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Cambodia's Law on Secured Transaction

Timothy J. Holzer

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CAMBODIA'S LAW ON SECURED TRANSACTIONS

Timothy J. Holzer and Pho Sotheaphal¹

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This Article is the first in a series of articles dealing with secured financing in Cambodia. This first article deals with security interest over moveable property and intangibles. Later articles will focus on security interest over land, guaranties and issues related to liens.

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ABSTRACT

Cambodian law permits the taking of and the perfecting of a security interest in movables (e.g., goods) and in intangibles (e.g., legally enforceable rights, such as contracts and rights in property.) Cambodia’s system is strongly patterned after Article 9 of the Uniform Commercial Code as developed in the United States.

Perfection (i.e. notice to third parties that a security interest exists) is usually effected by the filing of a notice at the Secured Transactions Filing Office (the “STFO”) of the Ministry of Commerce, although sometimes physical possession may be required.

However, conflicting or ambiguous provisions in other Cambodian laws may adversely affect the security interest obtained and perfected under the Law on Secured Transactions. Most of these conflicting provisions are found in the Civil Code and the Pawn Shop Regulations.

This Article explores key principles and nuances in Cambodia’s Law on Secured Transactions, particularly those issues related to the nature of collateral, the perfection of security interest and the risk and conflicts arising under Cambodian laws.

I. INTRODUCTION

This Article is directed to onshore practitioners, onshore and offshore lenders including banks and lending institutions, regardless of whether the financing structure is direct, consortium arrangement or syndication, those

considering financing by way of factoring and suppliers of equipment, materials and services.

This Article first discusses Cambodia's general legal environment for dealing with secured transactions. Then it describes why the Law on Secured Transactions is the best practice for secured financing over movables and intangibles. Next, it describes the various aspects of a secured transaction including collateral, the security interest, perfection, the five-year rule, and enforcement of a secured transaction. Finally, it discusses the conflicts of law between the Law on Secured Transactions and other Cambodian laws.

Cambodia's legal regime dealing with non-possessory security interest over moveable and intangible collateral is largely based on the U.S. Uniform Commercial Code's principles of attachment and perfection.

There are a series of laws that form the general legal environment relating to secured financing over moveable and intangible property. These laws include:

- **“Decree 38D”**² was implemented by Cambodia in 1988 and generally deals with contracts and other liabilities.
- **“Law on Secured Transactions”**³ (2007) is patterned after Article 9 of the Uniform Commercial Code as developed in the United States, and deals with security interest over moveable and intangible collateral using the devices of attachment and perfection.
- **[Cambodian] “Civil Code”**⁴ (initially published in 2007 but only became legally effective in 2011). This law was

2. Decree 38D, Contract and Other Liabilities (*unofficial English translation*) 1988 http://www.cambodiainvestment.gov.kh/decrees-38-referring-to-contract-and-other-liabilities_881028-2.html.

3. Law on Secured Transactions (No. 0507.012.NS.RKM) (*unofficial English translation*) 2007 <https://data.opendevlopmentmekong.net/dataset/ea44c76a-474c-4aa8-ace4-48c9bd1c0f63/resource/2d36fdce-0998-40ef-8e50-cd4abb724405/download/21ec110f-3131-4cad-8f0b-5907441b44df.pdf>.

4. The Civil Code of Cambodia (*unofficial English translation*) 2011:

NB 1: The Civil Code was initially promulgated in 2007 but was brought into legal effect by way of the Law on Implementation of the Civil Code, 2011. More precisely the Civil Code was implemented on 20 December 2011, which is the date specified in Notification No 10 [Ministry of Justice] on Date of Enforcement of the Civil Code *See infra* note 15.

NB 2: The Civil Code must be read in conjunction with the Law on Implementation of the Civil Code, which amends and supplements the Civil Code, the Land Law, and other laws affecting secured financing

NB 3: At the time of drafting of the Civil Code, leading scholars and drafters wrote and published, in the Khmer language, the “Commentaries,”⁴ which help in understanding some of the provisions in the Civil Code.

influenced by the earlier [Cambodian] Civil Code 1920⁵ and the Civil Codes of Japan, Germany and France. It contains general principles relating to natural persons, *juristic* persons, real rights (nature of property, i.e., immovable, moveable, intangibles – (and transfer of rights), obligations, specific types of contracts, security, and inter-person relationships. The Civil Code also sets up an independent system of secured financing that [sadly] conflicts with the principles set up in the Law on Secured Transactions.

- **“Pawn Shop Regulations”**⁶(2017) The Pawn Shop Regulations permits security operations, with permitted collateral being movables (e.g., cars, motorcycles, earth movers, generators) and documents of title, (e.g., certificates).
- **“Law on Implementation”**⁷ (2011) The Law on Implementation amends and supplements many of the provisions in the Civil Code and thus both of these laws must always be read together.

Since many of Cambodia’s laws are influenced by different countries, there can be inconsistencies in terminology and principles. This is particularly true when translations are made from a foreign language into Khmer, and then the Khmer version (the official version) is translated into English. There are no official translations of laws in English, though there are some official translations of treaties.

