

ACCESS TO LAND

1. Historical background

Cambodia's tumultuous modern history has witnessed the dramatic evolution of the land ownership situation in the country. All private interests in land were abolished and all land ownership records were destroyed during the Khmer Rouge regime from 1975 to 1979. A socialist-style ownership structure was in operation for the next 10 years from 1979, with the State as owner of all immovable properties. During this period, a certain squatter's rights or "ownership by occupation" and usufruct rights to the land and buildings occupied by an individual or families, all of whom have returned back to the cities after the disbanding of the Khmer Rouge regime, were recognised.

In 1992 the State of Cambodia enacted the new Land Law, which restored the former Civil Code concepts of private ownership. Claims arising before 1975 were not recognised. The 1993 Peace Accords and the subsequent formation of a new government brought about a return to a rules-based economy and a radical change in the legal framework of land use. A new Land Law was enacted in 2001 which repealed the 1992 Land Law. The 2001 Land Law introduced a civil law inspired legal framework, which considerably clarifies various types of rights relating to land, including ownership, easement, usufruct, security interest, concessions of state and private land, and leases. It also clarifies the process by which land is transferred by sale or succession, and registration of the transfer. In 2007 a new Civil Code was enacted to help consolidate the regulatory framework, previously implemented under the 2001 Land law, through a series of provisions regarding leases, ownership, and land securities, amongst others. The Law on the Implementation of the New Civil Code ("Implementation Law"), which brought into effect the Civil Code in December 2011, sets out the main framework currently governing to land and other immovable property transactions.

2. Legal framework governing land ownership and land use

Land ownership and land use are regulated by a complex set of laws and regulations: (i) the 2001 Land Law is considered the primary special law governing land in Cambodia. Some of its provisions were subsequently amended by the 2007 Civil Code; (ii) the 2007 Civil Code is a comprehensive codification of civil laws, including specific provisions on land matters, which supersede by the provisions the Land Law; (iii) the Law on the Implementation of the 2011 Civil Code, which was enacted in order to implement the 2007 Civil Code, made numerous fundamental amendments which have direct implications on numerous laws, including the 2001 Land Law.

The Ministry of Land Management, Urban Planning and Construction (MLMUPC) is the primary government institution with responsibility over land matters, in particular: (i) for the issuance and verification of land records certifying the different types of land rights; (ii) for the registration of economic land concession; (iii) for the registration of construction companies and architectural firms; and (iv) for the approval of land development planning, construction blueprints and permits.

3. Land Ownership

a) Public land ownership

Public ownership of land refers to ownership of State land, which is of “natural origin” or natural reserves, or land that contains sites of archaeological, cultural or historical heritage. State land refers to all land belonging to the state, which is under the control of ministries or national institutions, or which has been allocated by the government to a public entity or public enterprise for occupation. Under the 2001 Land Law, state land is divided into two categories: (i) State public land; and (ii) State private land.

State public land refers to land of a public interest nature, and is specifically placed under public interest property, including natural forest land, natural lakes or ponds, railways, ports, national parks, public schools, *etc.* State public lands, depending on their nature, are under the jurisdiction of different public institutions (Trustee Mandate of State Land) such as the Ministry of Agriculture, Forestry and Fisheries (MAFF), the Ministry of Environment (MoE), the Ministry of Water Resources and Meteorology (MOWRAM) or Provincial/Municipal State Land Committees. MAFF generally has jurisdiction on mostly agricultural arable land, which is usually granted to investors through Economic Land Concessions (ELCs) for investment and development purposes. MoE has jurisdiction mostly on conservation and environmental land, which can be also granted to investors for investment and tourism purposes. MOWRAM has jurisdiction over land situated in river basin, sub river basin, watershed, ground water and aquifer management. The State Land Committees controls other public land in their respective provincial/municipal territory but do not, however, have any authority to grant an ELC.

