

## Project finance in Cambodia: overview

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### MARKET OVERVIEW

#### 1. What types of projects make use of project financing in your jurisdiction? What have been the most significant project finance deals in the past 12 months?

##### Types of projects

The types of projects making use of project financing in Cambodia are largely related to infrastructure development, including:

- Ports, toll roads and bridges.
- Hydroelectric and coal-fired power plants.
- Renewable energy projects (particularly biomass and solar).
- Mining projects.
- Power transmission lines.

Most of the larger projects remain predominantly financed by offshore banks.

##### Significant deals

Project finance is steadily growing in Cambodia but experience in the region is still fairly limited, and is primarily associated with offshore commercial lenders. The most significant project finance transactions completed in recent years include the following:

- 194.1 megawatt (MW) Sinohydro Kamchay hydroelectric project.
- 338 MW Lower Stung Russey Chrum hydroelectric project.
- 246 MW Stung Tatay hydro power plant.
- 400 MW Lower Sesan 2 hydro power plant.
- 100 MW Sihanoukville coal-fired power plant.
- 135 MW Sihanoukville coal-fired power plant.
- 240 MW Sihanoukville coal-fired power plant.
- Sihanoukville International Airport.
- Fiber optic backbone network development.
- CPTL's 221 km of 115 kilovolt (kV) transmission lines.

### REGULATORY FRAMEWORK

#### 2. What regulatory framework governs project finance in your jurisdiction?

##### Regulatory framework

The Royal Government of Cambodia (RGC) has sought to develop policies and legislation geared towards the encouragement of a favourable investment environment, additional investment incentives and the reinforcement of institutional capacity.

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

- Law on Commercial Enterprises dated 30 May 2005 (Business Enterprise Law).
- Law on Investment dated 5 August 1994, as amended on 24 March 2003 (Investment Law) and regulations.
- Law on Concessions dated 19 October 2007 (Concession Law).
- Commercial Registration Law and regulations.
- Secured Transaction Law.
- Land Law and regulations, and construction regulations.
- Factory Law.
- Law and regulations on the management and exploitation of mineral resources.
- Environmental Law and regulations.
- Taxation Law and regulations.
- Labour Law and regulations.
- Electricity Law and regulations.
- Petroleum regulations.
- Water Resource Management Law.

##### Regulatory authorities

The key regulatory authorities implementing the above laws and regulations are the:

- Ministry of Commerce.
- Council for the Development of Cambodia.
- Ministry of Land Management, Urban Planning and Construction.
- Ministry of Industry and Handicrafts.
- Ministry of Mines and Energy.
- Ministry of Environment.
- Ministry of Economy and Finance.
- Ministry of Labour and Vocational Training.
- Electricity Authority of Cambodia.
- Cambodian National Petroleum Authority.
- Ministry of Water Resource and Meteorology.

##### Material laws

Infrastructure projects in Cambodia are principally governed by the following key pieces of legislation:

- Concessions Law.
- Investment Law.

- Business Enterprise Law.

The Concessions Law was enacted to promote and facilitate privately financed infrastructure projects throughout Cambodia. The Concessions Law only provides for the main legal framework related to the infrastructure project investment. Comprehensive regulations (namely, an implementing sub-decree) are expected to be enacted in the near future. In addition, a number of industry-specific laws have been enacted, including the Electricity Law, Road Law and Law on Telecommunications.

The Investment Law governs the investment licensing regime and a number of sub-decrees have been subsequently issued which further refine the Investment Law. An investment licence (registration as a qualified investment project (QIP)) is obtained from the Council for the Development of Cambodia and only eligible projects have the right to receive such a licence. This does not include investment projects that fall under the:

- "Negative List" as defined in Sub-Decree No 111 on the Implementation of the Law on the Amendment to the Law on Investment. For example, an agricultural company looking to set up a project in Cambodia which uses pesticides or insecticides prohibited by international regulations or the World Health Organisation and affect public health and the environment, or an entity that establishes a tourism business.
- Investment projects with capital levels below the thresholds provided in the Negative List. For example, companies producing chemicals, cement, agriculture fertiliser, petrochemicals with the investment capital less than US\$1 million.