For convenience, and since this Article’s focus is the Law on Secured Transactions, the definitions used in Article 3 and 6 of the Law on Secured Transactions will be the definitions used in this Article, unless otherwise specifically noted. Conceptually, this means that the Debtor may give a

NB 4: In understanding the massive work involved to prepare the Civil Code, it is helpful to read the translation note on the first pages of the Civil Code: “*The unofficial English Translation was prepared by the JICA Project Office in the Ministry of Justice of Cambodia for reference only. This translation was made from the Japanese version and is subject to further review to reflect the Khmer original draft more precisely. The official draft submitted by the Ministry of Justice to the Council of Ministers is in Khmer.*” https://www.jica.go.jp/project/cambodia/0701047/04/ku57pq00001spnva-att/01_02e.pdf

5. [Cambodian] Civil Code of 1920, [*Khmer only*] 1920. (This 1920 Civil Code “was continually amended until April 17, 1975 [but] has no further effect” (see *infra* note 7, Art. 92, Law on Implementation).

6. Prakas No. 30 on Management of Businesses of Taking of Pledge and Taking of Security by Transfer, issued by the Ministry of Economy and Finance on 13 January 2017.

7. The Law on the Implementation of the Civil Code, NS/RK/0511/007, [*unofficial English translation*] 2011, http://www.cambodiainvestment.gov.kh/wp-content/uploads/2012/03/Law-on-Implementation-of-CC_Eng_FINAL_110531.pdf.

security interest in Collateral to the Secured Party. If the collateral is an account receivable, the party obligated to pay is the Obligor on Account. A third party has the usage meaning set out in Article 9.1⁸ of the Law on Secured Transactions and may be the person against whom a perfection priority may be asserted.

II. DISCUSSION

A. *History of Cambodia's Secured Financing Over Moveable and Intangible Property*

During the time of the Khmer Rouge, sometimes called “the period of crisis from 1975 to 1979,”⁹ all laws and all money were abolished, entire populations were displaced, and judges, lawyers, educators, and other professions were marked for extinction. So, following 1979, Cambodia had an intense legal infrastructure challenge: how to develop and implement a totally new legal system? who will write the new laws? who will teach the new judges and the new lawyers? how conflicting will the new laws be? This challenge remains.

Initially following 1979, the Courts, lawyers, and business community were informally governed “through the policies of the Party and of the State or through equity, customs, and traditions.”¹⁰

Finally, in 1988, Cambodia issued Decree 38 D, which specifically dealt with contracts and other liabilities. Of the 136 articles in Decree 38 D, only one article dealt with secured transactions. Article 64 of Decree 38D formalized the principles applicable to a possessory pledge and in its totality reads as follows:

“A secured personal property contract is a contract whereby a debtor delivers his personal property to a creditor to be held as security for a debt. A creditor in possession of such secured property is entitled to be paid out of the proceeds of the sale of such property in priority to all other creditors.”¹¹

8. See *supra* note 3, Art. 9.1 Law on Secured Transactions (which reads, “[a] security interest attaches to collateral and becomes enforceable against the debtor and third parties with respect to the collateral”)

9. This phrase refers to the time of the Khmer Rouge and comes from Article 29, Land Law (*unofficial English translation*) 2001.

10. *Supra* note 2, Art. 136 Decree 38D.

11. Art. 64 Decree 38D.

In 2007, roughly twenty years after Decree 38 D, Cambodia, with assistance from the Asian Development Bank¹² promulgated the Law on Secured Transactions, which permitted non-possessory security interests over moveable and intangible collateral and the perfection (i.e., priority rights over third parties) of such security interest. Cham Prasidh, then Senior Minister and Minister of the Ministry of Commerce, wrote in his forward:

“It gives me great pleasure to introduce you to this important publication . . . [the] Law on Secured Transactions. . . . The Royal Government envisages the development of the legal infrastructure for financial markets as spreading over the next decade¹³ beginning with the introduction of key underpinning laws pertaining to commercial activities.”

Even as Cham Prasidh introduced the Law on Secured Transaction as a “key underpinning law,” Cambodia was busy drafting its new Civil Code, which in some parts clarified principles the Law on Secured Transactions relied on, and in other parts contradicted some of the principles set out therein.

The Civil Code, in connection with the existing Land Law,¹⁴ set up the present-day regime of secured financing using certain immoveable property as collateral. Under this regime, ownership, possession, and real rights (including hypothecs¹⁵ and leases) over immoveable property can be officially registered at the Cadastral Office of the Ministry of Land Management, Urban Planning, and Construction (the “MLMUPC”). Furthermore, certain encumbrances (e.g., perpetual leases¹⁶ and

12. See *supra* note 3, Foreword to Law on Secured Transactions (Note: Cham Prasidh expressed “sincere thanks to the Asian Development Bank for providing the financial support in the initiative.”).

13. Cham Prasidh’s use of the phrase—development of infrastructure over the next decade—was prophetic and perhaps a bit optimistic.

As Pho Sotheaphal, a longtime practicing member of the Cambodian Bar Association, and one of the authors of this Article, observes, the implementation of the post 1979 laws (including the Law on Secured Transactions) has not yet been fully absorbed into the legal system. Even now the majority of judges and lawyers have had little training and experience with the Law on Secured Transactions and commercial laws. Most of their training and experience is with just four laws: the Civil Code, the Code of Civil Procedure, the Criminal Code, and the Code of Criminal Procedures.