State public land cannot be sold to the private sector, although, under limited circumstances, it can be acquired by someone through leasehold possession for a period no longer than 15 years. Generally it is possible to reclassify such land as state private land after it loses its public interest nature.

State private land, on the other hand, refers to all land that is not considered as state public land and not legally possessed or owned by individuals or communities as stipulated in the 2001 Land Law. State private land is defined to include land other than forests, navigable rivers, land for roads, property used for a public service such as schools or administrative buildings, property that constitutes a natural reserve protected by law, and cultural patrimonies, *etc.* State private land can be exchanged, leased, granted on concession, or sold to private individuals or legal entities. These transactions are governed by special laws and regulations.

b) Private land ownership

Private land refers to land that is legally owned by an individual or a private legal entity. Private land is such state private land that has been acquired by a private person (legal or natural). Once ownership is acquired, it can be titled and publicly recorded; it can be sold or leased; it can be transferred by exchange, gift or succession on death; and it can be mortgaged to secure debt repayment. The 2001 Land Law establishes as its basic principle that “only natural persons or legal entities of Khmer nationality have the right of ownership”.

c) Co-ownership

Co-ownership is a form of strata title, which is reserved for buildings with separate dwellings for co-owners. Non-Cambodian citizens are permitted to register this kind of title, so long as the relevant dwelling is from the first floor up and meet

certain other mandatory requirements as stipulated in the 2010 Law on providing foreigners with ownership rights in co-owned buildings, the 2009 Sub-Decree for the management and use of co-owned buildings, and the 2010 Sub-Decree on the determination of the proportion and methods for calculating private units that can be owned by foreigners in co-owned buildings.

d) Collective Ownership

Collectively owned land is a reference to the land, described as “Monastery Immovable Property”, which is being used as premises for Buddhist monasteries under the care of the Pagoda Committee. This category also includes land belonging to minority indigenous communities who can live in accordance with their traditional customs. An indigenous community is a group of people that resides in the country whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use. This collective ownership includes all of the rights and protection of ownership as are enjoyed by private owners with the exception that the community cannot dispose of any collective property to any person or group.

d) Documents evidencing ownership of real property

There are two main types of land title certificates: “soft title” or “chicken feather title” (in Khmer *Slab Moan*) and “hard title”. Currently many properties are not registered in the national Cadastral Register of the MLMUPC. Proof of ownership are normally held under a variety of documentary forms, generally known as “soft title” documents, which are issued and recognised by the local or sub-national authorities. Soft titles can range from a simple private sale-purchase agreement, an application for land occupation, to a letter of transfer acknowledged by sub-national authorities. Soft titled land carries a high degree of risk as there might be competing claims to title, i.e. issuance of duplicates of soft title documents issued to different peoples or issuance of soft title document against the existence of a hard title certificate. Another typical problems associated with soft titles is the issuance of a soft title over State’s property.

“Hard title” refers to three types of property title certificates, which have been registered with the national Cadastral Register: (i) Certificate of Immovable Property Ownership; (ii) Certificate of Land Use and Occupation Rights; and (iii) Certificate of Immovable Property Possession. The Certificate of Immovable Property Ownership is registered systematically in relation to the adjoining parcels and indicates full ownership status. The last two are registered sporadically and indicate only possessory status.

There is a legislatively mandated process for the conversion of “soft title” claims into “hard title”. It can be done in two ways: (i) through a Systematic Registration, which is a government-initiated process conducted on a village-by-village basis; (ii) through Sporadic Registration, which is a type of registration conducted on a specific plot of land, on a case -by-case basis. Under this form of registration, property owners with “soft titles” do not have to wait for the slow rollout of the systematic registration process, and he can apply for this process with greater speed and certainty in respect of the legal status of their land.

