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# Real Estate

**Cambodia - Law and Practice**  
Bun & Associates

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# 2018

# CAMBODIA

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## **LAW AND PRACTICE:**

**p.3**

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law and Practice

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## 1. General

### 1.1 Main Sources of Law

The main sources of real estate law are the Constitution; the Civil Code; the Law on Implementation of the Civil Code; the Land Law; the Law on Management, Urban Planning and Construction (the "Urbanisation Law"); the Law on Providing Foreigners with Ownership Rights in Private Units of Co-owned Buildings (the "Foreign Ownership Law"); the Law on Environmental Protection and Management of Natural Resources (the "Environmental Law"); the Law on Investment; the Law on Taxation; the Code of Civil Procedures; the Royal Decree on Guidelines and Provisional Rules and Procedures for Reclassification of Public Properties to Private Property of State Entities (the "Royal Decree on State Public Property Reclassification"); the Law on Expropriation (the "Expropriation Law"); Sub-Decree No 86 on Construction Permits (the "Sub-Decree on Construction Permits"); Sub-Decree No 126 on the Management and Use of Co-owned Buildings (the "Sub-Decree on Co-owned Buildings"); Sub-Decree No 39 on the Management of Boreys (the "Sub-Decree on Boreys"); amended Sub-Decree No 42 on the Urban Planning of the Capital City, Towns and Urban Areas (the "Sub-Decree on Urbanisation"); Sub-Decree No 48 on Sporadic Land Registration; Sub-Decree No 46 on Procedures to Establish Cadastral Index Map and Land Register, known as systematic land registration (the "Sub-Decree

on Systematic Land Registration"); Sub-Decree No 118 on the Management of State-owned Land (the "Sub-Decree on State Property Management"); Sub-Decree No 129 on Rules and Procedures for Reclassification of Public Properties to Private Property of State Entities (the "Sub-Decree on State Public Properties Reclassification"); Sub-Decree No 181 on the Implementation of Land Use Master Plan of Phnom Penh Capital ("Sub-Decree No 181"); Inter-ministerial Prakas No 30 on Real Rights Registration Procedures Pertaining to the Civil Code (the "Prakas on Real Right Registration Under the Civil Code"); Inter-ministerial Prakas No 59 on the Registration of Immovable Properties under the Code of Civil Procedures (the "Prakas on Immovable Property Registration under the Code of Civil Procedures"); Sub-Decree No 72 on the Process of Environmental Impact Assessment (the "Sub-Decree on EIA"); and the Prakas No 507 on Stamp Duty Tax Collection (the "Prakas on Stamp Duty Tax Collection").

### 1.2 Main Market Trends and Deals

The Cambodian real estate market over the last 12 months has been moving forward with remarkable trends in property development.

Residential property development is still popular for the middle and high classes, which plays an important role in the development of the real estate sector, in particular for the area of Phnom Penh (the capital city) and some major provinces.

There has been an increase in the acquisition of real estate by foreign investors for large projects, such as malls and wholesale centres, not only in Phnom Penh but also in some major development areas in the provinces.

A large number of the approved development projects of condominium buildings and residential communities are currently at their completion stage. As such, the management of the buildings and residential communities is also a concern of the developers, relevant stakeholders and owners, especially since the existing laws and regulations in this area need to be better developed.

The development of transportation and logistic infrastructures — such as new highways, railways, ports and airports — is among the priorities of the royal government and is expected to contribute significantly to the real estate and construction sector of Cambodia.

### 1.3 Proposals for Reform

In response to the fast-growing real estate and construction sector, the royal government is committed to developing comprehensive laws and regulations for governing the sector.

A construction code is being drafted by the Ministry of Land Management, Urban Planning and Construction (MLMUPC), with the construction standard, quality of the building, security and safety the main reforms included to enhance the construction sector. The drafting of the code is at its early stages and it is very unlikely that the code will be adopted within the near future. The MLMUPC has also prioritised drafting the regulations on fines and penalties for illegal construction works.

Furthermore, the MLMUPC and the Ministry of Economy and Finance (MEF) on an individual basis are aiming to develop new regulations to govern real estate development projects (both residential and commercial) and land development activities. It is, however, unlikely that the new regulations will be adopted in the near future.

A master plan for Phnom Penh has been approved through Sub-Decree No 181. The master plan was adopted for the vision of the capital city up to 2035 and may be revised every five years based on the necessity for the economic and social development of Phnom Penh. Note that according to Sub-Decree No 181, three main action plans have been decided: (i) adoption of a number of main projects related to public

investment; (ii) urban planning rules (ie, zoning and detailed rules of urban planning); and (iii) implementation of the existing development and investment projects related to relevant areas such as construction and services.

With regard to the management of state properties, the Ministry of Economy and Finance is working on drafting a law on state property management. The draft law is expected to provide a clearer picture of the management (including transfer, lease and use) of state properties. It is not clear when the law will be enacted.

## 2. Sale and Purchase

### 2.1 Categories of Property Rights

The categories of property rights that can be acquired are ownership, special possession, perpetual lease, economic land concession, usufruct, easement, right of use/right of residence and security rights, namely right of retention, statutory lien, pledge, hypothec and transfer of title for security purposes.

