

Mediation in Cambodia: Current Status, Development and Prospects

Leang Sok

Mediation Program Advisor at the Cambodian Centre for Mediation (CCM). Leang has been involved in research on alternative dispute resolution (ADR) at the local level, namely in matters relating to domestic violence and intimate partner violence. He is a trained mediator and is currently a pro-bono mediator at CCM, which provides extensive mediation training in collaboration with domestic and international mediation houses. CCM has engaged at the national level to provide inputs and consultation on ADR, mediation, and legal aid in Cambodia. Leang holds a master's degree in Sociology-Anthropology, and he received extensive training on transitional justice, international human rights law, gender equality, business and human rights, as well as mediation, together with experiences in providing training and research.

Abstract: This article explores the current status, development and prospects of mediation in Cambodia. Various alternative dispute resolution (ADR) mechanisms such as mediation, arbitration, conciliation and negotiation are still in the process of finding their proper places in the dispute resolution ecosystem. Principle-based mediation in particular, is in its infancy, including its concepts, the role of mediators as compared to that of conciliators or arbitrators and the incorporation of mediation by lawyers and arbitrators in their respective practices. Various stakeholders including government, local and international private sector and community organizations are at different stages in their exploration of mediation as well. Institutions providing labour and commercial arbitration are seeking opportunities to provide mediation services, while different laws have incorporated sections dealing specifically with mediation. These have created potential opportunities for mediation to develop and grow in the current context of Cambodia, including deliberations on the ratification of the Singapore Convention on Mediation.

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Concept of 'Mediation' in Confusion with other ADR Approaches

The understanding of 'mediation' in Cambodia is limited for various reasons. First of all, to the public it is just a form of Alternative Dispute Resolution (ADR), which could be anything but court-related. Secondly, there is limited understanding of what mediation itself entails and people cannot distinguish between different

approaches within the spectrum of ADR. Thirdly, the various Khmer terms for ADR (including negotiation, conciliation, mediation, compromise) have been used interchangeably which further hinders understanding of what exact form of ADR is being referred to in each context. However, most often it is a reference to the conciliation process where power dynamics are considerably disproportionately vested in either the third party conducting the conciliation process and/or between parties themselves.

Research by Women Peace Makers (WPM) and the Cambodian Centre for Mediation (CCM) found that even local authorities which provide conflict resolution in their routine work were not able to distinguish between ADR-related terms like reconciliation, mediation, arbitration and so on. As a result, it is often not clear to them which specific mode of ADR they had employed. Even the media, has not accurately reported on ADR proceedings in Cambodia. A news media outlet that publishes both in the Khmer and English language, used an English term for 'mediation',¹ while in the Khmer language it used another term which had a different meaning from 'mediation'.

However, it is clear that the most dominant form of ADR in Cambodia is '(re)conciliation'. Compromise and concession are familiar concepts and their acceptance in the name of harmony and "saving face" is accorded more importance than ensuring a level-playing field between disputing parties. For example, if one or all parties to a dispute refuse to accept what is offered by the third-party conciliator, such third party might not receive it well and could deem the parties as not having given them the appropriate level of respect. As a result, they would find a way to pressure the parties into accepting their offered solutions rather than letting the parties decide the outcome.

A recent companies survey² conducted in Cambodia by the National Commercial Arbitration Center (NCAC) found that 81 percent of the 399 respondents had never heard of mediation as an option for dispute resolution (NCAC, 2022, unpublished). However, 78 percent of 404 respondents agreed or strongly agreed that the awareness of mediation's benefits needed to be raised.

Mediators and Roles of Mediators

A number of Cambodians have received training overseas (including from Australia, USA, UK, Singapore) to be accredited or certified mediators.³ Some have received this accreditation as far back as ten or more years ago. However, their

¹ CHANDARA, 2023.

² This was supported by International Finance Corporation (IFC).