At a recent banking conference, Tim Holzer, a consultant and one of the authors of this Article, recalls the following conversation: as we (a bank) were explaining the rights of the Secured Party, the Court asked, what is this Law on Secured Transactions? This Court has never heard of it.

14. Land Law (unofficial English translation) 2001 <https://phalthy.files.wordpress.com/2006/11/land-law-2001-kh-eng1.pdf>.

15. Cambodia no longer uses the term “mortgage,” instead the term hypothec is used to reflect a security interest in land.

16. See *supra* note 4, Art. 244 Civil Code (Note: the term of a perpetual lease is not less than 15 years. Leases with a term of less than 15 years cannot be registered at the Cadastral Office.).

hypothecs) may also be registered (if the underlying land is registered) at the Cadastral Office.

B. The Mandatory Legal Predicate

The Law on Secured Transactions is the best-practice choice for taking a security interest over moveable and intangible property because it (generally) permits perfection. Perfection is a right of the secured party to assert a priority¹⁷ in the collateral and its proceeds against third parties by filing a public notice at the Secured Transactions Filing Office (the “STFO”) maintained at the Ministry of Commerce (although at times physical possession of the collateral may be required). The Civil Code, on the other hand, does not really have a perfection system (other than possession) over moveable or intangible property.

Critically, if the parties want their transaction to be governed by the Law on Secured Transaction, they must clearly state so. Otherwise, the provisions of the Civil Code will apply by default. This mandate is stated in the Law on Implementation and reads:

...with regard to transaction executed after Date of Implementation [i.e., the date the Law on Implementation came into force, namely (21 December 2011);]¹⁸ if there is any obscurity among parties of the transaction whether the transaction is executed accordance with the provisions in the Civil Code or the provisions in the Law on Secured Transaction, it is assumed that the said transaction was made according to the provisions in the Civil Code.¹⁹

Under current practice, the above predicate requirement should be satisfied by using a sentence along the lines of “The Security Interest is taken under and governed by the provisions of the Law on Secured Transactions.”

It is important to note that even though the Law on Secured Transactions provides better perfection rights to a secured creditor, and even though the parties may elect to have the principles of the Law on Secured Transaction govern their transaction, there are provisions in both the Civil Code and in the Law on Implementation that may bring competing Civil Code provisions into play. These competing provisions are briefly discussed in Sections 4 and 9 of this Article.

17. See *supra* note 3, Art. 12 Law on Secured Transactions.

18. Notification No. 10 on Date of Enforcement of the Civil Code, the Law on the Enforcement of the Civil Code, the Law on Procedure of Suit Relating to Individual Status and the Law on Procurement of a Non-Suite Civil Case (20 December 2011).

19. See *supra* note 7, Art. 75 Law on Implementation.

C. *What Property Can Serve as Collateral?*

The Law on Secured Transactions provides that collateral may include *inter alia* goods or moveable things of any nature;²⁰ “intangible property, including [real] rights and claims and other intangible property;” “fixtures;”²¹ “accounts and secured sales contracts that have been sold, consigned goods, leased goods, and proceeds of collateral.”²¹ “Collateral may be in existence or may arise in the future.”²²

So far, so good. This seems like a pretty expansive description of possible collateral; however, see below:

1. Collateral Such as Goods or Moveable Things

Goods or moveable things are pretty straight forward. The Law on Secured Transactions even gives some explicit guidance for certain good: “goods includes mineral products where the security interest attached after extraction, timber to be cut and removed for sale, the unborn young of animals, crops grown, growing or to be grown including crops that grow on trees, vines, or bushes.”²³

2. Collateral such as Intangible Property and Other Intangible Property

Under the Law on Secured Transactions, collateral may be “intangible property” . . . and “other intangible property.”²⁴ “Intangible property” is not explicitly defined²⁵ in the Law on Secured Transactions. “Other intangible property” is explicitly defined as: “any moveable thing or right other than goods, accounts, secured sales contracts, documents, instruments and money.”²⁶

20. To fully understand the term “fixtures” it is necessary to read both the Law on Secured Transaction (particularly, Art. 20.3 and 20.4) and the Civil Code (particularly, Art. 125).

21. *See supra* note 3, Art. 6 Law on Secured Transactions.

22. *Id.*

23. *See supra* note 3, Art. 3.15 Law on Secured Transactions.

24. *Id.*

25. Although “intangibles” are not defined in the Law on Secured Transactions, the Civil Code states that “controllable intangible property” shall be governed by the law “pertaining to movables . . . *mutatis mutandis*.” *See supra* note 4, Art. 120 Civil Code; *see also* discussion *infra* in Section C(4) (Real Rights) of this Article.

26. *See supra* note 3, Art. 3.18 Law on Secured Transactions (definition of “other intangible property”).

3. Claims

“Claims” is not explicitly defined in the Law on Secured Transactions, but arguably may a generalized assertion of entitlement to an item of collateral or value.²⁷ Please read the discussion of the term Accounts *infra* which discusses the concept of nominative claim.

4. Rights and Real Rights

Cambodian laws use the terms “real rights”²⁸ and “rights.” It is not clear if “rights” and “real rights” have different meanings. To deal with this issue it is necessary to study the provisions of both the Law on Secured Transactions and the Civil Code. The principles in the Civil Code guide us in understanding the meaning of “real right,” since the term “rights” is not defined in the Law on Secured Transactions.

