



Project Finance

in 45 jurisdictions worldwide

Contributing editors: E Waide Warner Jr and Gavin R Skene

2011



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Cambodia

Martin Desautels, Rashed Idrees and Sambo Ly

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1 Collateral

What types of collateral are available?

Collateral over which security can be created under Cambodian law includes moveable property (serial-numbered vehicles, instruments, documents, secured sales contracts, etc), goods (equipment, inventory, consumer goods, consigned goods, leased goods, etc), intangible property and the proceeds of the aforementioned. In addition, security can be created over immovable property (land, building, rights *in rem*, fixtures) under the Land Law of Cambodia.

2 Perfection and priority

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

In general, a security interest is perfected when it has been attached to the collateral and a notice of the same has been filed. In addition, security agreements with respect to immovable property must follow the model security agreement and must be entered into in the presence of the competent authority.

The filing of notice is not required to perfect some security interests such as a purchase money security interest in consumer goods, a security interest in proceeds and a security interest in a guarantee. A security interest in goods, instruments, documents or secured sales contracts may be perfected by filing or by the secured party's taking possession of the relevant collateral. The perfection of a security interest in money can only be effected by the secured party taking possession of the money. Nominal fees are payable to file a notice to perfect a security interest.

As a general rule, the time of filing or perfection determines the priority of security interests in the same collateral. There are some exceptions to this general rule. A perfected purchase money security interest in equipment, for instance, has priority over conflicting security interests in the same equipment, even those created and perfected before the perfection of the purchase money security interest, if the purchase money security interest is perfected when the debtor receives possession of the equipment or within five days thereafter.

If there is neither filing nor perfection among various security interests in the same collateral, the first security interest to attach has priority over the other security interests.

Collateral may be held by a corporate entity in the capacity of agent or trustee of – and for and on behalf of – a secured party. As such, that collateral would not be considered to form part of the estate of that agent or trustee in the event of their bankruptcy. The parallel debt clause concept is not expressly recognised under Cambodian law and, consequently, such clause is not commonly used in practice.

3 Existing liens

How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Creditors may perform a search at the Secured Transactions Filing Office at the Ministry of Commerce and, for immovable property, a search in the Land Registry Office of the Ministry of Land Management, Urban Planning and Construction for an existing security interest that has been filed. For security interests that are perfected without filing, there is no established mechanism to assure the absence of such security interests in the collateral other than representations and warranties obtained from the debtor.

4 Enforcement of collateral

Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

For secured interests over immovable property, the secured party cannot take ownership of the secured immovable property upon default of the debtor (unless there is no objection from the debtor and its creditors, if any). The secured party can only claim for a compulsory sale of the secured immovable property in court. The sale of the immovable property must be made by public tender or auction. The court may prescribe another method of sale if the sale cannot be made through public tender or auction. The creditor can participate in the sale of the property. There is no requirement that the sale must be completed in local currency.

For security interests over moveable property, goods and intangible property which are created and perfected in accordance with the Law on Secured Transactions, the secured party shall, upon default, have the right of possession or control over the collateral even if the security agreement is silent about possession or control. The secured party may proceed directly against the debtor upon default with respect to its accounts or other intangible properties and is entitled to notify an obligor on an account or the obligor on any other intangible property to make payment to the secured party, and also to take control of any proceeds.

For other collateral, the secured party shall be entitled to a special, expedited order from the court granting the secured party possession or control over the collateral upon default. Issues at the hearing are limited to the existence of a security agreement covering the collateral and at least one event of default. It should be noted that the secured party may take possession or control of collateral without legal proceedings if the debtor has agreed in writing after default. A secured party may sell, lease, license or otherwise dispose of any or all of the collateral. Disposal of the collateral may be made publicly or privately, in one or more contracts, and the secured party shall give reasonable notice to the debtor. The secured party may buy that collateral at any public or private sale. The secured party is required to inform any other secured party from whom the secured party has received a written record of an interest in the collateral.

The secured party shall act at all times in a commercially reasonable manner when disposing of the collateral.

5 Bankruptcy proceeding

How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

No action, proceeding or execution process may be commenced or continued against a debtor or the estate of a debtor after the commencement of an insolvency proceeding in respect of that debtor. The administrator may, however, give written authorisation to secured creditors to repossess and sell the encumbered assets in accordance with applicable law or in any other way avail themselves of their security right. Employee wages, remuneration for the provisional administrator, administrative fees and court fees have priority over the security in the proceeds of the liquidation.