³ On the mediators' training in Brazil see: AWAD, 2020, p. 57-66.

actual practice as a mediator and the demand for their service as mediators has been limited. There is a discernible difference in the perceived status of those who have been accredited by an overseas institution but who have very limited practical experience in mediation and those who received their training in Cambodia without accreditation from any legally recognized institution. This difference in perception persists even where the overseas accredited mediator has failed to renew his or her accreditation.

This in effect has made those receiving mediation training in Cambodia feel that they are not officially qualified or deemed capable of conducting mediations. It has been observed in a number of training sessions, that this issue surfaced again and again, and is a deterrent to anyone aspiring to be a mediator in Cambodia.

The competition between lawyers, arbitrators and mediators from an income-generation perspective has created a contentious environment among these different professions in Cambodia. It does not help that the role of mediators has still not been clearly defined in the public's perception.

Development of Mediation in Cambodia

In 2008, the Ministry of Justice (MoJ) and Ministry of Interior (MoI) in cooperation with United Nations Development Program (UNDP), initiated a 3-year Access-to-Justice program to introduce mediation at the sub-national level. The program created a manual providing mediation guidelines for various types of disputes. The manual distinguishes, with concise explanation, the differences between each approach of dispute resolution within the ADR spectrum, from highly informal to highly formal, and includes negotiation, conciliation, mediation, arbitration and adjudication.

The program was piloted in a number of districts⁴ (through Justice Service Centers (JSCs)) and Commune Dispute Resolution Committees (CDRCs) at commune levels. The JSCs and CDRCs have been under-resourced and regular trainings were discontinued after the conclusion of the UNDP-sponsored program. Unfortunately, Cambodia's attempts in 2008 to create JSCs and CDRCs with the objective of rolling out mediation nationwide did not do enough to raise awareness of the usefulness of mediation.

After the failure to provide sufficient services and resources to JSCs and CDRCs, talk of the provision of legal aid at the national level gave the previous

⁴ Administration in Cambodia is divided by Capital and Provinces, followed by districts and further followed by communes. In Cambodia there are 25 provinces (including one capital city). Each province is subdivided into a number of districts and each district is subdivided into a number of communes and each commune is sub-divided into different villages.

program a new lifeline. JSCs and CDRCs were considered the most appropriate channels to provide legal aid at the sub-national level. At the same time, there was a campaign launched to reduce the backlog of cases in the courts. As a result, the number of JSCs grew to 68 in 2020, concurrently as MOJ was attempting to accelerate the provision of legal aid in Cambodia. As more JSCs were set up and reactivated, two additional staff members were recruited and trained to assist the mediations.

The MOJ launched a rigorous campaign between May 2020 and June 2021, to reduce the courts' backlog of cases which had overwhelmed the court facilities. Within that 13-month period, more than 37,900 criminal cases were resolved at the prosecution stage, investigative stage and the trial stage – equivalent to 96 percent of the total of over 39,500 backlogged criminal cases.⁵ The revitalization of JSCs soon came to an end, when an administrative reform at district level created an Office of Legal and Local Dispute Resolution in 2021, to be directly under supervision of district-level administration. This relieved all the duties and offices of the existing JSCs.

There was also a structural reform in MOJ. MOJ had a Department of Mediation and Local Dispute Resolution. At its earlier stage, the Mediation department was placed hierarchically under the General Department of Criminal Affairs but it was later moved to be under the General Department of Civil Affairs in 2021. This could be interpreted as a determination that mediation services are deemed to be more appropriate in civil matters than criminal affairs.⁶

Court-annexed mediation was briefly discussed, but has not materialized to this date.

Mediation within the Non-Government Sector

UNDP has a pool of mediators for UNDP staff-related disputes. However, cases were limited. A number of reasons for this have been raised,⁷ including the lack of awareness among staff about the mediation procedure and the benefits of using mediation service. Another reason could be psychological, as staff could perceive the need to seek a third party for resolving their conflict as a sign of weakness rather than viewing it as engaging a professional service.

The Asian Development Bank (ADB) has recently had several mediators accredited by the Singapore International Mediation Institute following an

⁵ DARA, 2021.