Existing rights and restrictions on a “hard title” can be reliably ascertained by conducting search of the Cadastral Register. The register is conclusive evidence of what is registered. Even though the law favours registered rights, there are,

however, many transactions conducted which go unregistered. In order to search the registry it is usually necessary to provide a copy of the title deed for which confirmation of the status is being sought. For nationally registered land all queries are addressed at the Cadastral office. For unregistered land the queries are made to the local and district land offices.

e) Practices of land acquisition

There is a constitutional prohibition on foreign ownership of land. The national ownership limitation has complicated but not prevented foreign investment, as reflected in the growing transactions of both commercial and residential properties. The following options are available to foreigners who want an interest in land in Cambodia:

f) Short or long-term lease

There are no restrictions on foreigners taking leases (whether short or long-term) of private or state private land. The most common device for foreigners is to lease from a Cambodian citizen or the state, which is explicitly authorized in the 2001 Land Law. Both short and long term leases are available and there is no restriction imposed by law on the terms and conditions for privately agreed terms among the parties.

The specific characteristics of a Long Term Lease (LTL) or perpetual lease are: (i) a minimum term of fifteen years and a maximum term of fifty years with a onetime renewal option for a further fifty year period; (ii) a requirement for legal protection whereby the LTL contract must be in written form and registered with the Cadastral Department; (iii) the right to use the land may include the right of ownership on the real and personal property situated on the land; and (iv) the type of land could be private and state-private land.

A perpetual lease forms a right "*in rem*" and burden any incoming buyer of the property. A right "*in rem*" provides a leaseholder with much stronger rights than under the previous land system, which treated all leases as contractual rights without creating an interest in the land. Upon registration with the Cadastral authority, a Long Term Lease Certificate will be issued confirming the leasehold, which takes the same form as a Title Deed and is designed to allow leases to be used as collateral for loans. The perpetual lease term can be assigned with or without consideration, sub-let, or inherited. It can be sold or transferred through succession.

g) Cambodian land-holding company

Another approach involves investment in a Cambodian incorporated company, which under the Land Law is considered of Cambodian nationality provided that fifty one percent or more of its shares are Cambodian national-owned. Thus, land title can be registered in the name of a private company with fifty one percent of shares being owned by a Cambodian national. The 2005 Law on Commercial Enterprises provides for multiple classes of shares, which can also facilitate landholding; a Cambodian-national shareholder may own fifty one percent or more of the shares while another shareholder may own a minority of shares, which however could carry control and dividend entitlement.

h) Cambodian Citizenship

Another method is for a foreign investor to acquire Cambodian citizenship, and with it the right to purchase land, provided his or her native-country laws allows

double citizenship. Though this process is costly and time consuming, and mostly used by foreign investors from many Asian countries, it is fully legitimate under Cambodian immigration laws, which allows for investors with a certain significant amounts of investment in Cambodia to become a Cambodian citizen.

4. Real Estate Development

With an open door policy on FDI and a clear liberalization policy affirmed under its WTO accession commitment, Cambodia witnessed an influx of foreign developers into the real estate and construction industry, which has contributed substantially to the country's gross domestic product. Relatively low land prices combined with an increasing demand for real estate facilities of an international standard have led to a property boom and land prices have increased significantly after the post global financial crisis in 2010.

Cambodia's real estate boom is unique. Due to constitutional restrictions on ownership of the land, foreign investors wishing to invest in real estate projects have to secure a Cambodian partner to form a Joint Venture. Many Cambodian Joint Venture partners have made a fortune through collaboration with foreign partners. The last several years saw a significant injection of either direct foreign investment or the acquisition of shares, assets, or both into the Cambodian property development market.

Construction activities have increased significantly, kick started by several local developers establishing themselves as market leaders in the development of gated communities (locally referred to as *Borey*). The industry has gone from strength to strength, and residential and commercial projects, catering to an increasingly wealthy population, have mushroomed throughout the Capital City and the suburbs. Cambodia has seen the completion of its first international standard shopping mall, developed and operated by AEON with several more coming on stream within the next few years. The Capital City of Phnom Penh, in particular, is experiencing a construction boom with the completion of several Grade A and Grade B office buildings, numerous high-rise condominium blocks and serviced apartments, new hotels, hospitals, international schools and restaurants. This trend is expected to continue with Cambodia's recent integration in the ASEAN Economic Community, with the majority of the FDI coming from ASEAN member states, China, Japan, and Korea, all hoping to capture potential demand from incoming investors.