### 2.2 Laws Applicable to Transfer of Title

The following laws and regulations apply to the transfer of title: the Civil Code, the Land Law, the Code of Civil Procedures, the Prakas on Real Right Registration under the Civil Code and the Prakas on Immovable Property Registration under the Code of Civil Procedures.

With an exception of the transfer of an economic land concession that is specifically governed by Sub-Decree No 114 in addition to the general rules related to the transfer of title, no other special laws apply to specific types of real estate (eg, residential, industrial, offices, retail, hotels).

### 2.3 Effecting Lawful and Proper Transfer of Title

According to the Civil Code, the transfer of title to real estate — with the exception of a right of possession, a right of retention, a right of use and a right of residence — is affected by the registration of the transfer with the official registry books. Some formalities are required by the relevant authorities in addition to the transfer documents. For non-registered land, the transfer of possessory right is required to be recognised by the local authorities and relevant authorities. Title issuance is not common in Cambodia.

### 2.4 Real Estate Due Diligence

Generally, the buyers would engage an experienced lawyer to carry out real estate due diligence, which typically involves a title check to confirm whether the real estate legally belongs to the seller, whether or not title over the real estate is valid and whether or not the title is subject to any encumbrance, litigation and restriction.

In significant deals, the potential buyers would also consider:

- verification of the company of the seller to confirm whether the seller is legally in existence and is entitled to sell the property;
- validation of the zoning rules and restrictions affecting the real estate and permits related to the real estate, such as building permits and environment-related permits and authorisations, as the case may be; and
- verification of any major contracts and liabilities relating to the existing project, if any.

## 2.5 Typical Representations and Warranties

Specifically, for the sale of land, if a sale has been made based upon the unit price of the area and if the actual area is less than the agreed area, the buyer may, unless otherwise agreed between the parties, demand:

- delivery of the deficient portion;
- a reduction in the purchase price reflecting the deficiency;
- termination of the contract; or
- compensation for damages.

Furthermore, if a sale has been made based on a fixed price for the entire area and if the actual area is less than the agreed area, the buyer may, unless otherwise agreed between the parties, demand:

- delivery of the deficient portion;
- a reduction in the purchase price reflecting the deficiency;
- termination of the contract; or
- compensation for damages, in any of the following cases: (i) the seller had been aware of the deficiency of the actual area, (ii) the seller guaranteed the accuracy of the agreed area, or (iii) the deficiency exceeds 5% of the agreed area.

## 2.6 Important Areas of Law for Investors

The most important areas of law for an investor of real estate are the Civil Code, the Land Law, the Law on Investment, the Sub-Decree on Construction Permits, the Foreign Ownership Law, the Tax Regulation, the Law on Commercial Enterprises, the Sub-Decree on Co-owned Buildings and the Sub-Decree on the Management of Boreys.

## 2.7 Soil Pollution or Environmental Contamination

There is no special provision dealing with the responsibility of the buyer for the soil pollution or environmental contamination of a property. However, the buyer, being the owner or manager of the real estate, could be declared liable before the third parties based on the legal provisions on tort in relation to soil pollution or environmental contamination of a property, unless otherwise proven.

## 2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

Generally, the buyers would consult with the relevant authorities during the due diligence process on the permitted use of a real estate under the zoning or planning law.

For a large portion of real estate or projects, the buyer would seek approval in principle from the royal government on the drawing of the development project. In some development zones or cities, the developer would seek agreement from the royal government on the development master plan of the zone. However, this is not very common in Cambodia.

## 2.9 Condemnation, Expropriation or Compulsory Purchase

The Law on Expropriation allows the state to confiscate a piece of real estate with prior compensation to the owner for the purpose of national and public interest, including construction, rehabilitation and expansion of public physical infrastructures.

An expropriation project would be prepared by the Expropriation Committee based on a proposal by the governmental institution. Prior to submitting the expropriation project to the royal government for approval, the Expropriation Committee shall publicly conduct a survey recording detailed descriptions and information to produce a report. Upon the government's approval, the Expropriation Committee shall issue a declaration of the project to relevant owners of the real estate.

After receiving the declaration of the expropriation project, the concerned owners may file a complaint within 30 working days with the Complaint Resolution Committee to investigate whether the project is of national and public interest. If there is a disagreement with the decision made on the complaint by the Complaint Resolution Committee, the owners may file their complaint to the competent court.

Such compensation will be fair and just based on the market price or replacement price on the date of the declaration of the expropriation project in the form of a cash payment, property or replacement rights based on the actual situation with consent from the owners and the Expropriation Committee.

## 2.10 Taxes Applicable to a Transaction

A transfer of ownership or right to possession of real estate is subject to stamp duty tax at a rate of 4% on the purchase price or the official threshold value, whichever is higher, which is due within three months from the approval of the sale/transfer by the relevant authorities.

According to the tax regulations, the purchaser or the transferee is responsible for the payment of stamp duty tax. In

practice it is possible to agree otherwise in the sale and purchase agreement, but the purchaser or transferee shall ensure that the tax is properly paid; otherwise, the penalties will be enforced against the transferee or purchaser.