⁶ On mediation in Brazil see: FERREIRA; SEVERO, 2021. See also: FARIAS, 2020.

⁷ Personal communication with Mr. Savath Meas, the Executive Director of Cambodian Center for Mediation (CCM).

assessment conducted by the Singapore International Mediation Center (SIMC), one of which is Cambodian. A conversation with this Cambodian mediator, suggests that mediation would be beneficial to staff welfare in resolving disputes within ADB-funded projects across Cambodia.⁸ It is mandatory under the Office of Professional Conduct to deal with internal dispute and within project implementation.

Mediation is seen as a softer approach in dispute resolution. The existing Compliance Review Panel of ADB is perceived to be stricter in terms of outcomes, with less flexibility. The introduction of mediation is seen as a more effective and cost-effective alternative, which also leaves the parties' relationship in a more positive state after the disputes have been resolved.

CCM was established in 2010 and has been assisting the government in the early Access to Justice program since 2008. CCM has conducted research on ADR and mediation, as well as organized mediation training under cooperation with internationally-accredited mediators. CCM has attracted a pool of local and international mediators to provide pro-bono mediation services and to promote mediation in general.

Moreover, other civil society organizations (CSOs) and private law firms have been exploring the possibility of bringing mediation to the fore as well. CSOs see benefits of mediation, in particular, in the resolution of daily disputes. For some law firms, adding mediation services is seen as an additional income-generating line of business on top of their existing legal practice. There is also an aspiration to be among the first to provide services in this field.

Growing Trend in the Formulation and Practice of Mediation

The Ministry of Justice is well on course in its development of ADR. After multiple consultative workshops with development partners and local and international CSOs, MOJ announced in April 2021, the setting up of a mediation training team to be made up of specialists from state institutions as well as national and international CSOs.⁹ In late 2021, the Ministry of Justice developed a plan and direction for the establishment of a non-judicial dispute resolution mechanism at the local level for 2022.¹⁰ In March 2022, MOJ signed an Memorandum of Understanding (MOU) with Oxfam in Cambodia and with a local organization, WPM, on a project that would strengthen the mechanisms for and the implementation of sub-national mediation.¹¹ The MOU with these two organizations provided MOJ

⁸ Personal communication with Mr. Sambath Kim, SIMC-accredited mediator and ADB Safeguarding Specialist.

⁹ DARA, 2021.

¹⁰ MINISTRY..., 2021.

¹¹ SOCHAN, 2022.

financial support and technical assistance respectively. This is an indication that MOJ is actively engaged in the development of ADR in Cambodia. Senior officials, including the Secretary of State, have been leading various consultations and discussions including attending overseas conferences related to mediation. Moreover, Senior officials of the MOJ also attended the VII Asia Pacific Mediation Conference in South Korea in December 2022.

The Ministry of Women's Affairs (MoWA) has developed Guidelines on Limited Use of Mediation to Respond to Domestic Violence, after advocacy based on evidence from research by WPM and CCM found that the practice of ADR at sub-national level was not principle-based and lacked gender sensitivity and a survivor-centered approach. Domestic violence is, to a certain extent, a criminal offence,¹² but has not been dealt with under any criminal legal provisions. They have been resolved through ADR mechanisms instead. The Law on Prevention of Domestic Violence and Protection of Victim ("DV Law") provided an option for mediation in some articles but there were no specific guidelines, training or resources to ensure a gender-sensitive mediation practice.

A batch of mediators have been trained and trainings are now being rolled out to local authorities at sub-national level, to deal with domestic violence cases at the commune level. Based on WPM and CCM research,¹³ local authorities who are the service providers, have requested that they be provided with proper trainings on mediation and an understanding of the differences between various related terms like mediation, conciliation, arbitration and negotiation.

