ABLI Legal Convergence Series

CORPORATE RESTRUCTURING AND INSOLVENCY IN ASIA 2020

ASIAN BUSINESS LAW INSTITUTE

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ASIAN BUSINESS LAW INSTITUTE

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The Asian Business Law Institute ("ABLI") is an Institute based in Singapore that initiates, conducts and facilitates research and produces authoritative texts with a view to providing practical guidance in the field of Asian legal development and promoting the convergence of Asian business laws.

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FOREWORD

It is not a stretch to say that insolvency and restructuring are words often associated with the image of a lengthy and complex process that involves collapsed businesses, lost jobs and societal and economic disruption. Beyond the immediacy of the multitude of problems that a failure presents, the importance of an efficient and efficacious process to resolve these problems is of great long-term relevance for a country (and indeed a region) in attracting investment and advancing economic development. The large number of international organisations dedicated to this area of the law, such as the UNCITRAL Working Group V, the World Bank, the Asian Development Bank ("ADB"), INSOL International and the International Insolvency Institute ("III") just to name a few, testifies to the intense interest in and the importance of this field.

The intense attention paid to the subject of insolvency and restructuring undergirds an unsaid desire to reduce, if not remove, diversity and fragmentation in approaches to finding solutions by searching for consistency and a convergence of philosophy and principles across jurisdictions. Fragmentation creates opportunities for jurisdictional arbitrage resulting in significant yet avoidable time and cost inefficiencies. This is anathema to a verdant investment climate. Private investors are understandably more likely to invest where the rules are predictable, transparent and broadly consistent across jurisdictions, so that they can be assured of a fair and efficient exit in distress situations. Further, the proliferation of cross-border trade and pollination of businesses across borders represent the reality of businesses today. This increases the prospects of multi-jurisdictional restructuring and insolvency workouts. Collectively, these factors speak to the critical importance of having a set of shared principles for resolving corporate economic malaise.

The case for harmonisation is particularly compelling for Asia. Based on estimates of the ADB, developing Asia will need US$1.7trn invested every year until 2030 in order for the region to maintain a strong growth momentum, respond to climate change, and tackle poverty issues. Specifically, South-east Asia will need to raise between US$2.76bn and

US$3.15bn, or between 5% and 5.7% of gross domestic product, between 2016 and 2030 to meet domestic demand for infrastructure in four key areas of power, water and sanitation, transport and telecommunications alone.

The road to harmonisation has seen strident steps. UNCITRAL has undertaken outstanding work to address the fragmentation in the status quo with the immense contributions of the Working Group V in the form of seminal Model Laws, the first being the UNCITRAL Model Law on Cross-border Insolvency (1997) and the most recent (in June 2019) the UNCITRAL Model Law on Enterprise Group Insolvency, all of which have been adopted by the Commission. Another milestone step has been the formation of the Judicial Insolvency Network ("JIN") to facilitate and promote court-to-court communication and co-operation and introduce best practices in cross-border restructuring and insolvency cases. This is a sterling example of judicial thought leadership. The JIN, as its first contribution, issued the JIN Guidelines providing for the principles of such communication and co-operation which has seen wide adoption by courts in key jurisdictions.

Much work remains to be done, however. It is for these reasons that the Board of Governors of the Asian Business Law Institute ("ABLI") decided in 2016 that insolvency and restructuring was a project topic that merited consideration and serious pursuit. Workshopping with leading figures in Asian and global insolvency communities and following detailed discussions with the leadership of the III, the joint ABLI-III Asian Principles of Business Restructuring project ("Project") was born. The Project is the first collaboration between the ABLI and an international organisation. That the collaboration is with an organisation of the standing and creed of the III speaks to the importance of this undertaking.

Careful thought was given to how the Project ought to be structured. It was envisioned from the outset that the ultimate goal was to produce a set of shared principles, to be called the Asian Principles of Business Restructuring (the "Asian Principles"), that covered both in-court and out-of-court workout regimes. The Asian Principles were intended to be a helpful reference that would inform judges and practitioners as well as legislators and policy-makers across the Asia-Pacific region on a

common approach to managing and resolving such workouts. With this objective in mind, an earlier phase to map the existing business reorganisation regimes in Asia, again both in and out of the court, was felt necessary. The mapping exercise would facilitate a bird's-eye view of the current regulatory landscape which would provide the backdrop for a holistic assessment of the nature and shape that the Asian Principles would take. Sixteen jurisdictions were identified, namely all ten Association of Southeast Asian Nations ("ASEAN") member states, Australia, the People's Republic of China, the Hong Kong Special Administrative Region of the People's Republic of China, India, Japan and South Korea.