Transfer of ownership or right of possession of real estate property is exempted from stamp duty tax if (i) the transfer is in the form of a concession from the royal government of Cambodia, either an economic or social land concession, or (ii) the transfer is among relatives in the form of succession or a first-time donation: between biological parents and biological children, between spouses, between biological grandparents and biological grandchildren, or between biological parents and a biological child or child-in-law as a common property.

Tax relief on the transfer of property between parents and children-in-law, and transfer among biological siblings in the form of succession is KHR200,000,000 and for donations it is KHR100,000,000.

For the transfer of non-registered property that was transferred many times before 1 January 2017 without paying stamp duty tax, on the first registration with a cadastral office no later than the end of 2018, relief of KHR600,000,000 will be granted as a deduction from the tax base for stamp duty tax.

The transfer of part or all of the shares in a company owning real estate is subject to a stamp duty tax of 0.1% on the higher value between the share purchase price and the par/nominal value. However, in a related party transaction, there is a risk of a 4% tax rate being imposed on top of the 0.1% rate.

## 2.11 Legal Restrictions on Foreign Investors

A foreigner or foreign legal entity is not allowed to own any land in the Kingdom of Cambodia. A company that is duly registered in Cambodia and with 51% or more of the voting shares held by a Cambodian national is considered as having Cambodian nationality and thus is allowed to own land parcel in Cambodia.

Under the Foreign Ownership Law, foreigners may own private units of a co-owned building on the condition that:

- the co-owned building has to be duly registered and is not located within 30 kilometres from the country border;
- foreigners are not allowed to own any parts of the ground floor and the basement floors; and
- the total surface area of all private units owned by the foreigner does not exceed 70% of the total surface area of all private units in a co-owned building.

In the case where foreign investors acquire or erect the building base on the lease agreement, the lease right over

the building will cease in the event of termination of the lease agreement.

## 3. Real Estate Finance

### 3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions of commercial real estate are generally financed under debt or equity financing. There are no special options available for acquisitions of large real estate portfolios or companies holding real estate.

### 3.2 Typical Security Created by Commercial Investors

Generally, a commercial real estate investor could be required by the lender to provide the following types of security:

- a mortgage provided by the borrower or third party in respect of land and building or other eligible real rights;
- a share pledge provided by the borrower's shareholder(s);
- a personal guaranty provided by the borrower's shareholder, related party or any other third party; and
- assignment of a right or interest that the borrower is, or is to be, entitled to under the project agreements.

### 3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There is no restriction on a foreign entity holding security interests in Cambodia. However, the enforcement of security that enables a foreigner/creditor to hold land ownership is not allowed.

There is no restriction on repayments being made to a foreign lender. However, a withholding tax will be applied on interest payments made to a non-resident taxpayer.

### 3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

The registration of security over real estate with the relevant authority is subject to the payment of public service fees.

The enforcement of security over real estate by a competent court is subject to court costs. Stamp duty tax will be applied to ownership transfer of real estate pursuant to the enforcement of security.

### 3.5 Legal Requirements Before an Entity Can Give Valid Security

A proper resolution approving a security interest is required. In principle, it has to be based on the articles of incorporation of the relevant entities (companies). However, according to the current procedures and practices, the authorities in charge of the registration or filing would also require a share-



holders' resolution for the perfection of a security interest over real estate assets to avoid any restriction under articles of incorporation and/or related constitutional document(s) of the entity.

### **3.6 Formalities When a Borrower Is in Default**

Once the security interests are duly perfected in accordance with the applicable laws and regulations, the enforcement of security provided by the defaulting borrower shall be made in accordance with the terms and conditions of the security agreement, otherwise such enforcement shall be ordered and done by a competent court pursuant. The current procedure would require the court compulsorily to sell the secured property and the proceeds from the sale are used for repayment on the loan.

The priority order of right registered in same real estate shall follow the chronological order of registration, except otherwise provided by law and other regulations. The Civil Code recognises a statutory lien over the entire property of the debtor arising from:

- expense for common benefit;
- claims held by employee;
- funeral expenses; and
- supply for daily necessities.

A creditor holding the statutory lien has the right to obtain satisfaction of the claim from the assets subject to statutory liens in priority to others.

### **3.7 Subordinating Existing Debt to Newly Created Debt**

According to the applicable laws and regulations, it is possible that an existing secured debt becomes subordinated to newly created debt by agreement of the relevant parties, in particular the creditors. It happens, for example, if two secured lenders want to swap the priority of their respective security interests. In such a case, the arrangement has to be registered for the perfection against the third party.

### **3.8 Lenders' Liability Under Environmental Laws**

According to the current environmental laws and regulations, only the owner or operator of the property (ie, project) is liable for compliance with the environmental laws and regulations. There is no provision of laws and regulations specifically imposing any liability on the lender who holds or enforces security interests.

### **3.9 Effects of Borrower Becoming Insolvent**

The security interests created are not void. Note that according to Article 19 of the Insolvency Law, after the court issues a ruling opening insolvency proceedings until the termination of the proceedings, no action, proceedings or execution process, or any other action of any kind by or on behalf

of a creditor, shall be commenced or continued against the debtor or assets of the estate. The administrator may, however, whenever it is in the best interests of the estate, allow a secured creditor in writing to repossess and sell the asset (collateral) in accordance with the legal proceedings, or to authorise the creditor to use other means and get payment from such use.