In labour dispute resolution, the Arbitration Council (AC), which was established in 2003 with the support of the Ministry of Labour, employers and unions, is empowered to assist parties in resolving collective labour disputes in Cambodia.¹⁴ As at March 2023, it had registered 3,043 cases of labour disputes, with a success rate of 75.16 percent.¹⁵

In addition to conducting arbitrations, Arbitration Council Foundation (ACF), the secretariat supporting the function of AC, had in 2018, commissioned a study on the demand for fee-based mediations in Cambodia, in order to expand its generally-applauded services, and to enhance the sustainability of the institution.¹⁶ However, the findings of the study suggest that the demand for a fee-based mediation service by the ACF was quite low.¹⁷ The study found that the lack of demand for mediation services might be a reflection of a range of factors, including an apparent decline in

¹² According to Law to Prevent Domestic Violence and Victim Protection in Cambodia.

¹³ SUYHEANG, 2020.

¹⁴ Retrieved from: <https://www.arbitrationcouncil.org/about-ac/>.

¹⁵ Retrieved from: <https://www.arbitrationcouncil.org/>.

¹⁶ THE ARBITRATION COUNCIL FOUNDATION, 2018, p. 3.

¹⁷ THE ARBITRATION COUNCIL FOUNDATION, 2018, p. 4.

labour disputes in recent years, a lack of knowledge and awareness about the role that external mediation services could play, some uncertainty over the quality of service delivery as perceived by employees and employers, and challenges relating to affordability.¹⁸

In the commercial context, Cambodia adopted a Law on Commercial Arbitration in 2006, to fulfil a requirement when Cambodia joined the World Trade Organization (WTO) in 2004. The functioning and operation of the National Commercial Arbitration Center (NCAC) was regulated in 2009 and amended in 2010. Similar to ACF overseeing the AC in the labour sector, the NCAC was established to oversee and assist the functioning of commercial arbitration. It was only in 2015 that NCAC started to receive cases. Within a period of five years from 2015 to 2020, NCAC received only 25 cases with total sum in dispute in excess of USD 72 million. However, not all cases submitted were administered by NCAC as the center found that it had no jurisdiction over 8 percent of the cases while another 4 percent was withdrawn by parties. All administered cases have been concluded with 28 percent receiving a final award and 60 percent comprising cases that are still active.¹⁹ Cases submitted included business disputes from various industry sectors such as international trade, banking and financial services, corporate, real estate and construction.²⁰

In addition to arbitration services, in March 2022, NCAC has provided mediator training and now has 16 commercial mediators accredited by the Center of Effective Dispute Resolution (CEDR), which is based in the UK. It is therefore ready to provide mediation for commercial disputes.²¹

After this first batch of commercial mediators were trained, NCAC had plans for a second training. However, with the lack of cases in commercial arbitration, commercial mediation would probably be put on hold.²² This could mean that while NCAC has commercial mediators in place, it would not be launching this initiative at full scale for now. Moreover, with the latest list of 65 commercial arbitrators,²³ and 25 cases submitted, with only 22 cases administered, there are limited cases for the available number of arbitrators.

In 2022, NCAC conducted a survey with the purpose of filling the knowledge gaps on:²⁴ (1) current dispute resolution practices among Cambodian companies; (2) companies' perceptions about the efficiency of the available dispute resolution

¹⁸ THE ARBITRATION COUNCIL FOUNDATION, 2018, p. 4.

¹⁹ NCAC, 2023b.

²⁰ NCAC, 2023b.

²¹ MUNMAKARA, 2022.

²² Personal communication with Ms. Sophary Noy, a lawyer and a commercial arbitrator.

²³ NCAC, 2023a.

²⁴ NCAC, 2022.

mechanisms in terms of time, cost, process and neutrality (judges, arbitrators or mediators); and (3) companies' experience and perceptions of the commercial mediation regime in Cambodia.

The survey found a mix of options that have been used in dispute resolution including negotiation, mediation or arbitration. While 31 percent of the respondents went through mediation, 81 percent (out of 26 respondents) were presented the opportunity to choose mediation.²⁵ However, it should be noted that, as highlighted earlier, the confusion in Khmer words used to describe these different methods could affect the accuracy of these statistics.

