Taking Evidence under the NCAC Rules: Overview and Comparison with International Best Practices

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Introduction

As a prominent alternative dispute resolution mechanism, arbitration plays a pivotal role in resolving commercial disputes. In Cambodia, the National Commercial Arbitration Centre ("**NCAC**") was established as the first commercial arbitral institution aiming to provide comprehensive procedural rules for resolving commercial disputes through arbitration. The initial 2014 NCAC Arbitration Rules have since been superseded by the 2021 NCAC Arbitration Rules ("**NCAC Rules**").

One key aspect of arbitration proceedings is evidence-taking, which forms the backbone of the arbitral tribunal's ability to render informed decisions. The NCAC Rules aim to provide the parties with a fair, expeditious, efficient, and cost-effective dispute resolution mechanism, including how evidence is taken.

In this article, we discuss:

1. The nature of evidence-taking and its significance in arbitration;
2. Evidence-taking under the NCAC Rules;
3. Challenges and limitations in evidence-taking; and
4. International best practices for effective evidence-taking, with reference to the International Bar Association Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") and the Rules on the Efficient Conduct of Proceedings in International Arbitration ("**Prague Rules**").

Nature of Evidence-Taking and its Significance in Arbitration

Evidence-taking is a cornerstone of the dispute resolution process. It assists the decision-maker(s) in understanding the facts of the dispute, assessing the veracity of each party's position, and ultimately issuing a reasoned and fair arbitral award.

Arbitration in Cambodia offers great procedural flexibility in this regard. Specific procedures on evidence-takingare not regulated – instead, arbitral proceedings follow a party-driven approach that grants disputing parties significant autonomy to determine the rules and methods for the taking of evidence. Parties may choose to adopt the NCAC Rules, or international rules such as the IBA Rules or the Prague Rules.

Where a dispute arises regarding the taking of evidence, the tribunal's discretion becomes essential. The tribunal may determine the relevant protocols that balance efficiency and ensure a workable approach to gathering, assessing, and weighing evidence.

In doing so, it is crucial the tribunal ensures that proceedings are conducted in a fair, impartial, expeditious, and cost-effective manner. This maintains the integrity of the proceeding and reduces the risk of an arbitral award being challenged. Thus, it is essential that evidence-taking is handled properly by the parties and the tribunal.

Evidence-taking under the NCAC Rules

If parties fail to determine any specific evidentiary rules applicable to their arbitration, the NCAC Rules will apply by default. The NCAC Rules provide certain requirements regarding evidence-taking, which we elaborate on below.

General Provisions on Evidence

Article 40 of the NCAC Rules places the burden of proof on each party to provide evidence to support their claims, counterclaims or defences. The tribunal has the authority to determine the admissibility, relevance, materiality and weight of all evidence. Such determination of the tribunal is not bound by the rules of evidence of any applicable law (Article 40.3 of the NCAC Rules).

Pursuant to Article 40.2 of the NCAC Rules, the tribunal's discretion extends to ordering a party, at any time during the arbitral proceedings and as it deems necessary or appropriate, to:

1. produce documents, exhibits or other evidence;
2. provide an index or summary of the documents, exhibits or other evidence the party has presented or intends to present;
3. make any site, object or document under its control available for inspection by the tribunal, the other party, or any expert appointed by the tribunal; and
4. arrange for samples to be taken from, or any observation to be made of or experiment conducted upon, any site, object or documents under its control.

Articles 41 and 42 of the NCAC Rules further outline the framework for evidence-taking involving witnesses, which includes parties' factual and expert witnesses and the tribunal's appointed expert witnesses.

Parties' factual witnesses and parties' appointed experts

Subject to the limitation of the number of witnesses to attend the hearing, any party has the right to request any particular witness to attend the hearing. Before the hearing, parties are required to give notice of (i) the identities of the witnesses they intend to call; (ii) the subject matter and relevance of their testimony; and (iii) the language that such witnesses may use in the hearing. The witnesses will testify under oath or affirmation and be questioned by the tribunal and each of the parties.