If a project is being externally funded through an agreement with the RGC (for example, through international donor funding such as sovereign loans) or by the RGC, the company will need to comply with the "Procurement Manual for all Externally Financed Projects/Programs in Cambodia", which was last updated in May 2012.

### International treaties

**Jurisdictions.** Cambodia has bilateral investment treaties (BIT) with numerous jurisdictions, as follows:

- Austria.
- Australia.
- China.
- Croatia.
- Cuba.
- Czech Republic.
- France.
- Germany.
- Indonesia.
- Kuwait.
- Japan.
- Laos People's Democratic Republic.
- Malaysia.
- The Netherlands.
- Democratic People's Republic of Korea.
- Pakistan.
- Philippines.
- Singapore.
- Republic of Korea.

- Switzerland.
- Thailand.
- Vietnam.
- Organisation of the Petroleum Exporting Countries (OPEC).

**Standard BIT provisions.** Cambodia BITs generally include the following standard provisions:

- **Article 3(2).** This provides for most-favoured nation (MFN) treatment of foreign investors in Cambodia (and vice-versa). This provision stipulates (among other things) that every provision of any other BIT to which Cambodia is a party is incorporated into this BIT, since the MFN provision requires that the state treat investors no less favourably than it treats any other party. This brings in the Netherlands-Cambodia BIT, which includes an "umbrella clause" (*Article 3(4), Netherlands-Cambodia BIT*). The umbrella clause imposes a very broad obligation on the state to comply with all of its obligations, whether they arise directly under the BIT or otherwise. Therefore, the obligations of a state under a contract (such as under a public private partnership (PPP)) become obligations of the state under the BIT. This has the effect of elevating a claim brought concerning an obligation under a PPP to that of a claim based on a failure to comply with treaty obligations.
- **Article 4.** This contains a right to compensation in the event of expropriation or nationalisation against the investments of investors of the other party in its territory. However, the expropriating party will have the right to expropriate or nationalise (or take similar measures) if the following conditions are met:
  - it is in the public interest;
  - it is handled using a domestic legal procedure;
  - it is without discrimination; or
  - compensation is provided.
- **Article 8.** With this provision, if a dispute arises between a foreign investor and RGC, through the BIT, both contracting parties agree to amicably resolve any dispute arising between them. If such a dispute cannot be resolved within six months from the date the dispute was raised by either disputing party, the dispute will be submitted to the competent court of the country accepting the investment (Cambodia). However, if the dispute relates to the amount of compensation for expropriation, and this cannot be settled through negotiations within six months, the dispute can be submitted to an ad hoc arbitration tribunal. The arbitration tribunal will determine its own procedures, but may, in the course of determining these procedures, take as guidance the Arbitration Rules of the International Centre for Settlement of Investment Disputes. The arbitration award will be final and binding on both parties.

Cambodian BITs do not generally provide for any tax exemption.

**ASEAN Comprehensive Investment Agreement.** The Association of Southeast Asian Nations (ASEAN) member states have adopted the ASEAN Comprehensive Investment Agreement (ACIA) as part of the region's ASEAN Economic Community. This was with the goal to transform ASEAN into a single market, a highly competitive economic region and to achieve regional economic integration. The ACIA offers a range of protections for entitled investments which are ensured by a number of obligations imposed on member states. These include the obligation to provide fair and equitable treatment, national and most-favoured nation treatment, as well as full protection and security and the obligation to offer protection from expropriation.

To benefit from the protections set out in the ACIA, an investment must be a "covered investment". A covered investment is defined as an investment made by an investor of one member state (a

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member of ASEAN) in the territory of another member state which have been admitted to its laws, regulations and national policies and, where applicable, specifically approved in writing by the competent authority of the member state (*Article 4(a), ACIA*).

ACIA benefits apply to investors from member states, including both natural and juridical persons, and extends its protection to investors from outside ASEAN who set up a juridical entity in any of the member states, provided that entity carries out substantial business activities in the ASEAN member state. A juridical entity which is established in a member state, but does not carry out substantial business activities in that member state, can be denied the protections of the ACIA in the event that such juridical entity invests in another member state (*Article 19, ACIA*). Benefits of the ACIA can also be denied if the investor is a juridical person of a member state but is controlled by an investor of a non-member state. A juridical person is "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions (*Article 19(3), ACIA*). These measures exist to deter the use of mere shell companies and to deter "treaty shopping", which consists of the use of a treaty contrary to its object or purpose.