Pragmatism and Exploration of Mediation Practice

Various legislation incorporate provisions related to mediation. These include DV law, Code of Civil Procedures, Labour Law, Land Law, Investment Law, Law on Management and Administration of Commune and Sangkat Council and the Law on Insurance 2014. Mediation is also adopted as the compliance mechanism of ADB loans for mega-project development.

Mediation in Cambodia has been adopted in the following sectors, as seen in practice and provided in legal text: traditional customary practice, community, sub-national level (currently guidelines are being developed for family disputes), legal aid, commercial, labour, telecommunication, land conflicts, insurance, potential intellectual property rights. Mediation has been seen as a more useful and cost-effective dispute resolution mechanism by those who have been exposed to mediation training. During CCM training, participants from banking sector have indicated that mediation training has proved to be useful in their dealings with customers. It is, at the very least, a useful soft skill.

Mediation Opportunities

There has been a growing interest in the provision of mediation services but less on the demand side. It has been observed that while those who have received mediation training have gained an understanding of what mediation is, user awareness is still limited. Locally-trained and overseas-accredited mediators might see the importance of mediation services in Cambodia but the demand for their services might not be explicit or as high as expected by mediators. A study by the Arbitration Council Foundation (ACF) found low demand. However, it should be taken into consideration that while mediators get exposed to theories, principles and benefits of mediation practice, the public and those who may need the service

²⁵ NCAC, 2022, p. 7.

do not have a similar level of exposure to mediation, which prevents them from seeing the usefulness of mediation service. So the *status quo* might not have improved, although excitement is emerging on the supply side.

Various stakeholders have been putting in more effort to provide services and training for selected target groups. At the same time, various stakeholders are also developing guidelines, codes of conduct, best practices and a record of lessons learnt for their own sectors. These independent efforts to promote mediation could be due to a lack of awareness of the similar and complementary efforts being put in place by other institutions. Some have also sent their officials for training, accreditation or made efforts to bring international training centers into their realm, to grow the capacity for mediation within Cambodia.

The current on-going debate is whether Cambodia should have a mediation law as a starting point to kick-start mediation in the country. Cambodian overseas-accredited mediators still see proper mediation practices missing in the country's ADR system. While centers to provide mediation services and training have been established, once trained, the local mediators trained by overseas-accredited mediators or other local mediators still have doubts on their accreditation status and question if they are qualified to provide mediation services in Cambodia.

The Level of Receptivity to the Singapore Convention on Mediation and the Possible Hurdles to Cambodia's Accession to and Ratification of the Convention

There is an optimism among local mediators that Cambodia would benefit from accession to and ratification of the Singapore Convention on Mediation.²⁶ However, ratifying an international convention is often treated with caution. Cambodian CSOs have been calling for the Cambodian government to ratify other conventions, including ILO Convention on Domestic Work (C189) and on Violence and Harassment in the World of Work (C190). While the government tends to support these calls, there has been very slow progress. It has been observed that the government has often and on various occasions stated that more time is needed to conduct a careful and thorough study on the advantages and the disadvantages of ratifying these conventions.

The government might not have the confidence at the moment, to ratify the Singapore Convention on Mediation without proper analysis to have the reassurance that the benefits of acceding to and ratification of the Convention would outweigh any potential additional burdens. Afterall, ratifying a convention comes with obligations.

²⁶ See COMETTI; MOSCHEN, 2022. See also: MASON, 2021.

Cambodia has ratified 8 out of 9 International Human Rights Treaties and in all of them, the government has both reporting and implementation obligations. Some of these obligations have been fulfilled and while others have been delayed.

Moreover, although 56 countries have signed or acceded to the Convention so far, only 11 have ratified. In addition, no country in ASEAN, other than Singapore itself, have ratified the Singapore Convention on Mediation (although ASEAN members Brunei, Malaysia, Philippines and Laos have also signed the Convention). So, raising awareness of the Convention's benefit to the regional bloc would be the next step in getting the relevant governments of the other ASEAN's member states to be on the same page.