The Civil Code, in discussing “things” (i.e., property), tells us that “objects shall be a tangible object in the form of a gas, liquid or a solid.”²⁹ These tangible objects may be either “immoveable” or “movable.” The Civil Code implies the following meaning to “intangibles:”

- (1) Objects shall be deemed as either Movable or Immovable.
- (2) An Immovable shall encompass land or any Object immovably fixed to land such as buildings or other structure, crops, timber, and similar Objects.
- (3) A Movable Object shall be any Object that is not otherwise deemed to be an Immovable Object.

27. Although a “claim” is not defined in the Law on Secured Transactions, the term appears to be used as an expression of an interest in an item of collateral or an item of value. The usages in the Law on Secured Transactions include the following: (i) “this law does not apply to . . . the transfer of a claim for compensation of an employee” (Art. 2.4.a); (ii) “a person gives value for rights if he acquires the rights . . . as security for or satisfaction of a pre-existing claim” (Art. 3.14); (iii) “Claim concerning inaccurate or wrongfully filed notice” (heading title of Art. 41); and (iv) “a secured party may, after default, propose to retain the collateral . . . the proposal shall be given to the debtor and to any other secured party from whom the secured party has received a written claim of an interest in the collateral” (Art. 51).

28. The English version of the Law on Secured Transactions contains an error. The English version describes collateral as including “rights,” but the Khmer version (the official version) reads “real rights.” This is highly significant, since “real rights” are explicitly defined in the Civil Code. See *supra* note 4, Art. 130 to Art. 132 Civil Code.

29. See *supra* note 4, Art. 120 Civil Code.

(4) Except as otherwise provided by special law, provisions pertaining to Movables shall apply *mutatis mutandis* to controllable intangible property.³⁰

So what is a real right? A real right is “the right to directly control an Object that may be asserted against any person.”³¹ The Civil Code specifies four types of real rights: “(i) ownership; (ii) possession; (iii) usufructuary real rights (i.e., perpetual lease, usufruct, right of use/right of residence and easement); and (iv) security rights (i.e., right of retention, statutory lien, pledge, hypothec and transfer as security).”³²

Is a “real right” immovable, moveable or intangible? Importantly, the Civil Code sets out two key principles to use when determining whether the object is immovable, moveable or intangible. These principles are the Principle Rule and the Exception Rule. These rules state:

“Component of land and the principle rule: Objects attached to land or comprising a part thereof; particularly buildings or constructed immovable structures upon such land, or seeds planted within said land, unharvested crops or timber upon said land; are components of the land unless having been severed from the land, and may not, except as otherwise provided by law or regulation, be subject to rights apart from those of the Object itself.”³³

“Component of a land and exception rule: Should the right holder bear a right in relation to another person’s land enforces his/her right upon any constructed buildings or structures, grown timber, crops or other such Objects on the land, those Objects shall not be deemed to be components of said land. The same shall apply to Objects attached to the land on temporary basis.”³⁴

Although a full study of the concept of land and its registration is beyond the scope of this Article, it is important to note that certain ownership and possession of land and certain “real rights” (e.g., perpetual leases and hypothecs) may be registered at the Cadastral Office, but not all land and not all real rights can be registered at the Cadastral Office. If an item of land or a real right cannot be or is not registered at the Cadastral office, then—in the

30. See *supra* note 4, Art. 120 Civil Code.

31. See *supra* note 4, Art. 130 Civil Code.

32. See *supra* note 4, Art. 132 Civil Code.

33. See *supra* note 4, Art. 122 Civil Code.

34. See *supra* note 4, Art. 123 Civil Code.

absence of a more specific law—a security interest over such collateral should be able to be taken and perfected under the Law on Secured Transactions.

Let's consider some possible land possession, leases, and hypothec issues that, under the principle and exception rules, may not be components of land, or that may not be registered at the Cadastral Office:

a) Is a lease agreement (or a hypothec agreement) itself land or immovable? Of course not. The agreement itself is a piece of paper and the terms and conditions³⁵ on it may be intangible property, other intangible property, rights, and maybe claims. Security interests on intangible property are best taken under the Law on Secured Transactions.

b) Consider the circumstance where a lessee leases (say, a ten year term) several acres of land and builds a ten story building on this leased parcel. The exception rule tells us that this building is probably not a component of land. So is the building moveable property or intangible property that may serve as collateral under the Law on Secured Transactions? There is no clear precedent on this question. Still, the Law on Secured Transactions states that collateral may include moveable and intangible property.

c) If land is not registered at the Cadastral office may it still be collateral? What if the landowner simply does not want to register his land at the Cadastral Office? Can that landowner still use his real right of ownership as collateral under the Law on Secured Transactions? Again, there is no clear precedent on this question... However, the Law on Secured Transactions explicitly states that collateral includes “real rights” and intangible property.

So, we always need to consider when and whether unregistered real rights and unregistered rights may be used as collateral under the Law on Secured Transactions. And, if such rights may be used as collateral, whether the involved security interest may be taken and perfected under the Law on Secured Transactions.

