

## TABLE OF CONTENTS

- Pledge over immovable
- Hypothec over immovable
- Perpetual leases over immovable
- Key Summary

## AUTHORS

- Ms. Lim Seakkeang Associate
- Mr. Meas Sovan Associate

**A** No 64, St 111  
 PO Box 172  
 Phnom Penh  
 Cambodia  
**T** +855 23 217 510  
 +855 23 967 450  
**F** +855 23 212 840  
**E** cambodia@bnglegal.com  
**W** www.bnglegal.com

## ENCUMBRANCE ON IMMOVABLE PROPERTY

### INTRODUCTION

This report aims to provide an overview of three types of encumbrance on immovable property in Cambodia: pledge, hypothec and perpetual leases. It addresses questions of how to secure debts as well as how to allow foreigners to enjoy and use the real property given they have no right to own land in Cambodia.

### 1. PLEDGE OVER IMMOVABLE

#### 1.1. THE CONTRACT

A pledge is a kind of encumbrance over immovable property agreed by parties to secure repayment of a debt. In other words, a pledge over an immovable gives the pledgee the right to receive a payment of claims in priority to other creditors from the immovable property belonging to either the debtor or a third party, which the pledgee uses as a security to his claim. The pledgee has the right to use and enjoy the pledged immovable in accordance with its ordinary use<sup>1</sup>. However, the pledgee shall be responsible for management expenses and general maintenance of the property<sup>2</sup>. It should be noted that the pledgee cannot demand interest on the secured claim<sup>3</sup>. Nevertheless, the said provisions shall



<sup>1</sup>Article 834 (1) of Civil Code

<sup>2</sup>Article 835 of Civil Code

<sup>3</sup>Article 836 of Civil Code

not apply if there is a special agreement otherwise by the parties in the act of creation of a pledge<sup>4</sup>.

According to Article 838 of the Civil Code, “[t]he duration of a pledge of an immovable cannot exceed five years. If a pledge of an immovable is created for a longer period, such period shall be reduced to five years. Regarding a pledge prior to the Date of Implementation of Civil Code and the remaining duration which such rights exists exceed 5 years from the Date of Implementation, the existent duration of pledge shall be reduced to five years counting from the date of Implementation<sup>5</sup>. The pledge of an immovable may be renewed. However, the renewal period cannot exceed five years from the time of renewal<sup>6</sup>.”

#### 1.2. REGISTRATION

For it to be used against a third party, the contract of pledge over the immovable property must be in authentic form and must be registered at a Cadastral Office. Unlike the case of a perpetual lease, there will not be a separate certificate issued; the pledge will be proved by having a written mention on the title deed, be it a Certificate Acknowledging the Owner of Immovable Property or a Possession Title to Immovable Property, a Certificate Acknowledging the Ownership of Private Unit of Co-owned Building, or a Certificate of Perpetual Lease<sup>7</sup>. The official fee for the registration is 200,000 riels per title and shall take from 03 to 05 days<sup>8</sup>.

<sup>4</sup>Article 837 of Civil Code

<sup>5</sup>Article 57 of Law on Implementation of Civil Code

<sup>6</sup>Article 838 of Civil Code

<sup>7</sup>Article 111 of Joint Prakas Concerning Real Rights Registration Procedure Pertaining to the Civil Code, dated 29 January 2013

<sup>8</sup>This is based on the Joint Prakas No. 995 SHV.BRK dated 28 December, 2012 on Provision of the Public Services of Ministry of Economic and Finance and Ministry of Land Management Urban Planning and Construction.

### 1.3. OTHER SPECIFICS

The official fee for discharge or for releasing it is 100,000 riels and it shall take 02 to 03 days based on the said Joint Prakas.

However, in case of default, the pledgee has the right to file a complaint against debtor for a settlement in court pursuant to the applicable law and procedure for repayment of the debt as in the case of hypothec. Nevertheless, the creditor does not have the right to dispose of the immovable property. In other words, he/she does not have the right to transfer the immovable property to any third party.

Pledges are also used in the area of loans for consumption by banks and microfinance institutions ("MFI"s) with their customers. Normally, after all the required documents have been executed, the bank shall submit those documents along with a letter requesting the Provincial /Capital Land Urban Planning Construction and Cadastral Department to register such encumbrance onto the title deed(s).

Regarding the creation of a pledge between legal entities, in addition to the execution of loan and a pledge agreement, corporates documents including the Articles of Association, Business Registration Certificate and Corporate Resolution on such transaction need to be submitted for registration of encumbrance at the Cadastral Office. In case the creditor/lender is an entity registered outside Cambodia's jurisdiction, notarized version of corporate documents are required.