Under Article 41 of the NCAC Rules, the tribunal has the discretion to:

1. allow, limit or refuse the appearance of the parties' factual or expert witnesses at the hearing;
2. direct that their testimony is to be presented in written form or other forms of recording;
3. direct the witness to attend hearings in person; and
4. where a witness fails to attend the hearing – to decide whether to place weight on the witness's witness statement, disregard it or exclude it altogether as deemed appropriate.

Unlike other rules, the NCAC Rules do not specify the tribunal's powers to determine some matters. For instance, the IBA Rules clearly specify the tribunal's power to determine:

1. the period in which to submit the witness statement;
2. who can be a factual witness;
3. the form of the witness statement; and
4. how to proceed where a witness refuses to provide witness testimony.

In these areas, it would appear that a tribunal in an arbitration under the NCAC Rules would have to rely on its general discretion and power to regulate the procedure of the arbitration, having regard to factors such as treating all parties fairly and ensuring that the proceedings are conducted expeditiously.

Experts appointed by the tribunal

For complex or technical issues, unless the parties agree otherwise, the tribunal may, after consulting with the parties, appoint one or more independent experts to report on technical issues specified by the tribunal.

The tribunal may require a party to provide information and/or any access to any relevant sites, goods, properties or documents to an appointed expert for inspection. The expert will then prepare and submit a written report to the tribunal. The report will be shared with the parties, who may provide written comments on the report to the tribunal. Upon the parties' agreement, the appointed expert may be requested to appear at the hearing to be examined by the parties and the tribunal.

Court involvement in evidence-taking

Article 35 of the Law on Commercial Arbitration provides that the tribunal, or a party with the approval of the tribunal, may request assistance in taking evidence from a competent Court. The Court may execute the request within its competence and according to its rules on taking of evidence.

Although it is unclear as to what types of requests or procedures are applicable to this mechanism as it has not been tested, it may be useful where material evidence is in the possession of non-parties who are not under the tribunal's jurisdiction or bound by the tribunal's orders. A party to the arbitration must then obtain a court order to compel such non-parties to produce the evidence.

Evidence-taking procedure agreed upon by the parties beyond the NCAC Rules

The NCAC Rules provide flexibility for parties to organise and schedule the arbitral procedure in the most appropriate manner to facilitate the resolution of their dispute. Pursuant to Article 35 of the NCAC Rules, the tribunal, upon its appointment, may conduct a preliminary meeting to discuss procedural matters, including any rules and requirements applicable to evidence-taking. This may include whether the parties adopt international standards such as the IBA Rules or the Prague Rules as their evidentiary rules, any special requirement for taking of evidence, limitations and procedural timeline, or the need for translation into a specific language. All these will generally be specified in the first procedural order.

Challenges and Limitations in Evidence-Taking

Despite the flexibility afforded by the NCAC Rules, arbitral proceedings may face challenges in evidence-taking, including the submission of irrelevant and/or excessive evidence and non-compliance with tribunal orders. If not addressed properly at the outset, these challenges may prolong the proceedings and cause the parties to incur more costs.

Irrelevant and excessive evidence

Article 40.1 of the NCAC Rules provides that parties bear the burden of proof to substantiate their respective positions with evidence, without limiting the relevancy or admissibility of evidence. This may lead to the submission of a large – or even excessive – quantity of irrelevant documents to the tribunal, impeding the efficiency of the arbitration by increasing time and costs for the parties and distracting from the key issues and evidence.

Therefore, it is crucial for the parties to carefully consider the relevance and necessity of submitted evidence, so as to ensure that the tribunal can effectively assess the case at hand. Robust directions from a tribunal on the areas or categories of evidence it considers relevant or material can also help parties focus their cases, and encourage parties not to adduce irrelevant evidence.

Non-compliance with tribunal orders for document production

Under Article 40.2 of the NCAC Rules, the tribunal may order parties to disclose relevant information that will assist the tribunal's determination. Where parties refuse to comply, they may hinder the tribunal's ability to assess the merits of the claims and defences, potentially affecting the overall outcome of the arbitration. This situation may also lead to delays, increased costs, and questions about the integrity of the proceedings.