Frankly, in Cambodia, like in many countries, it is not always clear. The wise Secured Party will take and perfect a security interest over a collateral by any law that does not prohibit its use. So, if you can register a hypothec at the Cadastral Office, then register it there. If you have a hypothec agreement with beneficial terms and conditions, then also take and perfect a security

35. Note, unlike some countries, the full lease or hypothec is not registered at the Cadastral Office. Only an abbreviated form is used. So, if the Secured Party wants a security interest to include all the intangible rights set out the written agreement, the Secured Party's only option is to take a security interest over those rights under the Law on Secured Transactions.

interest over those terms and conditions under the Law on Secured Transactions. If a default occurs, let the Court sort out whether the Secured Party has rights under the Law on Secured Transactions or the Civil Code. The important thing is that the Secured Party take and perfect his security interest under all available laws.

5. Accounts

The Law on Secured Transactions states, with a few clearly noted exceptions,³⁶ that collateral includes accounts³⁷ and that the law applies to the sale of accounts. There is no real magic to what an account receivable is. Even the fellow selling apples at the market knows when someone owes him money (an account receivable) for the apples sold. Likewise, the power company knows that its sale of electricity to 50,000 subscribers creates a set of receivables which the power company may use as collateral for a loan or which the power company may sell. Exporters or importers may use their account receivables in factoring transactions.

The Law on Secured Transactions also rather clearly sets out the procedures that are to be followed when there is a default and the collateral is an account:

. . . The assignee is subject to all the terms of the agreement between the obligor on an account and assignor.

. . . No information to the obligor on an account shall be required for attachment, perfection or enforcement of a security interest arising from an assignment . . .

. . . If information of an assignment is required to be given to the obligor on an account, the information shall be in writing, shall identify the rights assigned, and shall be authenticated by the assignor or the assignee, but need not disclose any of the terms or conditions of the assignment.

36. See *supra* note 3, Art. 2 The Law on Secured Transactions (Article 2.4 a–d only excludes four types of transactions dealing with “accounts,” namely: (a) “the transfer of a claim for compensation of an employee; (b) a sale of accounts. . . as part of a sale of a business out of which they arose; (c) an assignment of accounts. . . which is for the purpose of collection only; and (d) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract.”)

37. See *supra* note 3, Art. 3.6 and 3.11 Law on Secured Transactions (Note: Art. 3.11 states: an “account” is “any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or secured sales contracts.” And Art. 3.6 states a “secured sales contract means any record that creates a monetary obligation a security interest in, or a lease of, goods.”)

. . . An obligor on an account shall perform his obligation by paying the assignor until, but not after, the obligor on an account is informed that the amount due or to become due has been assigned and that payment is to be made to the assignee.

. . . After being informed of an assignment, the obligor on an account shall perform his obligation by paying the assignee, and not the assignor³⁸

So far, so good. However, the Civil Code also deals with a type of claim called a *nominative claim*. Sadly, the Civil Code has no definition for a nominative claim.³⁹ If an account is a nominative claim it may be that the Civil Code provisions control. The Civil Code requires the use of a notarized document (i.e., an instrument bearing a fixed date)⁴⁰ in order to assert the assignment of a nominative claim against a third party. The Civil Code states:

(1)The assignment of a nominative claim may not be asserted against the applicable obligor or any other third party unless the assignor has given notice thereof to the obligor or the obligor given consent thereto to the assignor or the assignee.

38. See *supra* note 3, Art. 25 Law on Secured Transactions.

39. Without doubt, a “nominative claim” under the Civil Code requires special handling. Sadly, neither the Civil Code nor any other law in Cambodia defines a “nominative claim.” Japanese scholars and the English version of the Civil Code imply that “nominative claims” may not include certain negotiable instruments.

The Commentaries (in English translation state, “A nominative claim” (*creance nominative*, in French) is a claim whose obligee is specified. There are multiple types of nominative claim, such as “claim payable to order” or “claim payable to bearer.” Nominative claims are the simplest form of claim. This Article provides for requirements for an assignee to be able to hold up against third parties with respect to the effect of assignment of a nominative claim. However, although the obligor is also a third party beside the parties to the assignment of claim (the assignor, who is the obligee, and the assignee), the status of the obligor is different from that of other third parties. Therefore, Paragraph 1 and Paragraph 2 provide for different arrangements in relation to these two types of person.” See *supra* note 5, Art. 503 of the Commentaries.

Japanese scholars seem to take an approach different than the Commentaries approach. Traditionally under Japanese law, two types of monetary claims are customarily traded, nominative claims (*shimei saiken*) and claims on bills (*tegata saiken*). Nominative claims are generally those claims whose obliges are specified, compared with claims represented by bearer securities. Nominative claims are created typically by a contract between two parties or more, such as purchase agreement and a loan agreement. For example, when a purchase agreement for goods is entered into, the seller has account receivables vis a vis the buyer. Such account receivables fall into a category of “nominative claim” under the Japanese Civil Code <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=2057&re=02&vm=02>.

40. The term “fixed date” is a complicated term in the Civil Code. Without going into all of the nuances and exceptions, it means that the instrument or document must physically be signed in front of a Cambodian notary. If a required signatory is outside of Cambodia, then that party must fly to Cambodia or the Cambodian notary must fly to that country. Needless to say, this can be a very expensive process.