## 2. HYPOTHEC OVER IMMOVABLE

### 2.1. THE CONTRACT

Hypothec is also an encumbrance. A hypothec (creditor) shall have the right to obtain satisfaction of his/her claim prior to other creditors out of the immovable property that has been furnished as security by the debtor or a third party, without transferring possession<sup>9</sup>. It means that the owner of the immovable property still possesses the property and has the rights to use and enjoy the profit of his/her immovable.

### 2.2. THE REGISTRATION

A hypothec can be established only with consent of the parties involved, the lender and the debtor or a third party that furnishes the immovable property to be used as a security. Same as a pledge, for it to be used against third parties, the agreement must be in authentic form and registered at the Cadastral Office<sup>10</sup>. The official fee is 200,000 riels per title and shall take from 03 to 05 days<sup>11</sup>.

The hypothec shall be mentioned on the Certificate Acknowledging the Owner of Immovable Property or Possession Title to Immovable Property, the Certificate Acknowledging the Ownership of Private Unit of Co-owned Building, or a Certificate of Perpetual Lease<sup>12</sup> in case of hypothec over perpetual lease.

### 2.3. OTHER SPECIFICS

The purpose of hypothec is to allow the owner of an immovable property to place the immovable as security for more than one debts based on the value of that immovable

property. Where multiple hypothecs are created on an immovable to secure debts, the order of their priority shall be based on the order of their registration<sup>13</sup>. However, a hypothec may transfer or waive his/her right on the hypothec and transfer or waive his order of priority ranking for the benefit of other creditors of the same debtor<sup>14</sup>. A creditor may also hypothecate his/her right of hypothec in order to secure his / her debt or debt of a third party. This is referred to as "sub-hypothecation"<sup>15</sup>. Disposal of the sub-hypothecation per Article 859, transfer or waiver of a hypothec per Article 860 and change of rankings per Article 861 of the Civil Code shall be ineffective unless it is made in authentic form and unless such disposal is additionally registered<sup>16</sup>.

Both parties may together request to discharge/release their hypothec from the Cadastral Office.

The official fee for releasing a hypothec is 100,000 riels and shall take 02 to 03 days based on the same Joint Prakas.

In case of default of payment, the hypothec has the right to file a complaint to the competent court against the debtor for a compulsory sale of the hypothecated immovable<sup>17</sup>.

## 3. PERPETUAL LEASES OVER IMMOVABLE

### 3.1. THE CONTRACT

Perpetual lease is another type of encumbrance over immovable property. It refers to a lease of immovable for a term of not less than 15 years and not more than 50 years<sup>18</sup>. Foreigners can enter into a perpetual lease which would allow them to use the property.

### 3.2. REGISTRATION

A lease cannot be considered "perpetual" if not made in writing. Without being made in writing, a lease is considered without a prescribed period of time which can be terminated anytime by one of the parties<sup>19</sup>. Moreover, a perpetual lease needs to be registered at the Cadastral Office, so as to fully protect the rights of lessee in order to assert it against third parties<sup>20</sup>.

The creation of perpetual lease shall be mentioned on the Certificate Acknowledging the Owner of Immovable Property or Possession Title to Immovable Property or Certificate Acknowledging the Ownership of Private Unit of Co-owned Building.

<sup>9</sup>Art 843-(1) of Civil Code

<sup>10</sup>Article 845 of Civil Code

<sup>11</sup>This is based on the Joint Prakas No. 995 SHV.BRK dated 28 December, 2012 on Provision of the Public Services of MEF and MLMUPC

<sup>12</sup>Article 116 of Joint Prakas Concerning Real Rights Registration Procedure Pertaining to the Civil Code, dated 29 January 2013

<sup>13</sup>Article 851 of Civil Code

<sup>14</sup>Article 860 (1) and Article 861(1) of Civil Code

<sup>15</sup>Article 859 (1) of Civil Code

<sup>16</sup>Article 862 of Civil Code

<sup>17</sup>Article 853 of Civil Code

<sup>18</sup>Article 244 and Article 247(1) of Civil Code

<sup>19</sup>Article 245 of Civil Code

<sup>20</sup>Article 246 of Civil Code

## ABOUT US

BNG Legal is a leading regional law firm providing comprehensive legal services to foreign and local clients in Cambodia and Myanmar.