However, the effort to raise the level of receptivity for the Singapore Convention on Mediation is illustrated in an effort by SIMC, in conjunction with the Singapore Ministry of Law, in organizing in a capacity-building workshop held in March 28–29, 2022 in Phnom Penh.²⁷ About 20 participants from Cambodia's Ministry of Commerce, Ministry of Justice, and the National Commercial Arbitration Center attended the workshop. It was an opportunity for Singapore and Cambodia to exchange views and share experiences²⁸ on mediation.

Looking into the Future

Mediation has a great potential to become a better mode of dispute resolution than bringing cases to court given the unpredictable nature of the court system, and the high rates of disputes reported at the community and sub-national administration levels.

While other forms of ADR still have their place, a principle-based dispute resolution mechanism in the form of mediation could provide another option which in the long run, could enter the mainstream like arbitration (in commercial and labor disputes) with more effort to raise awareness to mediation.

The government, CSOs and practitioners are all aware of the barriers to access to the courts such as the overwhelming backlog of cases in the courts and the insufficient number of judicial personnel. They have suggested ADR in general, as the solution to these problems. However, there is still a lack of understanding as to what form of ADR would be appropriate

Overseas-accredited mediators have expressed the wish to support the government in accelerating the introduction of legal or policy frameworks on mediation. They have made attempts through individual meetings and other platforms to push the government to accede to and ratify the Singapore Convention

²⁷ SIMC, 2023.

²⁸ SIMC, 2023.

on Mediation, as they see this to be one the most effective way to raise awareness of the use and practice of mediation.

Increasing publications on mediation in the local language would also go a long way to raise its awareness among the public. For a start, there should be clear categorization with clear distinction of the different mode of ADR. This would help raise the awareness and understanding of mediation.

Cambodia has scored very low in the ranking of World Justice Project. It would be time-consuming and costly to rectify formal court procedure to improve itself in the index. Going to court is not viewed favorably in daily life in Cambodia. As a result, many conflicts would go unresolved. In addition, the one who brings a dispute to court would usually be the party that has the greater ability to sustain and succeed in court proceedings, by reason of better financial resources and social connections, putting the other party at a disadvantage.

As a result, commercial arbitration and mediation have been applauded as positive steps forward, as international standards are in place with predictable schedule and procedures. However, this is still at an early stage and more cases and experience would be needed to improve the skills of those in these fields so as to build more confidence from related sectors and the public.

Conclusion

Cambodia is in a stage of positive development in mediation practice, in the light of various new provisions in laws and policies, as well as the growing and emerging efforts to raise awareness in mediation. Apart from government efforts, various stakeholders have increasingly been involved in the formulation and development of services and legal frameworks on mediation. However the demand for mediation from users is still limited. There needs a wide public education in order to ensure the users are well aware of this mode of ADR in the form of mediation. Moreover, there needs to be more synergies between different stakeholders so that their efforts are complementary to each other in building and shaping of legal and policy framework for mediation in Cambodia.

The efforts by the government with the financial and technical support from development partners and CSOs, indicate an intention to move mediation and ADR in general, forward. However, these efforts cannot be fully dependent on non-government sources of funding, without an integration with the national budget or it would be a challenge for the government to take ownership of these initiatives.

Historical and cultural practice of ADR in Cambodia in the form of conciliation where a third party plays a more dominant role, is still the main form of ADR adopted in Cambodia. An integrative approach to existing general ADR mechanism that is culturally sensitive will be required for mediation to take root.

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Personal Communication

Mr. Meas Savath, Director of Cambodian Center for Mediation (CCM), Accredited Mediator from UK, and Accredited Commercial Mediator (NCAC).

Mr. Kim Sambath, SIMI accredited mediator, ADB Safeguarding Specialist.

Ms. Noy Sophary, Lawyer and Commercial Arbitrator.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

SOK, Leang. Mediation in Cambodia: Current Status, Development and Prospects. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 05, n. 09, p. 23-35, jan./jun. 2023. DOI: 10.52028/rbadr.v5i9.ART01