(2) The notice or consent described in paragraph (1) shall not be asserted against a third party unless the notice or consent has been made using an instrument bearing a fixed date.⁴¹

In dealing with a pledge over a nominative claim, the Civil Code also requires a notarized document and reads:

(1) Should a pledge be created over a nominative claim, such pledge shall not be asserted against third parties, including Third Party Obligors, unless notice of the creation of the pledge is provided to such Third Party Obligors or the Third Party Obligors acknowledge the claim.

(2) The notice or acknowledgement set forth in paragraph (1) may not be asserted against a Third Party other than the Obligor unless the notice or acknowledgement has been made using an instrument bearing a fixed date.⁴²

Worse, the Civil Code implies that if the parties to a nominative claim agree to prohibit its assignment, that prohibition may “be asserted against a third party having no knowledge thereof . . . unless the third party’s lack of knowledge be the result of the third party’s gross negligence.”⁴³

6. Possible Solutions to Security over Accounts and Nominative Claims

So how can parties use receivables as collateral? Is factoring too risky? None of the following suggestions are perfect, and government guidance is required. For convenience, in the possible solutions below, we use the definitions and terms described in Section 1 of this Article, namely the definitions used in the Law on Secured Transactions.

a. Nominative Claim – Structured under Law on Secured Transactions

The Law on Implementation states that the parties may choose to have a secured transaction be governed by the provisions in the Law on Secured Transactions.⁴⁴ If the Courts accept this argument, perhaps transactional language along the following lines may be workable.

41. See *supra* note 4, Art. 503 Civil Code.

42. See *supra* note 4, Art. 841 Civil Code (requirements for perfection of pledge over nominative claim).

43. See *supra* note 4, Art. 501 Civil Code.

44. See *supra* note 7, Art. 75 and 76 Law on Implementation.

The Obligor (i.e., the person having the obligation to pay the nominative claim; known under the Law on Secured Transactions as the “Obligor on Account”) and the Obligee (i.e., the person claiming the receivable as an asset to be used as collateral; known under the Law on Secured Transactions as the “Debtor”), agree pursuant to the Law on Implementation that the security transaction over the Claim (i.e., the nominative claim; known under the Law on Secured Transactions as the “Collateral” or the “Account”) is governed under the Law on Secured Transactions and not the Civil Code. Possible language for dealing with this issue may be as follows:

For avoidance of doubt the parties further agree that:

- i. The term “Claim” means any nominative claim however described in the Civil Code, including the proceeds thereof;
- ii. the Secured Party (as defined under the Law on Secured Transactions) is a full and intended beneficiary of this election;
- iii. the Security Interest means any security interest whether by way of pledge, transfer of title, consignment, assignment, lease, or otherwise;
- iv. the Security Interest may be for all or any part of the Claim;
- v. the Debtor (under the Law on Secured Transactions) has an unrestricted right to grant a security interest over the Claim or to agree to and to effect the Sale of Claim without the need of further notice to or consent from the Obligor (i.e., the Obligor on Account) or any third party or the public at large;
- vi. the terms governing the Security Interest and/or the Sale of Claim are set out in the Law on Secured Transactions, including, without limitation, Article 25 thereof;
- vii. the terms governing perfection of the security interest and/or the Sale of Claim, or priority rights are as set out the Law on Secured Transaction including, without limitation, Article 10 and 12 thereof; and
- viii. the terms governing disposition of collateral, proceeds and Persons taking collateral are set out the Law on Secured Transaction including, without limitation, Article 14 and 17 thereof.

b. Nominative Claim – Structured as a Negotiable Instrument

Arguments may be advanced that a purported nominative claim transaction may be structured as a negotiable instrument transaction.

Although such a structuring may present its own issues, it may be that such a structuring could avoid the need of a notarized instrument in the assignment of a nominative claim. Article 506 of Civil Code language supporting the possible use of a negotiable instrument reads:

The conditions governing the assignment of a claim payable to order or to other claim regarding which securities representing such claim have been issued shall be established separately through special law.⁴⁵

Although Article 506 is not a model of clarity, it certainly appears that the assignment of such claims “shall be established separately through special law.” And Cambodia does have a Law on Negotiable Instruments,⁴⁶ which reads in pertinent part:

This Law governs negotiable instrumentsNegotiable instruments are written orders or promises to pay a determinate sum of money, transferable by delivery, and where required, also with endorsement. Negotiable instruments governed by the Law are checks, bills of exchange, and promissory notes.⁴⁷

There is no guidance as to whether a nominative claim transaction may be structured or re-structured as a negotiable instrument which may be transferable by delivery and “where required, also with endorsement.” Similarly, there is no guidance as to whether a negotiable instrument must be *to order* or whether it may also be *bearer*.

Further complicating the matter is that the English term instrument may not have an exact equivalent usage in Khmer.⁴⁸ Accordingly, if the parties elect to use a negotiable instrument under the Law on Negotiable Instruments, it may be wise to use language along the following lines in the secured transaction:

For a avoidance of doubt, the parties agree that if a written instrument (i.e., an *oupakor*, as known in the Law on Negotiable Instruments and Payment Transactions) is used by the parties to document a nominative claim, or to grant a security interest, a security

45. See *supra* note 4, Art. 506 Civil Code (“The conditions governing the assignment of a claim payable to order . . . shall be established separately through special law.”).