The ACIA requires parties to an investment dispute to try to resolve the dispute by consultation and negotiation, prior to initiating a claim whether under local courts or arbitration. If the dispute has not been resolved within 180 days of the receipt by the member state of a request for consultations, the investor may submit their claim to the host state courts or to arbitration.

Under the ACIA, an investor may submit a dispute against a member state to the International Centre for Settlement of Investment Disputes, in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), to the Regional Centre for Arbitration at Kuala Lumpur, or to any other arbitration institution agreed to by the parties.

## REGULATORY CONSIDERATIONS

### 3. Are government approvals required before financing a project? Are fees typically paid for such approval?

No specific government approvals are required for the project financing itself. However, the government approvals required for typical transactions that are project financed are substantially the same as for those required in 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
  - registration with the Council for the Development of Cambodia (if the project qualifies for investment incentives).
- Upstream approvals, which notably include:
  - approval by the Council of Ministers of the project;
  - electricity licence from the Electricity Authority of Cambodia;
  - approval and various permits from the Ministry of Environment;
  - construction permit from the Ministry of Land Management, Urban Planning and Construction; and
  - water use authorisation from the Ministry of Water Resources and Meteorology.

### 4. Is there any requirement to file or register project documents with a regulatory authority or other government body?

There is no legislative requirement to file or register any project documents with a regulatory authority as part of any financing transaction, other than the requirement of the borrower to notify the General Department of Taxation of the loan agreement. As the Royal Government of Cambodia will be a party to any PPP, there are no further filing requirements for these documents.

### 5. Do any specific laws exist in relation to state ownership or state repatriation of assets?

#### State ownership

Rights over land and assets held by the Royal Government of Cambodia (RGC) are negotiated through either a Concession Agreement in accordance with the Law on Concessions or a PPP.

#### State repatriation of assets

The Investment Law sets out the rules applicable to investments which are eligible to receive qualified investment project (QIP) status:

- Under Article 8, an investor must not be treated in a discriminatory manner, except for ownership of land as set forth in the Constitution of the Kingdom of Cambodia.
- Under Article 9, the RGC will not implement any nationalisation policy which adversely affects investors in Cambodia.
- Article 10 provides that the RGC will not impose price controls on the products or services of investors who have received prior approval from the RGC. Under the Investment Law, an investor wishing to pursue a claim against a host state must endeavour to first settle amicably as far as possible.
- Under Article 20, failure to reach settlement will allow the claimant to:
  - introduce the dispute for conciliation before the Council for Development of Cambodia, which will then provide its opinion;
  - refer the matter to a court in Cambodia; or
  - refer the matter to any international tribunal to settle the dispute as agreed by both parties.

However, the above protections do not apply to an investment which has not received QIP status.

## STRUCTURING THE FINANCING

### Main parties

### 6. Who are the main parties in a project finance transaction?

The main parties to a project finance transaction are the project company/borrower, the lender and the security provider/guarantor depending on the structure of the transaction.

If a concession agreement is required, the Royal Government of Cambodia and the relevant government ministry will also be party to the agreement.

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## Types of financing

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### 7. How are projects financed? What sources of funding are typically available?

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In addition to equity finance, project companies can obtain debt finance from:

- Offshore and local banks.
- Private financial institutions.
- Bilateral financial institutions, such as:
  - Proparco (the French investment and promotion company for economic co-operation);
  - Deutsche Investitions - und Entwicklungsgesellschaft mbH (DEG).
- Multilateral financial institutions, such as the:
  - International Finance Corporation;
  - Asian Development Bank.

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### 8. What are the advantages and disadvantages of using project financing to structure a construction or infrastructure project?