## **4. Planning and Zoning**

### **4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning**

The control over strategic planning and zoning is under the authority of the National Committee for Land Management and Urbanisation, which also has its own sub-committees at the capital and provincial level. Those committees follow certain procedural rules in the Detailed Procedure of the Preparation of the Master Plan for Land Use to assess and prepare the planning and zoning of each specific urban area.

The main applicable laws and regulations are the Urbanisation Law, the Land Law, the Law on Expropriation and the Sub-Decree on the Urbanisation of Capital, City and Town.

For Siem-Reap Angkor zone, the Apsara Authority is in charge of urban planning and approval on construction works, in addition to the strategic planning and zoning control by the general competent authorities.

### **4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction**

Government control over construction (new construction or refurbishment) is realised by exercising administrative power to require certain permits and approvals before and after the construction, including but not limited to the construction permit, construction site opening and construction closing permit. The main legislation covering this requirement includes the Sub-Decree on Construction Permits, the Ministerial Regulation on Management over a Construction Site and the Ministerial Regulation on Building Renovation Permits.

### **4.3 Regulatory Authorities**

In principle, the MLMUPC is the ministry in charge of regulating the development and designated use of individual parcels of real estate in Cambodia. However, for smaller construction, the authorities in charge can be the provincial or municipal hall. Furthermore, if a project is located in Siem Reap Angkor zone, the Apsara Authority shall be involved in approving the construction permit.

The main applicable laws and regulations are the Land Law and the Sub-Decree on the Urbanisation of Capital, City and Town.

Legal restrictions/requirements are imposed from the early stages of a project (ie, the requirement for a construction permit). The type of development that can be done on real estate properties will depend on the location of the project itself. For instance, the designated use of a location has been predetermined in the Master Plan of Phnom Penh recently adopted by the royal government of Cambodia. Similarly, there has been some restriction by the Apsara Authorities in the Siem Reap Angkor zone; for example, in terms of building height. Thus, it is highly recommended that a proper due diligence be conducted by an expert on target properties not only to verify the current status of the properties but also to anticipate any restriction on the project.

#### **4.4 Obtaining Entitlements to Develop a New Project**

With regard to the refurbishment of a building, the owner of the building would need to apply for a Construction Renovation Permit from the MLMUPC or the Provincial Department of the MLMUPC depending on the size of the construction.

In terms of developing a new project, the project-owner shall apply for a construction permit from the competent authorities, including the Apsara Authority if the location of the project is located in Siem-Reap Angkor area. If the project-owner develops a real estate project to sell the properties, a property development licence from the Ministry of Economy and Finance is required. On a related note, it is also important that the project-owner should be compliant with other relevant requirements for developing a new project, including, but not limited to, environmental compliance and insurance requirements from the applicable law for construction work. Failure to comply with the above requirements can result in various penalties.

During the process for obtaining the construction permit, the competent authorities will notify the public of the submission of application for the construction permit. This way, any person who would like to object to the project can contest it with the authorities. If the construction permit is issued, a person can still raise the objection to the MLMUPC as long as the project causes or threatens to cause damages to him or her.

#### **4.5 Right of Appeal Against an Authority's Decision**

The right of appeal against the relevant authority's decision is normally mentioned in the laws and regulations that govern the required permit/approval. In general, those laws and regulations allow the applicant to appeal against the decision

of the authority that issues the permit/approval. If the appeal cannot be settled by the authority, the applicant can carry on its complaint to the court.

#### **4.6 Agreements with Local or Governmental Authorities**

Other than the required permits/approvals for implementing a project, the government does not normally enter into an agreement with the project-owner.

#### **4.7 Enforcement of Restrictions on Development and Designated Use**

Restrictions on development and designated use can be imposed in three stages. Prior restrictions are verified during the process of the application for relevant permits. If the application does not meet the requirement, the authorities will not issue the requested permit. During the implementation stage, there can be inspection from the authorities to check the safety and quality of the construction work. If the authorities notice any non-compliance, the project-owner will be informed to rectify the non-compliance. After the completion of the construction of the project, the project-owner is required to apply for the construction site closing permit, according to which, the authority will inspect and verify if the construction work is in compliance with the approved construction permit. If not, the enforcement notice may include alteration or demolition of the building; however, demolition of a building is very rare in practice.

## **5. Investment Vehicles**

#### **5.1 Types of Entities Available to Investors to Hold Real Estate Assets**

According to Cambodian law, ownership of the land can only be held by a person having Cambodian nationality. In any case, the most suitable corporate structure to hold the real estate will depend on the type and value of the project; thus it is highly recommended to have proper legal and tax consultation.

#### **5.2 Main Features of the Constitution of Each Type of Entity**

To establish a private limited company, the project-owner would need to register the company at the Ministry of Commerce. However, in order to be considered as having Khmer nationality, the company will need to have a registered address in Cambodia and 51% or more of the voting shares held by natural person(s) of Cambodian nationality or by Cambodian legal entities recognised pursuant to the laws of Cambodia. It is worth noting that since the majority of shares are held by person(s) of Cambodian nationality, this is where the corporate and land security documents play a very important role to protect the interests of the investors.

