

LAW ON SECURED TRANSACTIONS_070523 (DFDL)

Cambodia's Law on Secured Transactions came into effect on 23 May 2007. The law considerably improves the position of creditors wishing to secure obligations with local collateral.

Application

The law applies to all transactions where the effect is to secure an obligation with collateral including a pledge, transfer of title, consignment, assignment, the sale of accounts, secured sales contracts and leases of goods for periods exceeding one year.

The law excludes the taking of security over claims for compensation made by an employee, the sale of accounts or secured sales contracts as part of a sale of a business, the assignment of accounts, secured sales contracts or instruments which are for the purpose of collection only, the assignment of a right to an assignee where that assignee is also obliged to perform under the contract and an interest in a deposit, checking, savings, passbook or other cash account except as provided as to proceeds. Security may be taken over the proceeds of such an account, but not over the account itself.

Effect of security

A security interest is regarded as a real right in the collateral and a security agreement is one which creates or provides for a security interest. However a secured interest shall only be perfected (enforceable against third parties) upon filing of a notice of security with the Secured Transactions Filing Office (STFO) or by the creditor party taking possession of the secured collateral.

Secured Obligations

The law allows for one or more obligations to be secured whether specifically or generally described. Obligations may be monetary or non-monetary obligations, whether governed by local or foreign law and whether future, mandatory, conditional, optional or pre-existing obligations.

Secured Collateral

Collateral which may form the subject of the security is broadly defined and includes movables of any nature, tangible or intangible property, fixtures, whether situated in or outside of the country and whether in existence or to come into existence in the future. It is permissible to describe the collateral in general terms. In this regard a description of collateral such as, "all the assets of the debtor" or all "movable property of the debtor" would be sufficient to adequately describe the nature of the collateral secured under a security agreement. However if the security is a serial numbered vehicle (which includes aircraft

or motorized vessels, whether or not operated locally or internationally) then the serial number of such vehicle must be stipulated in order to properly identify it as secured collateral.

With regard to immovable property the law specifically provides that security over land shall be governed by the 2001 Land Law and security interests must be registered under that law under the auspices of the relevant Land Office.

Security Agreements

Security agreements must be in writing and shall be effective as to their terms between the parties thereto as well as against purchasers of the collateral and creditors except where the law states otherwise. It is important to note however that in order to enjoy priority over secured creditors who have security over the same collateral or the priority of unsecured creditors the perfection of security will be necessary and priority in such circumstances will be determined by the timing of perfection.

Perfection of Security

A security interest only attaches to the collateral if the security agreement describes the collateral, value (not necessarily proportional to the value of the secured obligation) has been given by the secured party to the debtor and the debtor has rights in the collateral or at least the power to transfer rights in the collateral to the secured party, although the debtor need not be the owner of the secured collateral. Furthermore, in most cases perfection will require a notice of security to be filed with the STFO (which shall automatically perfect a secured interest in the proceeds of the secured collateral). Alternatively security may be perfected by the secured party taking possession of the secured collateral. Perfection shall occur at the time of filing or at the time that possession is taken. There are also certain limited instances based on the nature of the collateral where security is perfected without filing or the taking of possession of the collateral.

Ranking and Priority

Under the Law on Secured Transactions a secured party has a security interest in collateral where it has authenticated a security agreement with the debtor, has given value to the debtor and the debtor has rights to transfer the collateral to the secured party. However in most cases such a security interest will not be perfected unless filed with the STFO. Secured parties with perfected security enjoy priority over secured parties without perfected security. Secured parties without perfected security shall enjoy priority over other parties without perfected security whose security interest was created later in time. Secured

parties enjoy priority over unsecured parties in relation to the secured collateral. The Law does not make any specific provision regarding priority of secured creditors in circumstances where the debtor is insolvent or declared bankrupt. Cambodia does not yet have a bankruptcy law and the procedures and priorities enjoyed by creditors are therefore not clear in such circumstances. However, it is possible that Cambodian courts would continue to recognize the priority of secured creditors under the law in bankruptcy proceedings.

Enforcement of Security

The parties to a security agreement are free to define the events of default giving rise to the enforcement of the security. On the happening of an event of default a creditor is generally entitled to take possession and control of the secured collateral without reference to any judicial proceedings. Collateral of an intangible form specifically does not require judicial action. As for other collateral judicial action may be required in order to obtain an expedited court order for the delivery of the secured collateral to the secured party (unless the debtor has agreed after the event of default to deliver the secured collateral). The expedited legal proceedings will be limited to determining the existence of the security agreement and the happening of an event of default.

In cases where the security given is accounts, secured sales contracts or other rights to payment the secured party is obliged to notify (but not necessarily to obtain the consent of) the obligor on such account or right.

Secured Transactions Filing Office

The STFO is yet to be established under subordinate regulations to be issued by the Ministry of Commerce. The regulations shall also provide for the form of a notice of security and for the prescribed fees payable for filing.

Conclusion

While the new law substantially improves the ability of creditors to take security over local assets and provides such creditors with real rights in secured collateral, it is important to note that the law is yet to be subject to an authoritative interpretation by the courts. Nonetheless the law should provide comfort to foreign investors who have hitherto had to rely on contractually regulated forms of security which were generally not enforceable against third parties.

The Law on Secured Transactions has been debated for some time and in anticipation of its promulgation, a number of parties have executed security agreements which provide for the security to be perfected as and when the new law is passed. Creditors who have previously executed such security agreements, should consider whether such security agreements are compliant with the new law and whether the security is capable of being filed with the STFO by way of a Notice of Security.

Furthermore, parties which have executed security agreements which were intended to operate as contractual arrangements between the parties *inter se* and not intended to bind third parties may wish to reexamine strengthening the security given thereunder by filing a Notice of Security as and when this becomes possible.