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#### Advantages

Cambodia's legal framework currently allows relatively unrestricted local and foreign lending. Project finance in general has the advantage of being able to isolate the project assets for the purpose of security. The Law on Secured Transactions permits the establishment of priority by way of registration with the Secured Transactions Filing Office of the Ministry of Commerce (STFO). The STFO is an online registration platform where general priority rules are based on timing of registration. Subordination agreements are possible with respect to priority, and are enforceable.

No taxes are involved in the creation of security, and there are only minimal filing charges.

#### Disadvantages

The primary disadvantage of project finance transactions in Cambodia is the difficulty regarding onshore enforcement. If the security is a physical asset in Cambodia, there may be difficulties associated with the lack of capacity and transparency in the court system.

#### Corporate vehicles

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### 9. What corporate vehicles are typically used for financing projects? What are the considerations behind choosing these vehicles?

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Virtually all project companies take the form of either a:

- Private limited liability company (with two to 30 shareholders).
- Single-member private limited liability company.

This is due to there being no thin capitalisation rules in Cambodia and no debt to equity ratios. The entities can be leveraged and secured. Furthermore, a limited liability company can have any combination of shareholding, and can be 100% foreign owned. These flexibilities make the structure a useful vehicle for project finance purposes.

## Documentation

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### 10. What are the typical documents in a project finance transaction?

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In addition to the finance documents themselves, the following documents are generally required in a project finance transaction:

- Concession agreement with the Royal Government of Cambodia.
- PPP agreement.

Depending on the specific details of the project, separate agreements may be required for access rights and leasing arrangements.

## SECURITY

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### 11. What forms of security are available to protect investments? How are they created and perfected?

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#### Forms of security

Under Cambodian law, collateral (property) over which security can be created includes both:

- Moveable property (for example, serial-numbered vehicles, instruments, documents, secured sales contracts, goods (equipment, inventory, consumer goods, consigned goods), intangible property and the proceeds of the aforementioned).
- Immoveable property (for example, land, buildings, rights in rem and fixtures can also be secured as collateral).

#### Formalities

Under Cambodian law, a security interest is generally perfected when it has been attached to the collateral and the relevant filing or registration requirement has been fulfilled or the creditor has taken possession of the secured collateral. The governmental authority responsible for the registration varies depending on the nature of the collateral, for example:

- Filing for security interests over moveable assets should be performed at the Secured Transactions Filing Office of the Ministry of Commerce (STFO). The STFO has been functioning since early 2008, and the first notice was successfully filed in February 2008 via the e-filing website ([www.setfo.gov.kh](http://www.setfo.gov.kh)).
- Filing for immoveable assets should be made with the Land Registry Office of the Ministry of Land Management, Urban Planning and Construction (Land Office).

The filing of a notice is not required to perfect certain security interests, such as security interests over monetary proceeds and security interests in the form of guarantees. A security interest in goods, instruments, documents, or secured sales contracts can be perfected by filing or by the secured party's taking possession of the collateral.

In relation to security interests over immoveable assets, only a short form security agreement is required to be registered for the purpose of the perfection requirement. To any possible extent and for greater protection of the lenders, the comprehensive agreement should also be filed. However, certain land offices are reluctant to accept the filing of the comprehensive agreement unless it is translated into the local Khmer language.

Only nominal fees are payable to file the notice to perfect a security interest or to register a security interest over immoveable assets.

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## 12. What mechanisms are available to protect security interests against competing interests?

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The principal mechanism used to protect security interests in Cambodia is registration with the Secured Transactions Filing Office of the Ministry of Commerce or Land Office (as applicable) (see *Question 11*). There are minimal alternative measures that can be used as protection of security interests in Cambodia.

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## 13. How is priority established?

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The timing of filing or perfection generally determines the priority of the various security interests over the same collateral (except in the case of "purchase money security interest" (that is, a security interest either taken by the seller of a good to secure the payment of the relevant good by the buyer or by a creditor other than the seller)). If there is no filing or perfection for various security interests existing over a single collateral, the first attached security interest (on the basis of the date of the security agreement creating the relevant security interest) will take priority over the other security interests.

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## 14. Can an agent or trustee hold security on behalf of a group of lenders?

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The concept of a trust is not explicitly recognised under Cambodian law.