5. Licensing regime of real estate development

This bullish real estate development market can be explained by three important factors: the first one is the policy attempt by the Cambodian Government to stimulate the market by allowing foreigners to acquire freehold property strata titled properties (from 1st floor and above). The second factor is the enactment of two laws: the 2009 Sub-Decree for the Management and Use of Co-owned Buildings, which paved the way for strata titling, and the 2010 Law on Providing Foreigners with Ownership Rights in Co-Owned Buildings. The law permits foreigners to own certain qualifying condominiums provided that: (i) the subject building has a "strata" title; (ii) the subject condominium is located above the ground floor; (iii) foreign ownership of the building does not exceed seventy percent of the total habitable area of all private units of the co-owned building; and (iv) there is an internal regulations governing the management of the property in place amongst the co-owners. The third factor is the development of an appropriate regulatory

framework for real estate agents and valuation services providers.

The MEF has issued two regulations aimed at regulating the real estate development business: Prakas (Declaration) on the Management, Regulation, and Licensing for Real Estate Developer in 2008 and Prakas on the Management of Real Estate Development Business in 2009. The regulations provide that no real estate developer may engage in a realty development business of any nature without a licence from the government. There are different licensing conditions pertaining to different types of construction projects. A licence is granted according to the particular type or size of each real estate development project. The applicable licence fee and its validity period are determined subject to the category and size of the development project under consideration.

There are 3 categories of licence with different requirements. The first licence type covers a real estate development project where the developer finances with his own capital without external bank financing. The second licence type applies to a developer who uses bank financing to develop the real estate project. The third licence type, which has more stringent conditions, applies to a developer who uses prospective purchaser's advance deposits to develop the project. For this latter category, the regulations stipulates the creation of a housing development account where the developer is required to deposit two percent of total project investment cost. Payments from the prospective buyers will be mandatorily held in this account. In the event that the developer fails to perform his obligation or commits a fraud by abandoning the project without returning investor deposits, the fund will be distributed to the prospective buyers as compensation. The developer is required to maintain the two percent of the cost of the entire project or for each phase of project if the project is developed into phases.

6. Legal requirements to build a Co-Owned Building or Condominium Building

In order to build a Co-Owned Building or a condominium, a developer needs to go through the following process: (i) Submission of proof that the land title is a hard land title; (ii) Registration of the status change of land parcel type to a "co-owned parcel"; (iii) Submission of the Certificate of Co-Owned Land Parcel to the Cadastral Administration; (iv) Delivery of a Construction Licence from MLMUPC based upon a full construction blueprint as certified by a registered architectural firm, a construction site-opening permit, and a construction site closing permit upon the completion of the construction; and (v) Registration with MLMUPC for "Titles Acknowledging the Private Units Owners" upon the completion of the construction project.

7. Potential Issues in complex real estate development

The growth of the real estate industry is moving at a record pace, with the private sector dynamism leading the way. Unfortunately, government regulations have not been able to keep up similar pace. For example, the Sub-Decree on Management and Use of Co-owned Building purportedly governs the residential units and does not stipulate about the mixed commercial development, which is a novel concept introduced in recent years by foreign developers. The existing regulations are silent as to the notion of private area and common area, car parks and underground space. As such, great uncertainty arises as to how these strata titles will be handed by the Cadastral authority. For instance, how is a strata title for a co-owned building, which has mixed residential, shop house, commercial areas, be handled?

** Article courtesy of Dr. Sok Siphana, Advisor to the Royal Government of Cambodia*

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