46. The Law on Negotiable Instruments and Payment Transactions (unofficial English translation) 2005 http://www.cambodiainvestment.gov.kh/wp-content/uploads/2011/09/Law-on-Negotiable-Instruments-and-Payment-Transaction_051024.pdf.

47. See *supra* note 39, Art. 1 Law on Negotiable Instruments and Payment Transactions.

48. Instrument is not a well-defined term in Cambodian law. The Law on Secured Transactions uses the Khmer term “*likhet-snam*,” which means a written letter. The Law on Negotiable Instruments uses the Khmer term “*oupako*,” which, depending on the context, means “legal instrument” or “equipment.” In the Civil Code usually the Khmer term for instrument is “*likhet*,” (which is generally similar to a “*likhet snam*”) and means a written document, possibly a deed or letter.

assignment or a transfer of such Claim (i.e., the nominative claim), then that *oupakor* is governed by the Law on Negotiable Instruments and Payment Transactions and not by the Civil Code provisions dealing with nominative claims. Furthermore, should the *oupakor* be used as collateral or used in a sale of Accounts or other intangible property under the Law on Secured Transactions, then the term *oupakor* may also be read as an *ikhet-snam*.

As to perfection, a Secured Party would be wise to both file a notice with the STFO and to take physical possession of the instrument. After all, if you are taking a security interest in an instrument that can be negotiated by physical delivery, you must have that physical delivery. And if you want to assert a perfection priority and proceeds rights over collateral against a third party you may also have to give a notice to that third party.

c. Nominative Claim – Structure Loan for Consumption (Use of Bank as Trustee)

Although it has never been done, it may be possible to structure a set of nominative claim transactions as a loan for consumption using a bank as a trustee. This would require a three-party agreement among the Bank, the Obligor, (i.e., the person having the obligation to pay the amount due on the nominative claim called the “Obligor on account” in the Law on Secured Transactions), and the Obligee (i.e., person using the account [receivable] as collateral, and called the Debtor under the Law on Secured Transactions).. This three-party agreement might be called, among other things, a Depository Account Agreement.

Under the Depository Account Agreement, the Obligee (i.e., the Debtor under the Law on Secured Transactions) could use the Depository Account Agreement (and the underlying balance therein) as collateral. Until there is a default, the Obligee would simply use the depository account in the normal course of business. The Bank would always permit the Obligee (i.e., the Debtor) and the Secured Party full information about the depository account, and upon the Secured Party declaring a default, would freeze the depository account and perform as required by agreement or court order.

7. Depository Accounts

The Law on Secured Transactions states: “. . . this law does not apply to . . . an interest in a deposit account, checking account, savings account, passbook or other case account, except as provided to the proceeds.”⁴⁹ Note

49. See *supra* note 3, Art. 2.4.e of the Law on Secured Transactions.

that the Law on Secured Transactions does not prohibit a security interest in a bank account; it simply prevents taking and perfecting a security under the Law on Secured Transactions.

Still, Cambodia recognizes the principle of freedom of contract. If the Bank, the account owner, and the Secured Party enter into an agreement governing the deposit account, such an agreement may be written in a manner so as to give some clear protections to the Secured Party. Under this agreement, the account owner would have free use of the account, while Debtor and the Secured Party would be entitled to full information (e.g., deposits, withdrawals, balance). And upon the declaration of default by the Secured Party, the Bank would freeze the depository account and perform as required by agreement or court order.

D. Creation of a Security Interest

A security interest attaches to collateral and becomes enforceable against the debtor and third parties with respect to that collateral only if: (a) the debtor has authenticated a security; (b) value has been given to the secured party; and (c) the debtor has rights in the collateral or the power to transfer rights in the collateral to the secured party.⁵⁰

But be careful, a reading of the Law on Secured Transactions could lead to the conclusion that a security interest attaches when “the debtor has authenticated a security.” Authentication alone may not be sufficient. Pay attention to the requirements of the Civil Code: “[t]he creation, transfer, or alteration of a real right shall take effect in accordance with the agreement between the parties.”⁵¹

E. Perfection

Perfection gives the Secured Party rights in the collateral against the world. Attachment only gives the Secured Party rights in the collateral against the debtor.

“A security interest is perfected when it has attached to the collateral and all of the applicable requirements of this article are satisfied.”⁵² Without attempting to list all rules relating to perfection, the following provisions are noted:

a notice must be filed [at the STFO] unless the article provides otherwise . . .

50. See *supra* note 3, Art. 9, Law on Secured Transactions.

51. See *supra* note 4, Art. 133 Civil Code.

52. See *supra* note 3, Art. 10 Law on Secured Transactions.

a purchase money security interest in consumer goods is perfected when it attaches and without the filing of a notice . . .

a security interest in goods, instruments, documents, or secured sales contracts may be perfected by filing or by the secured party's taking possession of the collateral . . .⁵³

Some collateral, such as securities, documents of title, and shares, may be perfected either by a notice filing or by taking possession. For this collateral type, it is strongly recommended that both possession be taken and a notice be filed. Otherwise, there is a real possibility that conflicts in the date of perfection may arise should enforcement be required.