However, use of security agents/trustees is common, as the rights assigned to the security agent/trustee are valid. Under Cambodian law, the party shown as holding the security will be the party that is recognised as holding rights under Cambodian law. This means that the rights of the beneficiaries under a trust may not be recognised by a Cambodian court. However, the rights granted to the security trustee/agent will be recognised.

The parallel debt clause concept is not expressly recognised under Cambodian law and, consequently, such clause is not commonly used in practice. The agent or trustee is not required to hold any licences to hold or enforce the security.

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## 15. How can security interests be enforced? What steps can a lender take to enforce security?

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### Immovable property

For secured interests over immovable property, the secured party cannot take ownership of the secured immovable property on 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 (see *Question 16*). 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 secured creditor can participate in the sale of the property. There is no requirement that the sale must be completed in local currency.

### Movable property

For security interests over moveable property (including goods and intangible property) created and perfected in accordance with the Law on Secured Transactions, the secured party will, on default, have the right of possession or control over the collateral even if the security agreement is silent on possession or control.

The secured party may proceed directly against the debtor on default with respect to its accounts or other intangible properties and is entitled to notify an obligor on an account or on any other intangible property to make payment to the secured party, and also to take control of any proceeds.

### Other property

For other collateral, the secured party is entitled to a special and expedited order from the court granting to the secured party possession or control over the collateral on default. Issues at the hearing are limited to the existence of a security agreement covering the collateral and at least one event of default.

Alternatively, the secured party may take possession or control of collateral without legal proceedings if the debtor has agreed for this in writing after the default has occurred.

A secured party can sell, lease, license or otherwise dispose of any or all of the collateral. Disposal of the collateral can be made publicly or privately, in one or more contracts, and the secured party must give reasonable notice to the debtor. The secured party can 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 must at all times act in a commercially reasonable manner when disposing of the collateral.

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## 16. Can a lender foreclose or appropriate against an asset?

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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 on default outside of court proceedings if the debtor has agreed in writing after default.

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## 17. How does the start of bankruptcy/insolvency proceedings affect a lender's ability to enforce its security?

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No action, proceeding or execution process can 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. However, the administrator may 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 liquidation.

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. Instead, such entities are subject to more specific, sector-based regulation (banking and financial institutions regulations, insurance regulations and regulations related to the issuance and trading of non-government securities and so on).

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 on 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.
- The existence of an event of default.

## CONTRACTUAL PROTECTIONS

### 18. What other forms of contractual protections are available to lenders to protect their investment?

Protection against nationalisation and expropriation is provided under the Law on Investment and various bilateral and international agreements to which Cambodia is a party. No form of investment 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.

## INSURANCE

### 19. What insurance arrangements are typical for projects in your jurisdiction? How do lenders protect their interests as regards project insurance?

All insurance policies over project assets must be obtained through an insurance company that is registered and licensed to operate in Cambodia, except for certain insurance policies that are allowed to be obtained from offshore insurance companies under the implementing sub-decree, which to date has not yet been enacted. In practice, offshore insurance of onshore risk is common. 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.

### 20. Are lenders named as co-insured or joint insured?

Lenders will be named as co-insured or joint insured depending on the insurer and the lender. Both options are possible and there are no applicable restrictions.

### 21. Are non-vitiating provisions common?

Non-vitiating provisions are permitted but are not particularly common in insurance agreements in Cambodia.

### 22. How are insurance proceeds treated and applied?

Insurance proceeds are treated as part of the security and will be applied in accordance with the security documents.

### 23. Are there any restrictions on insurance over projects provided by foreign companies?

If the project assets are located in Cambodia, the insurance policy must be obtained through an insurance company that is registered and licensed to operate in Cambodia. Certain insurance policies are allowed to be obtained from offshore insurance companies, as permitted under a specific regulation which to date has not yet been enacted. In practice, offshore insurance of onshore risk is common.

### 24. Is reinsurance a feature of project financing in your jurisdiction? Are there any other aspects of project insurance that are particular to the jurisdiction?

Reinsurance is commonly used for project finance transactions where the funding is coming from offshore into Cambodia. A licensed insurance company in Cambodia can transfer the whole or part of the insured risk under an insurance contract executed by such a licensed insurance company to a reinsurance company.