## 5.3 Minimum Capital Requirement

According to Cambodian law, a minimum capital of USD1,000 is required to incorporate a private limited company. However, in practice, a registration capital of USD5,000 is recommended.

## 5.4 Applicable Governance Requirements

There are no special regulations governing entities that invest in real estate. All types of company incorporated in Cambodia are classically governed by the Law on Commercial Enterprises.

## 5.5 Annual Entity Maintenance and Accounting Compliance

The maintenance and accounting compliance cost would vary on a case-by-case basis. A private limited company generally will have to prepare and audit its financial statements on an annual basis, and may, but is not required to, appoint a qualified auditor for this purpose. In addition, companies have to keep certain statutory registers, minute books and records, and if they do not have the resources to undertake this in-house, they will need to outsource the maintenance.

# 6. Commercial Leases

## 6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

If the parties decide not to enter into a sale and purchase agreement, they can, pursuant to Cambodian laws, enter into a lease agreement or an economic land concession to occupy and use the real estate for a limited period of time. In this respect, pursuant to the Civil Code and the Land Law, there are three types of agreements that can be executed.

- A standard lease, which is governed by Chapter 5 of the Civil Code and can be used for the renting of every kind of asset (residential, office, warehouse, factory, hotel, etc). Its term should be less than 15 years.
- A perpetual lease, which is governed by Article 244 and seq of the Civil Code. It is a long-term lease that grants to the tenant extensive rights to use and enjoy a property, and can be used for the renting of every kind of asset (residential, office, warehouse, factory, hotel, etc). The term is between 15 and 50 years, and it shall be registered with the cadastral office in order to be enforceable against a third party.
- The economic land concession, which is governed by the Land Law and Sub-Decree No 146 on economic land concessions. This agreement is used for agricultural and industrial-agricultural activities.

## 6.2 Types of Commercial Leases

There are no specific regulations covering commercial leases in Cambodia. A tenant who decides to operate a commercial premise will be entitled to execute a standard lease or a

perpetual lease depending on (i) the title deed owned by the landlord (ie, hard title certificate or soft title certificate) and (ii) the term of the lease.

The nature of the premises and the activity operated within the premises will not affect the nature of the lease.

## 6.3 Regulation of Rents or Lease Terms

Some provisions of the Civil Code are compulsory, such as the provisions relating to the term of a lease. Indeed, the term of the perpetual lease is between 15 and 50 years, which is compulsory; it is not possible for the parties to deviate from these provisions in a perpetual lease.

In addition to the compulsory provisions, there are some provisions of the Civil Code that can be deviated from and there are some topics for which there are no provisions. In such a case, the parties are free to negotiate the terms and conditions in the lease agreement. This is particularly the case for rent, for which the Civil Code does not include any provisions relating to the calculation of rent upon the execution of the lease. Therefore, the parties are free to agree upon the amount of rent to be paid.

## 6.4 Typical Terms of a Lease

### Length of Lease Term

For a standard lease, the term shall be less than 15 years. For a perpetual lease, the term is between 15 and 50 years. If a perpetual lease is established with a term exceeding 50 years, the term will be reduced to 50 years and if it is established with a term less than 15 years, it will be considered as a normal lease.

### Maintenance and Repair of the Real Estate Actually Occupied by the Tenant

The landlord should carry out and bear the costs of all repairs and maintenance work that become necessary according to Article 602 of the Civil Code. However, the parties are free to specify otherwise in the lease.

### Frequency of Rent Payments

The parties are free to specify the date of payment of the rent in their lease agreement. However, if nothing is mentioned in the lease agreement, the rent shall be paid as follows: (i) for a standard lease, at the end of each month in the case of a building and at the end of each year in the case of land, or if there is a harvest season, the rent shall be paid without delay upon the close of such season; and (ii) for a perpetual lease, at the end of each year, or if there is a harvest season, the payment shall be made without delay after such season. In practice, the rent is generally payable monthly in advance.

## 6.5 Rent Variation

Whether the rent payable will remain the same as long as the lease lasts will depend on the terms and conditions agreed

between the parties in the lease agreement. The parties may decide that the rent remains the same for the whole duration of the lease (fixed rent) or that the rent will be variable (turnover rent or progressive rent).

However, in the case of a perpetual lease, the landlord and tenant benefit from a specific right to request for the court to set an appropriate amount for the rent if one of them considers that the circumstances have changed compared to those that existed at the time the lease was executed.

### 6.6 Determination of New Rent

As mentioned in **6.5 Rent Variation**, the rent will increase or decrease depending on the provisions of the lease agreement.

### 6.7 Payment of VAT

Under Articles 56 and 57 of the Law on Taxation, rental is subject to 10% VAT, which is required to be collected by the lessor from the lessee and remit said tax to the Cambodian tax authority by the 20th of the following month. Legally, the paid VAT becomes VAT input/credit for the lessee.

### 6.8 Costs Payable by Tenant at Start of Lease

In addition to the rent, the tenant shall pay other amounts depending on the terms and conditions of the lease agreement. Subject to the lease agreement, they can include the following costs:

- security cash deposit;
- service charges;
- insurance premiums;
- management fees;
- maintenance and repair costs;
- utilities;
- taxes; and
- real estate agent fees.

