Asia Pacific Guide to Lending and Taking Security - Cambodia

If things go wrong

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

The structure of the insolvency regime under the Insolvency Law follows what is frequently termed the "unitary" approach.

The opening of insolvency proceedings under the Insolvency Law sets off an initial period of an objective assessment of the debtor's financial condition. The creditors determine whether the debtor will be rehabilitated or liquidated at the opening creditors' meeting, which must be held within 30 to 60 days of the opening of the insolvency proceedings. The proceedings will then be directed toward either a rehabilitation of the debtor through the implementation of a plan of compromise or a liquidation.

Under the Insolvency Law, creditors are decision-makers in a number of key areas. For example, during liquidation proceedings, creditors are given the authority to dismiss the liquidator, to approve the temporary continuation of the business by the liquidator and to approve a private sale. In rehabilitation proceedings, they have the authority to dismiss the administrator and to propose and approve a rehabilitation plan. They may also request or recommend action from the court, including recommending that the rehabilitation proceedings be converted into a liquidation.

However, the Insolvency Law does not apply to debtors covered under the Law on Banking and Financial Institutions, the Law on Insurance and the Law on Non-Government Securities. The insolvency of banks, microfinance institutions and other financial institutions specified in the Law on Banking and Financial Institutions is covered by the Law on Banking and Financial Institutions. The Law on Insurance covers the insolvency of insurance companies, such as life insurers, general insurers, micro-insurance companies, and reinsurance companies. The insolvency regime for entities covered by the Law on Non-Government Securities (for example, securities dealers, securities underwriters, securities brokers and investment advisers) is governed by the 2018 Sub-Decree No. 24 on Rehabilitation and Liquidation in the Securities Sector.

# 2. Is it possible to obtain a moratorium before insolvency?

No.

# 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

Yes, on a complaint by the administrator and on a hearing of the other party to a transaction, the court may avoid the following transactions:

A transaction entered into by the debtor with the intent to defraud creditors by placing the debtor's assets beyond the reach of creditors that may seek to recover claims owed by the debtor

A transaction effected within three years prior to the opening of insolvency proceedings for which no consideration was received by the debtor, except for ordinary transactions in favor of the debtor's spouse or relatives of direct descent or ascent

A transaction effected within one year prior to the opening of insolvency proceedings in which the value of the debtor's obligation considerably exceeded the value of the other party's obligation

A transaction effected within one year prior to the opening of insolvency proceedings in which the debtor discharged a debt that was not due or provided new or additional security for a debt and in which the other party to the transaction is a related person

A transaction effected within six months prior to the opening of insolvency proceedings in which the debtor discharged a debt that was not due or provided new or additional security for a debt

A transaction effected within one year prior to the opening of insolvency proceedings in which the debtor discharged a debt that was not due, provided new security or granted a security right for the repayment of certain shareholder loans or similar claims

Where a transaction is avoided, any money paid, property transferred or proceeds from the sale of the transferred property will be recovered and included in the estate of the debtor.

# 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

If the security is created under the Civil Code, generally, the holder of a real security right may enforce it in accordance with procedures established under the Civil Procedure Code. However, summary enforcement is available for a pledge and a transfer as security.

For a security interest over movable property that is created and perfected in accordance with the LST, the secured party, on a default (which the parties are free to define as they choose), has the right to take possession or control of the collateral even if the security agreement is silent about possession or control. The secured party may only take possession or control of collateral without legal proceedings if the debtor has agreed to this in writing after default. The debtor is not permitted to agree to this in advance in the security agreement.

# 5. Do any limitation periods apply in relation to bringing an action to enforce security?

The extinctive prescription period for claims is five years, commencing on the date that the claim is capable of being exercised. "Extinctive prescription" is a term meaning the extinction of a claim based on a secured party's failure to exercise a claim within a certain period.

# 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

Under the Civil Code, a real security right may be enforced in accordance with procedures laid down by the Civil Code, i.e., compulsory sale, summary enforcement for a pledge over movable property or, in the case of a transfer as security, conversion to cash or conclusive transfer of ownership.

Under the LST, a secured party (the disposing secured party) may dispose of the collateral. Disposal may be by sale, lease, license or another method. A disposing secured party might sell the collateral in parts or as a whole, or it might dispose of some at one time and some at other times. Disposal of the collateral may be arranged in a public forum or privately. If the disposal is public, the disposing secured party may buy the collateral. The debtor is entitled to reasonable notice of the disposal, provided that notice is practicable under the circumstances. The debtor may waive its right to receive notice. If another secured party with interest in the same collateral notifies the disposing secured party of its interest, the disposing secured party must give notice to the other secured party in advance of the disposition.

# 7. Are there any particular legal or practical difficulties or delays in enforcing security?

Yes. Notwithstanding the enforcement provisions in various laws, in practice, enforcing security through court proceedings remains a major challenge for secured parties in Cambodia, especially in relation to security over movable property.

# 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

No. However, as a foreign entity is not permitted to own land in Cambodia, it is worth noting that the foreign entity may not bid for nor purchase the land collateral when the land collateral is being liquidated on enforcement.

# 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

When comparing arbitration and litigation as a forum to resolve disputes under the finance documents, there are three major points to be aware of.

First, arbitration in general, can be advantageous when compared to litigation in a number of ways, mainly due to the freedom of the parties to determine their own procedure to govern the proceedings. The parties may determine the qualifications and appointment procedure of the arbitral tribunal, the language of the proceedings, the privacy and confidentiality of the proceedings and the governing laws and rules for conducting the proceedings. Arbitral awards are also final and binding. They cannot be appealed. However, they can be set aside or not recognized for enforcement based on limited legal grounds under Cambodian law. Litigation, on the other hand, may not afford any of these advantages.

Second, in comparison to court judgments, arbitral awards are more widely recognized and enforced internationally. Subject to limited exceptions, foreign arbitral awards are generally recognized and enforceable by Cambodian courts since Cambodia is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). That would also mean that arbitral awards issued in Cambodia are generally recognized and enforceable in countries that are members of the New York Convention. On the other hand, foreign judgments are generally unenforceable in Cambodia unless the country in which the foreign judgments are made has a bilateral agreement with Cambodia to reciprocally recognize and enforce judgments of each other's courts. So far, Cambodia only has such a bilateral agreement with Vietnam. That should also mean that Cambodian court judgments may not be recognized and enforceable in other jurisdictions, subject to their local laws. Arbitration would, therefore, likely be more advantageous against a party that has assets in multiple jurisdictions.

Third, one potential risk for using arbitration to resolve disputes under the finance documents is the question of whether disputes under security documents are capable of being resolved by arbitration or whether enforcing arbitral awards against secured property would violate Cambodia's public policy. Resolving disputes under security documents by arbitration might affect the rights of third parties that have interests in the secured property but are not parties to the arbitration agreement. Nonetheless, to date and our knowledge, this question has never been tested in Cambodian courts.

With regard to hybrid enforcement provisions, while Cambodian law does not expressly prohibit this type of provision, to date and to our knowledge, their legality has not yet been tested in Cambodian courts.

# 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

While Cambodian law does not expressly prohibit this type of arbitration clause, there is a possibility that asymmetrical arbitration clauses may be considered invalid if they can be shown to be contrary to Cambodian public policy. Arbitral awards issued from this clause might run the risk of being unenforceable on the grounds of invalidity of the arbitration agreement or violation of Cambodia's public policy. Nonetheless, to date and to our knowledge, this concept has never been tested in Cambodian courts.

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