Insurance contracts worth over US\$500,000 are permitted to be reinsured with an offshore insurance company.

## PROJECT RISKS

### 25. What risks are typical in your jurisdiction and how are these mitigated or allocated?

There are no specific exclusions or enforcement difficulties other than general litigation risk due to Cambodia being a country with a developing court system and lack of judicial capacity. Typical project finance transactions use international arbitration as a primary dispute resolution mechanism (international arbitral awards are enforceable in Cambodia, see *Question 43, Arbitral awards*). There is not a track record of enforcement with major projects in Cambodia. In the authors' view this is largely driven by the fact that the industry is emerging, and while there have been no publicised project defaults, reliance on the court system is not widespread among project participants.

Enforcement of concession agreements is not an issue in principal, but there is no established track record of actual enforcement.

Direct agreements or tripartite agreements with lenders are commonly used for larger projects and the Royal Government of Cambodia is familiar with such documents.

## PUBLIC PRIVATE PARTNERSHIPS (PPPS)/PRIVATE FINANCE INITIATIVES (PFIS)

### 26. Has your jurisdiction enacted any specific legislation for enabling the use of PPPs or similar funding models such as PFIs?

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 (namely, an implementing sub-decree) are expected to be enacted in the near future. In addition, a number of industry-specific laws have been enacted (for example, the Electricity Law, Road Law and the Law on Telecommunications).

### 27. Are there any limitations on the use of PPP or PFI transactions?

Under the present legal framework, certain legal restrictions on PPP transactions should be highlighted, notably in relation to 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 date of signing of the concession contract. However, the Royal Government of Cambodia is entitled to grant a longer concession period if the nature of the infrastructure project requires a longer term. The concession agreement must be governed by Cambodian law.

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## 28. How are projects involving PPPs or PFIs typically financed? How does this differ to other projects?

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Typically, PPP financing is no different to other financing, as the Royal Government of Cambodia generally provides concessionary agreements and not government funding (unlike other jurisdictions).

In addition to equity finance, project companies can obtain finance from:

- Offshore and local banks.
- Private financial institutions.
- Bilateral financial institutions, such as:
  - Proparco (the French investment and promotion company for economic co-operation);
  - Deutsche Investitions- und Entwicklungsgesellschaft mbH (DEG).
- Multilateral financial institutions, such as the:
  - International Finance Corporation.
  - Asian Development Bank.

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## 29. Can security be given to lenders by a concessionaire over interests in PPP or PFI projects? Does this require consents?

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This will depend on the term of the concession agreement. Generally, it is possible to give security provided it is permitted in the terms of the concession agreement.

### SOCIAL, ETHICAL AND ENVIRONMENTAL ISSUES

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## 30. What social and ethical issues are relevant to project financing in your jurisdiction?

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With respect to social issues, corporate social responsibility is a new concept in Cambodia and is not widely practised in local businesses. International companies are slowly encouraging the concept.

Depending on the nature of the project, there may be underlying ethical issues associated with economic land concessions and resettlement plans if the land is already occupied. This includes compensation plans for resettlement that may have to be met by the concessionaire. It is recommended that these issues are addressed as conditions precedent to any project financing agreements.

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## 31. What environmental risks might be encountered? How is potential environmental liability assessed and how is liability allocated?

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The implementation of environmental policies is improving in Cambodia. However, in practice health, safety, and environmental factors are still inconsistently applied and have minimal impact on a foreign investor's ability to invest in a project.

The primary environmental risk under the Law on Environmental Protection and Resource Management is the requirement for all ministries to consult with the Ministry of Environment before issuing any decisions or undertaking any activities related to the protection, development or management of the use of natural

resources. This has the potential to result in delays and can mean that applications for approvals or permits are very time-consuming.

Environmental impact assessments (EIAs) are required for some projects depending on their nature, size and activity, as specified in the Sub-Decree on the Implementation of Environmental Impact Assessment Process. Investors whose projects are subject to an EIA must submit a preliminary report and pre-feasibility study report to the Ministry of Environment. For projects that can have a severe environmental impact, full EIA reports and feasibility study reports must also be submitted to the Ministry of Environment. Approval from the Ministry of Environment on the preliminary and full environmental impact assessment reports must be obtained before commencing the project.