The bankruptcy proceedings provided under the Law on Insolvency do not apply to banks and financial institutions, insurance companies, and those governed by the Law on Issuance and Trading of Non-Government Securities which, in each case, would be subject to laws more specific to them (banking and financial institutions regulations, insurance regulations and regulations related to the issuance and trading of non-government securities).

Immovable property collateral can only be foreclosed through court proceedings. For accounts or other intangible property collateral, the secured party may collect the collateral without judicial action. The secured party may also take possession or control of other collateral upon default outside of court proceedings if the debtor has agreed in writing after default. It should be noted that the secured party is entitled to a special, expedited order from the court granting the secured party possession or control over the collateral. The hearing is limited to only two issues: the existence of a security agreement and the existence of an event of default.

6 Foreign exchange

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

No restrictions are imposed on foreign exchange operations, including purchases and sales of foreign exchange, transfers, all kinds of international settlements and capital flows in foreign or domestic currency, between Cambodia and other countries. There are no taxes payable to any governmental authority on foreign currency exchange. Nevertheless, the National Bank of Cambodia may impose certain temporary restrictions – for up to three months, extendable upon approval by the prime minister – on foreign exchange operations in the event of a foreign exchange crisis.

7 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or loan payments to parties in other jurisdictions?

In general, there are no restrictions or controls on remittances of investment returns or loan payments to other jurisdictions.

Nevertheless, the remittance of investment returns or loan payments and other transfers overseas relating to the investment must be undertaken through banks established in Cambodia. Prior declaration to the National Bank of Cambodia is required for offshore investment made by residents for amounts equalling or exceeding US\$100,000. The payment of interest or dividends to non-residents is subject to 14 per cent withholding tax.

8 Repatriation

Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Cambodian project companies are not required to repatriate foreign earnings.

9 Offshore and foreign currency accounts

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Cambodian project companies may establish and maintain foreign currency accounts in both local and offshore banks. No specific approval is required.

10 Foreign investment and ownership restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

In general, foreign investors enjoy the same treatment as local investors. However, there are some restrictions imposed on foreign ownership in some sectors such as landownership, printing and printing related services, radio and television activities. In the aforementioned sectors, the ownership of foreign investors is limited to 49 per cent. In some other sectors such as exploitation of gemstones, making bricks from clay and tile, rice milling, silk weaving and manufacturing of wood, and stone carving, local equity participation is required. Except for the 14 per cent withholding tax that applies to the payment of dividends to non-residents, there are no specific fees or taxes applicable to foreign investors over and above the general fees and taxes applicable to the project and the related companies. No additional registrations and approvals are specifically required for foreign investment besides the registrations and approvals that are required generally for the project and the related companies.

11 Documentation formalities

Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

For moveable property, only a notice of the security agreement related to the security interests needs to be filed with the relevant government authority for perfection. However, it is advisable to also file the security agreement with the government authority. For the registration of a security interest in immovable property, the execution of an additional mortgage agreement in the Khmer language in the form provided by the cadastral office is required.

12 Government approvals

What government approvals are required for typical project finance transactions? What fees and other charges apply?

The government approvals required for typical project finance transactions are substantially the same as those required for an infrastructure project. For example, government approvals required for the financing of a large-scale power project would include the general downstream approvals (including commercial registration with the Ministry of Commerce, tax registration with the General Tax Department, labour registration with the Ministry of Labour and Vocational Training, and, if the project qualifies for investment incentives, registration with the Council for the Development of

Cambodia) and upstream approvals, which notably include:

- approval by the Council of Ministers of the project;
- authorisation of the Ministry of Industry, Mines and Energy;
- an electricity licence from the Electricity Authority of Cambodia;
- approval and various permits from the Ministry of Environment;
- a construction permit from the Ministry of Land Management, Urban Planning and Construction; and
- a water use authorisation from the Ministry of Water Resources and Meteorology.

The profits of the project company shall be subject to a 20 per cent profit tax; however, the project company can enjoy a profit tax exemption for up to nine years if its project meets 'qualified investment' project criteria and other specified criteria. The payment of dividends, interest, rental and service and technical payments to non-residents by the project company is subject to a 14 per cent withholding tax.

13 Foreign insurance

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

All insurance policies over project assets must be obtained through an insurance company registered and licensed to operate in Cambodia. Insurance contracts worth over US\$500,000 are allowed to be reinsured with offshore insurance companies. Insurance policies may be payable to foreign secured creditors.