### 6.9 Payment of Maintenance and Repair

The maintenance and repairs of the areas used by several tenants are generally borne by the owner of the building or the co-owners if it is a co-ownership. Indeed, pursuant to Article 602 of the Civil Code, the landlord should carry out and bear the costs of all repairs and maintenance work that become necessary in the premises and in the common areas. However, the parties can agree otherwise in the lease agreement.

### 6.10 Payment of Utilities and Telecommunications

Generally, the tenant has to pay for its own consumption relating to the utilities and telecommunications, and based on its separate meter. In some cases, the tenant pays directly the service providers (such as the internet company) and in some cases, the tenant pays the landlord, who pays directly to the service providers.

### 6.11 Insuring the Real Estate That is Subject to the Lease

The terms and conditions agreed between the parties in the lease agreement and the terms and conditions of the insurance policy dictate who pays the cost of insuring the real estate that is the subject of a lease and which events that cause damage are covered.

### 6.12 Restrictions on Use of Real Estate

The landlord can include in the lease agreement restrictions relating to the use of the premises by the tenant and, in particular, to the permitted use.

The restrictions can be imposed in order to comply with:

- the permitted use of the premises further to the building permit obtained by the landlord;
- the health and safety regulations; or
- the competition clause granted to another tenant, the purpose of which is to avoid having two tenants (and, in particular, competitors) operating the same activities in the building.

### 6.13 Tenant's Ability to Alter and Improve Real Estate

To what extent and under what conditions the tenant is permitted to alter or improve the premises are subject to the terms and conditions of the lease agreement entered into between the landlord and tenant.

### 6.14 Specific Regulations

There are no specific regulations that apply to leases of particular categories of real estate. The nature of the premises and the activity operated within the premises will not affect the nature of the lease.

### 6.15 Effect of Tenant's Insolvency

The terms and conditions of the lease agreement determine the effect of the tenant's insolvency. Generally, the lease includes a provision pursuant to which the landlord can terminate the lease in the case of insolvency of the tenant and if the latter fails to pay the rent.

However, if the lease does not include any specific provision, further to the opening of the insolvency proceedings of the tenant, an administrator will be appointed for the management of the tenant's assets. In such a case, the administrator will be entitled to terminate the lease pursuant to the insolvency law.

### 6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

Various kinds of security could be requested by the landlord in order to secure the performance by the tenant of its obligations under the lease agreement:

- a security cash deposit;
- a first demand bank guarantee; or
- a parent company guarantee.

### **6.17 Right to Occupy After Termination or Expiration of a Lease**

The terms and conditions agreed between the parties in the lease agreement dictate if a tenant has a right to continue to occupy the relevant real estate after the expiry or termination of a commercial lease. Generally, leases include a provision pursuant to which the tenant shall vacate and return the premises upon the expiry or termination of the lease.

There are no specific measures that are required to ensure that the tenant leaves. However, it is recommended in practice that the landlord send a notice before the expiry of the lease in order to inform the tenant of the expiry of the lease, that it will not be renewed and that it has to vacate and return the premises.

### **6.18 Right to Terminate Lease**

It will depend on the terms and conditions of the lease agreement and in particular if it includes a termination clause as to whether events typically give the landlord and tenant a right to terminate the lease. Generally, the default of payment of the rent and the non-performance of one of the tenant's obligations can authorise the landlord to terminate the lease.

Furthermore, if the parties have executed a perpetual lease, the tenant benefits from a specific right of termination if there is no profit that could be derived from the demised premises during three years because of unforeseeable circumstances or force majeure, or if there is no prospect of future profit exceeding the annual rent because of damage to part of the demised premises. The landlord benefits also from a specific right of termination in the case of a perpetual lease and if the tenant fails to pay the rent during three years.

### **6.19 Forced Eviction**

Whether a tenant can be forced to leave in the event of a default prior to the date originally agreed will depend on the terms and conditions of the lease agreement and in particular if it includes a termination clause. If the tenant does not leave the premises upon the termination of the lease, the landlord shall first obtain a court judgment ordering the tenant to vacate the premises. If the tenant does not comply with the judgment, the landlord will request the assistance of a bailiff and the local authorities to vacate the tenant.

The time required for litigation will depend on each litigation, the specificity of the case and the workload of the court, etc. The proceeding can take more than a year for such a case.

### **6.20 Termination by Third Party**

In principle, leases cannot be terminated by a third party. However, pursuant to the Expropriation Law, the state can carry out an expropriation on immovable property or on real right to immovable property for public and national interest purposes. In such a case, the lease agreement will be terminated and compensation will be paid to the tenant according to Article 29 of the Expropriation Law. The compensation shall start from the date of the declaration of the expropriation.

Therefore, the length of the process of expropriation shall depend on the urgency by which the immovable property is needed by the state and if there are any objections by the person interested.

## **7. Construction**

### **7.1 Common Structures Used to Price Construction Projects**

The most common contractual models for pricing construction works are the lump sum contract and the unit price contract. The type of contract used will depend on the choice made by the parties.

The lump sum contract is used when the type and quantities of construction works are clearly defined. In such a case, the contractor will perform the construction works for a fixed price. The unit price contract is used when the type and quantities of construction works are not clearly defined. In such a case, the contract is based on anticipated quantities of items that are counted in the project in addition to their unit prices. The final price of the project depends upon the quantities required to carry out the work.