In relation to environmental liability, the Royal Government of Cambodia will soon be introducing an Environmental Code and the drafting of the Code is at an advanced stage. However, it is unclear when it will be introduced. It is anticipated that the Environmental Code will provide for specific procedures regarding environmental liability. However, the Ministry of Environment, as a matter of practice, rather than law, may require newly-licensed project companies to enter into an environmental protection contract with the Ministry of Environment. The contract requires the project owner to state that it will:

- Comply with environmental regulations.
- Act to safeguard the environment.
- Immediately remedy any negative environmental impact caused by the project company.

### NATURAL RESOURCES AND MINERALS

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## 32. Who has title to minerals or other natural resources? Can foreign companies acquire rights to such assets?

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All natural resources (including oil, gas, mineral resources, water resources and so on) are the property of the State of Cambodia. Private parties may acquire production sharing rights in oil and gas, concession rights over other mineral resources, or water use rights through a water licence or permit. In general, these 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. There are also other specific obligations under the relevant regulations, the petroleum or concession agreements, and the licences and permits issued by the relevant ministries.

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## 33. What royalties and/or taxes are payable on the extraction of minerals or other natural resources? How is the charge calculated?

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Royalties applicable to petroleum must be at least 12.5% of the value of the petroleum sold. For other mineral resources, the royalties for some types of mineral resources are set at a specific amount per unit of mined material and the royalties for some mineral resources are set at a certain percentage of the value of the mineral products sold. A 30% tax applies to the profits realised from oil and gas production-sharing businesses and other natural resource businesses.

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### 34. Are there restrictions, fees or taxes on the export of minerals or natural resources?

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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.

Cambodia levies export duty on a few items such as timber, rubber, uncut precious stones and certain aquatic products. The appropriate licence must be held in order to export, which will depend on the specific resource. However, the regulations governing this area are still developing as the level of exports increase.

Fees are also payable by the exporter to the relevant Ministry. For example, a licence to conduct the business of precious metals and stones for import and export requires the licensee to pay to the National Bank of Cambodia:

- An application fee for the licence.
- An annual licence fee.
- A fee for every transaction regarding the import or export of precious metals or stones.

## FOREIGN INVESTMENT

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### 35. Are there any incentives to encourage foreign investment in projects?

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Incentives to encourage foreign investment in projects include:

- A profit tax exemption for up to nine years or special depreciation (as elected by the investors).
- An import tax exemption for the import of production equipment, construction materials and production inputs (this is only granted to export and supporting industry projects) for qualified investment projects.

Large-scale infrastructure projects will usually qualify for these investment incentives.

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

Aside from a 14% withholding tax applicable to certain payments made to non-residents, only nominal fees are payable to the government authority to register the security documents.

### 36. Are there investment treaties that protect foreign investment in projects?

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There are a number of bilateral invest treaties (BITs) to which Cambodia is a party (see *Question 2, International treaties*).

On 16 April 1997, the bilateral investment treaty between Cambodia and Thailand came into force, which provides for more favourable investment conditions and greater economic co-operation between Cambodia and Thailand, with particular regard to investments by private investors of one party in the territory of the other party.

The Cambodia and Thailand BIT is a general declaration of intention. It provides that an aggrieved investor can submit a dispute to:

- The courts of the country in which the investment is made.
- The International Centre for Settlement of Investment Dispute.

- An ad hoc tribunal established under UNCITRAL (provided both parties to the dispute have so agreed).

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### 37. What fees or taxes are payable on foreign investment in a local project company? Are payments of principal, interest or premiums on loans or debt securities held by parties in other jurisdictions subject to fees or taxes?

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In general, foreign investors enjoy the same treatment as local investors. However, certain restrictions are imposed on foreign ownership in sectors such as land ownership, printing and printing-related services and radio and television activities. In these sectors, the ownership of foreign investors is limited to 49%.

Local equity participation is required in some other sectors, such as:

- Exploitation of gemstones.
- Making bricks from clay and making tiles.
- Rice milling.
- Silk weaving.
- Manufacturing of wood.
- Stone carving.