14 Foreign employee restrictions

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

There is a restriction on the employment of foreign staff under Cambodian law. Companies are only authorised to bring foreign staff whose qualifications, skills and expertise are not available among Cambodian citizens to work in Cambodia. The permitted number of foreign staff is limited to 10 per cent of the total workforce. To employ foreign staff exceeding this ratio, approval must be sought from the minister of labour and vocational training, who generally approves such request by foreign investors.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

Other than the payment of import duties and customs clearance, the import of project equipment and materials can be undertaken without any governmental approval except for the importation of some hazardous and sensitive materials, which may require the approval of the relevant government authority. Investment projects which are entitled to the import exemption of production equipment, construction materials and production inputs, are required to obtain prior approval of the CDC on the equipment and materials to be imported under the import tax exemption.

16 Nationalisation and expropriation

What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Protection against nationalisation and expropriation is provided in both the Law on Investment and various bilateral and international agreements to which Cambodia is a party. No form of incorporation is especially protected. Nonetheless, it is advisable to register

the project as a qualified investment project (if the project qualifies for such registration) to ensure that the project enjoys the protection provided under the Law on Investment.

17 Fiscal treatment of foreign investment

What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Profit tax exemption for up to nine years or special depreciation (as selected by the investors) and import tax exemption on the import of production equipment, construction materials and production inputs (the latter is only granted to export and supporting industry projects) are available for qualified investment projects. Large-scale infrastructure projects will usually qualify for these investment incentives.

Other than certain tax exemptions granted to some multilateral and bilateral financial institutions, foreign creditors may not enjoy any significant incentives.

Besides the 14 per cent withholding tax applicable to certain payments made to non-residents, only nominal fees are payable to the government authority to register the security documents.

18 Government authorities

What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

See questions 12 and 25 on the relevant government agencies and their respective authority.

Some infrastructure projects, such as airports, roads and railways, were originally owned and operated by the state or state-owned enterprises, before they were granted as concessions to private investors. Some other projects, in particular hydroelectric power plants and power transmission lines, are new projects that have never been established or operated by the state; however, the ownership of these projects will often be transferred to the state or state-owned enterprises after the end of the concession period.

19 International arbitration

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

International arbitration and the enforcement of foreign arbitral awards are specifically recognised under the Law on Commercial Arbitration and the Law on the Approval and Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Cambodian courts may enforce foreign arbitral awards without examining the merits of the matter except where:

- the arbitration agreement is not valid under the law governing that agreement;
- notice of arbitration was not properly given;
- the award is given in relation to disputes or matters falling outside the scope of the arbitration agreement;
- the composition of the arbitration tribunal is not in accordance with the arbitration agreement or alternatively, the laws of the country where the arbitration was held;
- the award is not final and binding under the laws of the country in which the award was given;
- the subject matter is not capable of being settled by arbitration under Cambodian law; or
- the recognition or enforcement of the award would be contrary to public policy.

While Cambodian courts are entitled to reject the enforcement of an arbitral award if the courts find that the object of the dispute is not arbitrable under Cambodian law, there is no clear regulatory guidance as to the types of disputes that are not arbitrable. Similarly, we are not aware of any Cambodian law or regulation that subjects any types of disputes to automatic domestic arbitration.

To our knowledge, no foreign arbitral award of a commercial dispute has been enforced, in recent times, in Cambodia.

20 Applicable law

Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Except for the concession agreement, which is required to be governed by Cambodian law, other project agreements and financing agreements are typically governed by foreign laws such as English law, New York law, Chinese law and Singaporean law. Security agreements are typically governed by Cambodian law, except those related to collateral located outside Cambodia.

21 Jurisdiction and waiver of immunity

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

The submission to a foreign jurisdiction is effective and enforceable under Cambodian law. Except in the following circumstances, Cambodian courts may enforce foreign court judgments without examining the merits of the matter:

- the foreign court did not have jurisdiction to hear the matter;
- the foreign court judgment was issued by default;
- the foreign court judgment violates the public policy or morals of Cambodia;
- there is no guarantee of reciprocity between Cambodia and country in which the foreign court is based; or
- the foreign court judgment is not final and conclusive.

To our knowledge, Cambodia has not signed any treaty of guarantee of reciprocity on foreign judgments with any other country.