### **7.2 Assigning Responsibility for the Design and Construction of a Project**

Generally, the design and construction works are provided under separate independent agreements as the owner prefers to use two different companies rather than one. In such a case, the owner will appoint an architect who will be responsible for the design and a construction company that will be responsible for the construction.

However, if the owner decides to appoint one company for both (design and construction), he or she or it will enter into a design and build contract pursuant to which the contractor is responsible for the design and the construction.

The scope of the work and the responsibilities of the parties will depend on the terms and conditions of the construction contract.

## 7.3 Management of Construction Risk

The terms and conditions of the construction contract are essential in order to manage the construction risk on a project.

Generally, the owner includes provisions in the construction contract relating to:

- schedule of payment of the construction price (ie, progress payment);
- late delivery penalties to be paid by the contractor to the owner in case of late delivery (ie, when the construction is not completed on the agreed date);
- guarantees provided by the constructor (ie, performance bank guarantee or parent company guarantee);
- warranties regarding the defects and non-compliance that appear after the completion of the construction works; and
- construction insurance policies.

## 7.4 Management of Schedule-Related Risk

There is no construction code in force in Cambodia and there is no specific regulation covering this issue. However, it is common practice in construction projects to manage the risk of late delivery by having a provision in the construction agreement pursuant to which the contractor shall pay late delivery penalties to the owner.

## 7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Such security may be sought through negotiation between the parties and on the nature and size of the construction projects. Generally, for small projects, these kinds of security are not required. However, for main projects, it is common that the contractor provides the owner with a performance bank guarantee or a parent company guarantee to secure the performance of its obligations under the construction contract.

## 7.6 Liens or Encumbrances in the Event of Non-Payment

Pursuant to Articles 799 and 801 of the Civil Code, the contractors, engineers and artisans benefit from a statutory lien over the immovable property of the owner that can be registered at the relevant cadastral office. Therefore, in the case of default of payment by the owner and if the invoice is not challenged by the owner, the contractor will be entitled to register its lien on the property.

## 7.7 Requirements Before Use or Inhabitation

When the construction is completed, the owner must apply for a construction site closing permit. Then, the owner will apply for a certificate of compliance to be delivered by the competent authority that will review the construction and ascertain that it was carried out and is in compliance with the building permit. For buildings used as hotels, offices and more generally all buildings where remunerated activi-

ties are performed (ie, commercial premises), the certificate of compliance shall be obtained before the opening of the premises and their operation.

## 8. Tax

### 8.1 VAT

The sale or purchase of corporate real estate is subject to VAT, which can be collected only by vendors that are legal entities. If the vendor is an individual, the sale of real estate is not subject to VAT.

VAT is not applicable in the transfer of possessory right or ownership of land. In the transfer of buildings, VAT at a standard rate of 10% of the purchase price applies. When both land and building are transferred, the total purchase price is at risk of being deemed as liable to VAT. Thus, it is advisable to separate the price of each item for tax purposes. Due to different interpretations on the transfer of land and buildings as a package, seeking a tax ruling is highly recommended in order to mitigate the tax risk.

However, there is a possible exemption of VAT on the transfer of a building in the event of a transfer of business when the following conditions are fulfilled:

- the business must be transferred from one person to another in order to be carried out under the new ownership;
- the transferor must notify the Cambodian tax authority within ten days following the transfer date;
- the transferor must seek a deregistration of its business after the transfer of business; and
- the transferee must collect VAT in the event of supply of transferred stocks and assets, and shall keep the tax records in connection with the transferred assets for a period of ten years.

Even if the conditions to be fulfilled are not complex, this exemption procedure is not common under current practice.

### 8.2 Mitigation of Tax Liability

In terms of tax optimisation and subject to tax due diligence on the target company, a share acquisition imposes less tax exposure, which is an option to be used for the acquisition of real estate.

### 8.3 Municipal Taxes

In Cambodia, the occupation of business premises may be subject to immovable property tax. Hence, according to Article 3 of Prakas No 493 SHV.PRK on the Collection of Immovable Property Tax, dated 19 July 2010, the payer of this tax is the "individual or legal entity who is the owner, possessor, or final beneficiary of the immovable property". The "final beneficiary" refers to the last owner (individual

or legal entity) who receives the right to use or to receive income, to dispose of and to reside in the property.

#### **Tax Due Time and Method of Calculation**

The immovable property tax is collected annually by the end of September and is imposed at the rate of 0.1% of 80% of the total value of the property after deducting an allowance of KHR100,000,000, which means that if the value of a property is lower than that figure, it will be exempted from immovable property tax.

The value of a property is determined by the Immoveable Property Evaluation Commission. In 2011, the Prakas on Tax Base for Immoveable Property No.371 SHV.PRK, dated 5 May 2011, was issued to address the value of property for immovable property tax purposes.

To avoid any doubt, it is recommended that an agreement relating to immovable property should clearly state which party will be responsible for the payment of this annual tax.

#### **Exemption from Immoveable Property Tax**

Some properties are exempted from this tax:

- agricultural land;
- land owned by the state or government institutions;
- land owned by a community or a person for the purpose of religious and charitable activities, of which no part of earning of the property is used for any private interest;
- land owned by diplomatic and consular missions or international agencies of technical co-operation of other governments; and
- buildings that are less than 80% completed.