Apart from the 14% withholding tax that applies to the payment of dividends to non-residents, there are no specific fees or taxes, additional registrations or approvals applicable to foreign investors over and above the general fees and taxes applicable to the project and the related companies.

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### 38. Can project companies establish and maintain foreign currency accounts, both locally and in other jurisdictions?

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No restrictions are imposed on foreign exchange operations (for example, 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.

No taxes are payable to any governmental authority on foreign currency exchange. However, the National Bank of Cambodia may impose certain temporary restrictions (for up to three months, extendable on approval by the prime minister) on foreign exchange operations in the event of a foreign exchange crisis (with such term currently undefined).

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### 39. Are there any restrictions on the payment of dividend/repayment of shareholders' loans to a foreign parent?

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In general, there are no restrictions or controls on remittances of investment returns or loan payments to other jurisdictions. However, the remittance of investment returns or loan payments and other transfers overseas relating to the investment must be undertaken through financial institutions registered in Cambodia.

A prior declaration to the National Bank of Cambodia must be made for offshore investments made by residents for amounts equal to or exceeding US\$100,000 (such declarations must be made by the financial institution not the investor). The payment of interest or dividends to non-residents is subject to a 14% withholding tax.



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#### 40. Are there restrictions on the importation of equipment from abroad for use in a project?

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Aside from the payment of import tax and duties and customs clearance, the import of project equipment and materials can be undertaken without any governmental approval (with the exception of the importation of certain hazardous and sensitive materials, which may require the approval of the relevant government authority).

Investment projects entitled to the import exemption of production equipment and construction materials and production inputs must obtain the prior approval of the Council for the Development of Cambodia on the equipment and materials to be imported under the import tax exemption.

### CHOICE OF LAW AND JURISDICTION

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#### 41. Will local courts recognise a choice of foreign law or jurisdiction in a project contract or financing agreement? Are there any mandatory rules that apply despite a choice of foreign law or jurisdiction?

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##### Foreign law

The concession agreement must be governed by Cambodian law, but other project agreements and financing agreements are typically governed by foreign law (such as English law, New York law, People's Republic of China law and Singaporean law). Security agreements are typically governed by Cambodian law, unless the agreement relates to collateral located outside of Cambodia.

Although choice of a foreign law as the governing law of a contract is legal, valid and binding under the laws of Cambodia, and Cambodian law does not impose any restriction on the choice of governing law, current judicial practice indicates that the courts of Cambodia may not be willing or able to recognise or give effect to the laws of any jurisdiction other than Cambodia.

##### Jurisdiction

There are no mandatory rules regarding choice of jurisdiction in a project contract or financing agreement.

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#### 42. Are waivers of immunity enforceable?

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

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#### 43. Will the courts recognise a foreign arbitral award or court judgment?

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##### Arbitral awards

International arbitration and the enforcement of foreign arbitral awards are specifically recognised under the Law on Commercial

Arbitration and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

Cambodian courts can enforce foreign arbitral awards without examining the merits of the matter unless:

- 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.
- The recognition or enforcement of the award would be contrary to public policy.

The Cambodian courts have enforced a foreign arbitral award without examination.

##### Court judgments

Article 199 of the Cambodian Code of Civil Procedures specifies that a final judgment of a foreign court will be valid only when all of the following conditions are fulfilled:

- Jurisdiction is properly conferred in the foreign court by law or by treaty.
- The losing defendant received service of summons or any other order necessary to commence the action, or responded without receiving such summons or order.
- The contents of the judgment and the procedures followed in the action do not violate the public order or morals of Cambodia.
- There is a guarantee of reciprocity between Cambodia and the foreign country in which the court is based.

However, to the authors' knowledge, Cambodia has not signed any treaty of guarantee of reciprocity on foreign judgments with any other country other than Vietnam. Therefore, on this basis, the judgment of a foreign court will not be valid in Cambodia.

### REFORM

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#### 44. Are there any recent or proposed legal developments affecting project finance?

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The Royal Government of Cambodia has moved from a policy of utilising concession models to using PPPs. We are not aware of any proposed legal developments affecting project finance.

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## Practical Law Contributor profile

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