There is no restriction on waiver of immunity. To date, the Cambodian government has granted such waiver of immunity in several instances.

22 Title to natural resources

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

All natural resources including oil, gas, mineral resources, water resources, etc are the property of the state. Private parties may acquire production sharing rights in oil and gas, concession rights over other mineral resources, or water use right through a water licence or permit. In general, the aforementioned rights can be obtained by both local and foreign parties. Holders of oil and gas production-sharing rights and mineral concession rights are required to pay royalties and surface rent, and have other obligations as specified in the relevant regulations, the petroleum or concession agreements, and the licences and permits issued by the relevant ministries.

23 Royalties on the extraction of natural resources

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Royalties applicable to petroleum shall be at least 12.5 per cent of the value of the petroleum sold. As to other mineral resources, the royalties for some types of mineral resources are set at a specific amount per unit of mines and the royalties for some mineral resources are set

at a percentage of the value of the mineral products sold. A 30 per cent tax applies to the profits realised from oil and gas production-sharing businesses and other natural resource businesses.

24 Export of natural resources

What restrictions, fees or taxes exist on the export of natural resources?

Export of all natural resources is prohibited. Natural resources are reserved for local supply and processed for export. Only processed products of natural resources can be exported.

25 Environmental, health and safety laws

What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

The following are some key laws and regulations to which project companies are commonly subject:

- business enterprise law, commercial registration law and regulations, and secured transaction law (Ministry of Commerce);
- investment law and regulations (Council for the Development of Cambodia);
- concession law (Council for the Development of Cambodia and the ministry in charge of the infrastructure project);
- land law and regulations, and construction regulations (Ministry of Land Management, Urban Planning and Construction);
- factory law, and law and regulations on the management and exploitation of mineral resources (Ministry of Industry, Mines and Energy);
- environmental law and regulations (Ministry of Environment);
- taxation law and regulations (Ministry of Economy and Finance);
- labour law and regulations (Ministry of Labour and Vocational Training);
- electricity law and regulations (Electricity Authority of Cambodia);
- petroleum regulations (Cambodian National Petroleum Authority); and
- water resource management law (Ministry of Water Resource and Meteorology).

26 Project companies

What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Virtually all project companies take the form of a private limited liability company (two to 30 shareholders) or a single-member private limited liability company. Besides equity finance, project companies can obtain finance from both offshore and local banks and from private financial institutions, bilateral financial institutions, notably, Proparco (the Investment and Promotions Company for Economic Cooperation) and Deutsche Investitions- und Entwicklungsgesellschaft mbH (DEG) and multilateral financial institutions, notably the International Finance Corporation and the Asian Development Bank.

27 Public-private partnership legislation

Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The Law on Concessions was enacted on 19 October 2007 to promote and facilitate privately financed infrastructure projects throughout the country. The Law on Concessions only provides for the main legal framework related to the infrastructure project investment. Comprehensive regulations (ie, an implementing subdecree) are expected to be enacted in the near future. In addition, a number

Update and trends

The global financial crisis appears to have had little effect on private infrastructure investment in Cambodia. We note that most of the private infrastructure investment projects, the majority of which are power projects developed by Chinese investors and financed by Chinese banks, have proceeded on schedule or without significant delay. There seem to be no particular programmes or incentives enacted by the government during the financial crisis to increase private investment in infrastructure.

While power sector remains and will, in our view, continue to be the leading sector for project finance in Cambodia for the years to come, telecommunications and information technology infrastructure, tourism facilities and transport facilities have recently emerged as new sectors for project finance, and they are expected to gain further momentum following the financial crisis.

of industry-specific laws have been enacted or are expected to be enacted soon, including the Law on Electricity, the draft Law on Telecommunications, etc.

entitled to grant a longer concession period if the nature of the infrastructure project requires a longer term. As to the governing law, the concession contract must be governed by Cambodian law.

28 PPP – limitations

What, if any, are the practical and legal limitations on PPP transactions?

The legal restrictions on PPP transactions that should be highlighted are the term of the concession and the governing law of the concession contract. The term of the concession is limited to 30 years from the signing of the concession contract. However, the government is

29 PPP – transactions

What have been the most significant PPP transactions completed to date in your jurisdiction?

The most significant PPP transactions completed to date include the SCA airport concession, the CPTL power transmission line project, the 194.1MW Sinohydro Kamchay hydroelectric project, and the 338MW Lower Stung Russey Chrum hydroelectric project.



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