A person who acquires collateral that is subject to a perfected security interest takes subject to the security interest, unless: (a) "the person gives value for the collateral without knowledge of the security interest and before it is perfected [and] if the collateral is tangible, the person must also take delivery of the collateral without knowledge of the security interest and before it is perfected;"⁵⁴ (b) the person acquiring "goods" acquires the goods "in the ordinary course of [the debtor's] business;"⁵⁵ and (c) "a person who buys goods that are consumer goods of the seller takes the goods free of a security interest whether or not the security interest is perfected, if the person buys without knowledge of the security interest and before a notice is filed that covers the consumer good. . . ."⁵⁶

F. Five Year Rule

A perfection notice filed at the STFO has a limited duration. "A filed notice is effective for a period of five (5) years after the date of filing. The effectiveness of a filed notice lapses on the expiration of the five (5) year period, unless before the lapse, a continuation statement is filed."⁵⁷

G. Enforcement

Cambodia does permit the parties to define default: "[t]he parties to a security agreement are free to define default with respect to the agreement."⁵⁸ However, the Secured Party's ability to use self-help and

53. See *supra* note 3, Art. 10.2, 10.3 and 10.4 Law on Secured Transactions.

54. See *supra* note 3, Art. 14.1 Law on Secured Transactions.

55. See *supra* note 3, Art. 14.2 Law on Secured Transactions.

56. See *supra* note 3, Art. 14.3 Law on Secured Transactions.

57. See *supra* note 3, Art. 36.2 Law on Secured Transactions.

58. See *supra* note 3, Art. 46.1 Law on Secured Transactions.

simply take possession of the collateral is limited. The general rule is that a court order is required.

“Upon default, the secured party may take possession or control of collateral without legal proceedings if the debtor has agreed in writing after default.”⁵⁹ However, for accounts and secured sales contracts, the Secured Party appears to have some immediate right of recourse, with the law providing:

Upon default with respect to accounts or other rights to payment, the secured party may proceed directly against the accounts . . .

Upon default, with respect to accounts, secured sales contracts, or other rights to payment, or whenever agreed by the debtor, the secured party is entitled to notify an obligor on an account or the obligor on any other right to payment to make payment to the secured party, and also to take control of any proceeds

The secured party may act under this article without recourse to judicial process.⁶⁰

H. Conflicts with Other Laws

As Cham Prasad noted in his introduction to the Law on Secured Transactions, the “Royal Government envisages the development of the legal infrastructure for financial markets as spreading over the next decade” This development has not always proceeded smoothly. There are conflicts, contradictions, and confusion in the laws. In this short section we look briefly at some difficult conflicts.

The Law on Implementation was careful to preserve the Civil Code protections for bona fide acquirers of movables. Essentially, this means that Articles 193 and 194 of the Civil Code apply⁶¹ to protect the bona fide acquirer. These Articles may – and probably do – diminish the rights of a Secured Party, even if that security interest is perfected under the Law on Secured Transactions. The Articles read as follows:

Art. 193 (Bona fide acquisition of ownership of movables) A transferee who commences in good faith and without negligence the possession of a movable upon receiving the delivery of the movable under a valid

59. See *supra* note 3, Art. 48 Law on Secured Transactions.

60. See *supra* note 3, Art. 47 Law on Secured Transactions.

61. See *supra* note 7, Art. 77 Law on Implementation [note: Article 77 provides that “[even if a secured transaction is governed by the Law on Secured Transactions, this] . . . shall not prevent application of Article 193 (Bona fide acquisition of ownership of moveable) and Article 194 (Transfer of stolen or lost property) of the Civil Code.”].

contract transferring the ownership of the movable, the person shall acquire ownership of such movable even where the transferor did not have the ownership thereof. This shall not apply where the transferor still maintains the direct possession over the movable.⁶²

Art. 194. (Transfer of stolen or lost property) (1) In the case described in Article 193 (Bona fide acquisition of ownership of movable), if the transferred thing comprises stolen or lost property, the injured party or owner of the lost property may demand the return of the property from the transferee within two years of its theft or loss. (2) If a transferee purchases and receives in good faith stolen or lost property via public auction, sale on the open market, or from a merchant who sells items of the same type, the injured party or the owner of the lost property cannot demand return of the property without paying the transferee compensation for the price paid by him.⁶³

The Pawn Shop Regulations (in connection with Article 193 and 194 of the Civil Code) also act to protect a bona fide acquirer who acquires from a pawn shop.

I. Use of Offshore Arbitration

For large secured transitions, it is common—and advisable—to use offshore arbitration. Cambodia law permits this. Even the Royal Government of Cambodia (the “RGC”) accepted jurisdiction of an offshore arbitration over a contract dispute to which the RGC was a material party.

III. CONCLUSION

Yes, there are ambiguities and issues related to the use of Cambodia's Law on Secured Transactions. Yes, the Courts, many lawyers, and even bankers are more familiar with criminal law, family law, and procedural rules than with the intricacies of the Law on Secured Transactions. Still the core law is robust and comprehensive.

Based upon the descriptions laid out above, the Cambodian legal system could move to more to a best practice that more widely embraces the Law on Secured Transactions to create efficiency throughout the legal system and better facilitate the law itself.

62. See *supra* note 4, Art. 193 Civil Code.

63. See *supra* note 4, Art. 194 Civil Code.