As such, Article 55(g) of the NCAC Rules empowers the tribunal to impose sanctions for non-compliance with its orders in general, but does not specify what specific sanctions may be imposed, as follows:

> *"[…] the tribunal shall have the power to […]*
>
> *(g) impose sanctions as the tribunal deems appropriate to any party for failure or refusal to comply with the Rules or with the tribunal's orders or directions or any partial award or to attend any meeting or hearing".*

However, as sanctions are wholly at the tribunal's discretion, this may cause uncertainty and unpredictability for the parties. Parties who feel that they have been wronged or unfairly treated by a tribunal may attempt to challenge or set aside a tribunal's decision or award. Tribunals should bear this risk in mind when devising procedural orders and guidelines.

International Best Practices for Effective Evidence-Taking

When addressing the challenges and limitations of evidence-taking, international best practices can provide valuable insights for both parties and tribunals. Key frameworks like the IBA Rules and the Prague Rules are widely recognised for offering comprehensive guidelines on managing evidence in arbitration. These frameworks present different approaches towards balancing party autonomy with tribunal discretion in the evidence-taking process. Currently, the IBA Rules are more commonly used in international arbitration compared to the Prague Rules.

The IBA Rules aim to reconcile civil law and common law practices; however, many critics feel that these rules lean more towards common law. They elaborate extensively on document production processes that may be unfamiliar to civil law practitioners and grant significant control to the parties involved, promoting an adversarial approach to evidence-taking with considerable freedom given to the disputing parties.

In contrast, the Prague Rules are designed to align more closely with civil law traditions. They introduce a more inquisitorial approach to evidence-taking, encouraging a proactive role for the tribunal in managing, directing, and supervising the evidentiary process. This approach prioritises cost and time efficiency.

Below, we provide a brief comparison of the IBA Rules and the Prague Rules.

	IBA Rules	Prague Rules
Managing excessive and/or irrelevant evidence	• **Broader scope for party involvement**: Article 2 mandates that the tribunal facilitate consultations between the parties to agree on an efficient, economical, and fair process of evidence-taking, including its scope, timing, and manner. • **Document production**: Article 3 permits parties to submit a Request to Produce for the production of necessary evidence. A notable tool is the Redfern Schedule, which requires the requesting party to provide descriptive information about requested documents, including their relevancy and how they are material to the issues in the arbitration. This structured format enables the tribunal to more easily assess the necessity of the requested evidence.	• **Greater discretion of tribunal**: Article 2 requires the tribunal to hold a case management conference ("**CMC**") promptly after receiving the case file to guide the parties on the types of evidence considered appropriate, relevant and necessary to prove their respective positions. • **Document production**: Article 4.2 explicitly discourages the tribunal and parties from any form of document production. Any document request should be made at the CMC. This actively narrows the scope of evidence that can reduce delays and improve efficiency.
Party objections to document production	Where parties object to document production, the tribunal has the discretion to determine the admissibility, relevancy, materiality, and weight of evidence submitted. The IBA Rules additionally take a structured approach to objections. • Use of the Redfern Schedule allows parties to raise objections at an early stage when the Request to Produce is submitted. • Article 9(2) outlines the grounds on which objections can be made, reducing ambiguity and delays in the proceedings.	Where parties object to document production, the tribunal has the discretion to determine the admissibility, relevancy, materiality, and weight of evidence submitted.
Non-compliance with tribunal orders	Any failure to comply with the tribunal's orders, including orders for document production, may lead to the tribunal drawing an inference that the documents ordered to be produced are adverse to the interests of the non-compliant party (Article 9.6 of the IBA Rules; Article 10 of the Prague Rules). This inference acts as a deterrent against withholding evidence and encourages both parties to provide all relevant information openly. In addition to sanctions, this deterrent effect can help to ensure arbitrations are conducted effectively and efficiently.	

Conclusion

The NCAC Rules provide a flexible framework in evidence-taking that accommodates a wide range of evidence types and tailors the procedures to the specific needs of each dispute. As arbitration becomes increasingly popular, effective management of evidence-taking is essential for the success of an arbitration. Parties may also wish to consider international best practices. This will significantly enhance the efficiency of evidence management and ensure smooth arbitration proceedings.

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