of Powers. At a conceptual level, the proposed structure and setting up of the commercial court system as stipulated in the First Draft Law for commercial court will allow so much opportunity for the Executive branch to control the whole system and operation of the commercial court. But again a cynic would point out that the current way of establishing the commercial court has conformed perfectly to the status quo; i.e. in Cambodia, the line separating the Executive and the Judiciary is as clear as mud.

By Chea Samnang

Box 3: Domain of Competency

- a. Commercial Transaction.
- b. Negotiable Instruments
- c. Law of Commercial Enterprise
- d. Insolvency Law
- e. Law on Banking and Financial Institutions
- f. Foreign Exchange Law
- g. Law of the Management of Quality and Safety of Products and Services
- h. Maritime Law
- i. Unfair Competition and Price Fixing
- j. Anti-dumping and subsidy and countervailing duty
- k. Copyright and Related Rights, Trade-marks, Geographical Indications, Industrial Designs, Patents and Layout Designs of Integrated Circuits

Sources: Draft law on commercial court, August 2003

The Commercial Court Law

Draft as of August 4, 2003 - Extracts

Article 3: Constitution of the court

The commercial Court shall consist of a chief judge, a deputy chief judge, at least one other judge, and at least two associate judges

Article 4: Appointment of judges

The associate judges of the court shall be appointed by Royal Decree upon the proposal made by the Supreme Council of Magistracy

Article 6 : Who may be appointed as judges?

- a. Cambodian national
- b. Never convicted of a crime
- c. Physically fit
- d. Completed the education program of the Royal School of Magistrates, the specialized education program for commercial court judges, and the training period of magistrates in the Commercial Court

Article 7: who may be appointed as associate judges?

- a. Cambodian national
- b. Never convicted of a crime
- c. Physically fit
- d. Actively practices his trade or profession on a daily basis,
- e. Member of a regulated profession, that he holds the license permit, accreditation and the like, required by law for the exercise of the said profession;
- f. Completed the specialized education program for associate judge of the commercial court judges, and discloses the nature and extent of his interest in any business, domestic and international, as provided by the regulations of the Ministry of Justice.

Article 10: Term of office of judges - cessation of office

- a. Judges hold office during good behavior and for a term of five years. The five years term of office may be renewed for further terms, each term not exceeding period of five (5) years.
- b. Judges may be suspended or removed by Royal Decree upon the proposal made by the Supreme Council of Magistracy prior to the expiration of their term of office.
- c. Actual services of judges may be disrupted by Royal Decree upon the proposal of the Supreme Council of Magistracy.
- d. A judge shall cease to hold office on attaining the age of 65.

Article 10: Term of office of associate judges - cessation of office

- a. Associate judges hold office during good behavior, the time they practice their trade or profession on a daily basis, and maintain their status as member of the professional organization that they are a member of when such organization exists.
- b. Associate judges hold office for a term of five years. The five years term of office may be renewed for further terms, each term not

exceeding period of five (5) years.

c. Associate judges may be suspended or removed by Royal Decree upon the proposal made by the Supreme Council of Magistracy prior to the expiration of their term.

d. Actual services of associate judges may be disrupted by Royal Decree upon the proposal of the Supreme Council of Magistracy.

e. The proposal made by the Supreme Council of Magistracy for disruption of actual services, suspension, and removal of associate judges shall be made in accordance with the procedure provided in this law.

Article 16: Appointment of Prosecutors

The prosecutor of the court shall be appointed by Royal Decree upon the proposal made by the Supreme Council of Magistracy

Article 17: Who may be appointed as prosecutors

Successfully completed the education program of the Royal School of Magistrates, the specialized education program for commercial court prosecutors; and training period of magistrates in the commercial court.

Article 18: Term of office of prosecutor - cessation of office

Prosecutors hold office during good behaviour but may be suspended or removed by Royal Decree upon the proposal made by the Supreme Council of Magistracy.

Actual services of prosecutors may be disrupted by Royal Decree upon the proposal of the Supreme Council of Magistracy

Article 19: Duties and powers of the prosecutor

The prosecutor shall have the exclusive responsibility in filing criminal charges and in carrying on prosecutions. When the subject matter heard by the court is not a criminal prosecution, the prosecutor may intervene in the proceedings when it is in the public interest to do so.

Article 20 : Independence of prosecutor

Prosecutors are independent from the judges of the Commercial Court. Prosecutors carry on their duties on behalf of the State which is a party to the proceedings.

Article 25 and 54: Jurisdiction - Territorial

The Commercial Court shall be located in Phnom Penh and have jurisdiction over the Cambodian territory. It may sit as such times and at such places throughout the Kingdom of Cambodia as it considers necessary or desirable for the proper conduct of its business.

Article 27: Jurisdiction - Exequatur

a. The Court shall have exclusive original jurisdiction to hear and determine in first instance action seeking the recognition and enforcement of foreign court orders and arbitral awards where the orders or arbitral award fall

within the jurisdiction of the Court under Articles 26 and 28 of this law.

b. Court orders include all orders rendered by a foreign jurisdiction, independently of the name given to such order by the foreign jurisdiction, and that may be referred to as order, judgment, decision, decree, verdict or award for costs in a court action.

c. In this Article, arbitral awards include awards made by domestic and international arbitrators or permanent arbitral bodies.

Article 28: Jurisdiction - Idem

In addition to the jurisdiction of the Court in Articles 26 and 27 of this law, the Court shall have concurrent or exclusive original jurisdiction to hear and determine in first instance action or criminal prosecution on matters that are expressly attributed to the jurisdiction of the court by provision of a law.

Article 29: Jurisdiction - Domestic and International

The jurisdiction of the Court shall include domestic and international matters that otherwise falls under its jurisdiction.

Article 31: Powers

The Court shall have with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privilege that are vested in the court of the first instance of general jurisdiction. The provision of the Civil Code of Procedure and Criminal Code of Procedure shall apply to the Commercial Court, except when this law or the Commercial Court rules of Procedure of Law provide otherwise.

Article 32: Sittings

- a. Subject to rules of the Court, two (2) judges and one (1) associate judge may sit and act at anytime and at any place in Cambodia for the conduct of the business of the court.
- b. Subject to the rules of the Court, where two (2) judges and one (1) associate judge act or sit in accordance with paragraph (1) above, they constitute the court.
- c. The court shall be presided by the judge.
- d. Subject to the rules of the Court, all arrangements that are necessary or proper for the conduct of the business of the Court, and the assignment from time to time of judges and associate judges to transact such business, shall be made by the Chief Judge.

Article 46: Rule of the Court

The Commercial Court Rules of Procedure are applicable to all proceedings heard and determined by the Court. When the Commercial Court Rule of Procedure do not provide for a particular rules, the rules of the Civil Procedure Code and Criminal Procedure Code apply mutatis mutandis.