Registered with the Bar Association of the Kingdom of Cambodia, our legal professionals combine international standards with local expertise.

We differentiate ourselves by coupling a deep understanding of the local business environment with international professionalism and integrity.

We facilitate business, investment and trade between Cambodia, Myanmar, and the rest of the world through innovative and cost-effective legal services.

Superior knowledge of local protocol, local procedure, and local people is necessary for any business to succeed.

Conducting daily business in Cambodia and Myanmar, BNG Legal is up to date with the newest procedures and requirements, helping clients efficiently and successfully complete any project.

## CAMBODIAN LAW BLOG

[cambodianlaw.wordpress.com](http://cambodianlaw.wordpress.com)

BNG Legal believes expanding access to legal information is crucial to rule of law. To that end, several of our legal professionals write a blog discussing recent developments in the legal landscape.

## LEGAL DATABASE

The laws and regulations in our database are based upon the Official Gazettes, law compendiums and other collections from the ministries and institutions of the Royal Government of Cambodia. These are available to the public through our partner site, [www.bnqlaw.net](http://www.bnqlaw.net).

The Cadastral Office shall issue to the lessee the Certificate of Perpetual Lease<sup>21</sup>. The official fee is 400,000 riels (and plus 4,000 riels for each hectare if the size of leased land is bigger than five hectares). The process shall take from 15 to 20 days<sup>22</sup>.

In addition, certain changes amid the perpetual lease including rental fee, duration, term of payment or special agreement of perpetual lease are required to be registered at the cadastral office<sup>23</sup>.

### 3.3. OTHER SPECIFICS

In terms of rental, the lessee shall pay it to the lessor at the stipulated time. If there is no stipulation of time, the lessee shall pay the rental at the end of each year<sup>24</sup>. Both parties may request the court to increase or decrease the rental if it is no longer appropriate<sup>25</sup>. It is important to confirm that there are tax considerations in leasing land in Cambodia. The rate of the tax on leasing land is 10% of the rental<sup>26</sup>.

In case the lessee fails to pay the rental for 3 years, the lessor may cancel the perpetual lease<sup>27</sup>. On the lessee's side, The lessee is allowed to pledge or transfer

his/her right over the long-term lease as well as the buildings and/ due to unforeseeable circumstances or force majeure<sup>28</sup>. Lastly, perpetual leases may be subject to sublease and may be inherited<sup>29</sup>. or other immovable properties that he/she has constructed the lessee may cancel the perpetual lease if no profit can be gained from the immovable for 3 years on the land except as otherwise specified in the lease agreement<sup>30</sup>. For example, the Cambodian nominee may enter into a perpetual lease agreement with the foreigner to lease the purchased land back to the foreigner.

<sup>21</sup>Since this perpetual lease is very new, we are yet to see a sample of Certificate of Perpetual Lease, as the existing form is Certificate of Long-Term Lease, the sample of which was Annex 1 of the 2007 Sub-Decree No.114.

<sup>22</sup>This is based on the Joint Prakas No. 995 SHV. BRK dated 28 December, 2012 on Provision of the Public Services of MEF and MLMUPC

<sup>23</sup>Article 36 of Joint Prakas Concerning Real Rights Registration Procedure Pertaining to the Civil Code, dated 29 January 2013

<sup>24</sup>Article 248 of Civil Code

<sup>25</sup>Article 249 of Civil Code

<sup>26</sup>Article 25 (1) (b) of Law on Taxation

<sup>27</sup>Article 250 of Civil Code

<sup>28</sup>Article 251 of Civil Code

<sup>29</sup>Article 252 (2) (3) of Civil Code

<sup>30</sup>Article 7 of 2007 Sub-Decree No.114 on "the Mortgage and Transfer of the Rights over a Long Term Lease or an Economic Land Concession

## KEY SUMMARY

ENCUMBRANCE	VALIDITY	NUMBER OF (USES)	REGISTRATION	TERMINATION
PERPETUAL LEASE	50 Years Renewal	Used to secure only one debt	Register at Cadastral Office for land parcels with registered titles.  (Can only be certified by local authority for land parcels without registered titles)	The end of contract.  Cancellation by parties.
PLEDGE	5 years renewal	Used to secure only one debt	Register at Cadastral Office for land parcels with registered titles.  (Can only be certified by local authority for land parcels without registered titles)	Repayment
HYPOTHEC	N/A	Can be used to secure more than one debts	Register at Cadastral Office for land parcels with registered titles.  (Not clear for land parcels without registered titles)	Repayment