#### **Penalties**

Late payment or underpayment of the tax is subject to a fine of 10%, 25%, or 40% based on the seriousness of negligence and subject to 2% interest per month. In addition, legally, it could lead to criminal charges, but under current practice this very rarely happens.

#### **8.4 Income Tax Withholding for Foreign Investors**

Legally, foreign investors cannot own real estate in Cambodia. However, any income generated from real estate or other business activities may be considered a Cambodian source of income for non-resident foreign investors pursuant to Article 33 of the Law on Taxation. Hence, the payer must withhold the tax of 14% before making the payment the said non-resident foreign investors according to Article 26 of Law on Taxation.

On the other hand, when the payer and recipient of rental income from a real estate are Cambodian resident taxpayers, there will be withholding tax imposed on such income. This situation must be distinguished from the gain arising

from a disposition of a real estate, which is subject to capital gains tax.

#### **Withholding Tax (WHT) on Rental Income**

##### **Principle**

A resident lessee carrying on a business who pays a rent for any immovable property is required to withhold the WHT at a rate of 10% before making any payment to the lessor, the income recipient. The Law on Taxation does not specify whether the lessee can be an individual or a legal entity. However, based on knowledge relating to current practice, an individual is not required to withhold said tax from the lessor.

Some lease agreements may state fees and charges other than the rental fee. In this case, tax implications can be drawn depending on whether the lessee is an individual or a legal entity. In the former case, the lessee must withhold 15% tax on those fees and charges. In the latter case, withholding tax is not applicable as long as there is a correct and proper VAT invoice issuance following the criteria required by applicable tax laws and regulations.

##### **Exemption from WHT**

The General Department of Taxation (GDT) has issued instruction No 18410, dated 3 November 2016, on the withholding tax relating to real estate companies.

According to this instruction, a real estate company, in principle, has an obligation to withhold the 10% WHT on a rental fee before making any payment to the owner of the immovable property. However, the GDT has provided tax exemption for real estate companies that sublease the same property to its customer that is an incorporated legal entity; the customer is not required to withhold the tax on the same property.

##### **Capital Gains**

A capital gain that arises from the disposal of real estate property is subject to income tax. "Disposal" is interpreted in a broad way, including sale, contribution to an enterprise or a company, exchange, distribution or donation.

When the seller is an individual, the capital gain on the sale of real estate is subject to a progressive tax on income ranging from 0% to 20%. However, at present, there is no mechanism to collect the tax from individuals.

The capital gain of a legal entity on disposal of real estate is subject to a standard rate of 20% and the gain will be included in the annual income tax calculation. The deadline for the payment of the tax is three months from the end of the tax year.

## 8.5 Tax Benefits

From a Cambodian tax perspective, owning a real estate may not be entitled to any tax attributes unless the property constitutes a special economic zone (SEZ).

The special economic zone was introduced in Cambodia by two sub-decrees dated 29 December 2005: Sub-Decree No 147 on the Organisation and Functioning of the Council for the Development of Cambodia (CDC) and Sub-Decree No 148 on the Establishment and Management of Special Economic Zones, as amended by Sub-Decree No 28, dated 14 March 2006.

A special economic zone (SEZ) is a “special area for the development of economic sectors which brings together all industrial and other related activities and may include general industrial zones and/or export processing zones. Each SEZ shall have a production area which may have a free trade area, service area, residential area and tourist area.”

### Establishment of a SEZ

According to Article 3 of Sub-Decree No 148, the developer must fulfil the following technical conditions in order to establish a SEZ:

- the land area must be at least 50 hectares and within a specific location with geographic boundaries;
- the SEZ must have a surrounding fence;
- the SEZ must be established in appropriate and strategic areas as determined by the royal government and the Council for the Development of Cambodia;
- the SEZ must have management office buildings, zone administration offices, a large road network, clean water, electricity and telecommunications networks, fire protection and a security system;
- the SEZ must have a water sewage network, a waste water treatment network, a location for the storage and manage-

ment of solid wastes, environmental protection measures and other related infrastructure as deemed necessary;

- have sufficient capital and means to develop infrastructure in the zones, including the HR to manage the activities of the zone;
- have legal possession of the land for establishing the SEZ;
- construct the infrastructure in the zone and maintain and repair it;
- lease the land and provide services to investors;
- arrange security personnel and ensure good public order at all times;
- promote and attract investment in the zone; and
- adopt the rules pertaining to services in the zone, including internal rules of the SEZ, and determine the types of business, production and services permitted.

### Tax Incentives for Zone Developer

The zone developer will benefit from income tax exemptions during the tax holiday period (the minimum is three years). It can enjoy a corporate income tax holiday that is also applicable to a Qualified Investment Project (QIP). Therefore, the tax benefits for the zone developer may be an investment incentive and investment guarantee, or special depreciation, or special depreciation and investment guarantee.

In addition, the zone developer will not be required to pay the import tax and other taxes on the importation of production equipment and construction material to be used for the development and construction of the SEZ.

Also, the zone developer will benefit from an exemption from the immovable property tax for the real property located within the SEZ that serves directly for production.

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