The publication of this compendium of 16 jurisdictional reports marks the conclusion of this first phase. The drafting of the jurisdictional reports was guided by a detailed questionnaire of over 200 questions across eight parts that was assiduously prepared by members of the Advisory and Working Committees of the Project. The questionnaire covers a wide variety of issues including the role of insolvency office-holders, to the effect of stays and moratoria, rescue financing, ranking and priority, treatment of foreign creditors, and the management of international and cross-border insolvencies and restructuring matters. Authored by practitioners who are insolvency specialists in their respective jurisdictions and reviewed by insolvency experts highly regarded internationally, the jurisdictional reports not only delve into the law as written and the law as practised in each jurisdiction when read individually, but also offer a comprehensive (and comparative) picture of the current regimes of the relevant jurisdictions when read together. In fact, this compendium will provide a comprehensive account of the existing regimes in a number of ASEAN jurisdictions – a first.

This compendium would not have been possible without the generosity of the many contributors who so graciously volunteered their time and effort. Indeed, we understand that almost 100 participants from academia, the judiciary and practitioners around the world were involved in this mammoth exercise. We must, first and foremost, thank all the reporters for so skilfully crafting the jurisdictional reports to share their expertise and experience. Gratitude must also be extended to members of the Advisory and Working Committees of the Project for guiding its progress, including the meticulous review of all manuscripts and the

design of the questionnaire. We wish to also thank the teams at the ABLI and the III for co-ordinating this enormous project, and Academy Publishing for copyediting the various chapters.

With the publication of this compendium, the foundation has been set for the next and even more challenging phase of the Project, that is the task of distilling the essence of the jurisdictional reports and formulating the Asian Principles. It is our hope that the Asian Principles, once published, will fulfil the purpose for which it was conceived: to serve as a bedrock for an acceptable basis to resolve insolvency and restructuring matters in Asia. We hope that through this there will be a convergence of philosophy and approach in insolvency and restructuring laws, which in turn will help promote seamless trade, attract investment, encourage entrepreneurship and ultimately improve lives in Asia.

Finally, it is with a heavy heart that we dedicate this compendium to the late Dr Shinjiro Takagi who passed away in August 2018. Dr Takagi was among the initial group of III members who conceived the Project and had been its staunchest champion ever since. We take solace, however, in the knowledge that the quality of this compendium will live up to the high standards Dr Takagi had always set for himself, and that the publication of the Asian Principles will help realise his vision for a better world.

With the exciting journey ahead, we congratulate ABLI and III on the publication of this compendium and look forward to the second phase of the Project with keen anticipation.

James Allsop AO
Chief Justice
Federal Court of Australia

Kannan Ramesh
Judge of the High Court
Supreme Court of Singapore

24 March 2020

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Jurisdictional Report
CAMBODIA

Reporter: **Jay Cohen***
Partner and director, Tilleke & Gibbins

A INTRODUCTION

1 Cambodia has a civil law system whose origins are influenced by the French legal system. However, Cambodia's legal system was destroyed in the 1970s and has since been rebuilt by the Royal Government of Cambodia. As part of Cambodia's entry into the World Trade Organization ("WTO") in 2004, the Cambodian government committed itself to enacting an ambitious package of more than 40 new laws to bring its legal framework into conformity with WTO requirements.[1] Cambodia weathered the global financial crisis in 2008 better than many of its regional neighbours, in part because of low levels of financial leverage in its economy. Legal reforms that followed the global financial crisis appear to be in line with Cambodia's WTO commitments as opposed to a specific response to the global financial crisis.

2 The Insolvency Law was enacted in 2007 and applies to both entities and natural persons but only if they are business persons engaged in business, such as in the case of a natural person operating a sole proprietorship. However, if an entity ("Covered Entity") is a covered entity under the Law on Banking and Financial Institutions[2] ("Banking Law"), the Law on Insurance[3] ("Insurance Law") or the Law on Issuance

* This reporter would like to acknowledge the assistance of Nitikar Nith, Pichrotanak Bunthan, Mealtey Oeurn, David Mol and Marina Sar, all from Tilleke & Gibbins' Cambodia office, in the preparation of this report.

1 Ministry of Industry, Mines and Energy, "Private Sector Assessment for the Kingdom of Cambodia" (December 2003).

2 Law on Banking and Financial Institutions (effective 18 November 1999).

3 Law on Insurance (effective 4 August 2014).

and Trading of Non-Government Securities[4] ("Securities Law"), then insolvency proceedings shall not be opened under the Insolvency Law, and Covered Entities will be subject to additional rules under industry specific legislation.[5] Since the enactment of the Insolvency Law, there have been no amendments to the law and no delegated legislation has been enacted. Any gaps in the law have been dealt with on a case-by-case basis, as a result of which the law has not gone through any systematic reforms. As to the interpretation of the law, as there have been few actual insolvency cases in Cambodia, practices are still developing. Neither court records nor court decisions are available to the public, thus limited information is accessible by the public. While members of the public can attend insolvency hearings,[6] they have no express right to attend creditors' meetings or creditors' committee meetings, where substantial activities take place in connection with the insolvency proceedings.

3 Cambodian law allows for the establishment of sole proprietorships, general and limited partnerships, private limited companies and public limited companies.[7] A foreign company is also permitted to establish a subsidiary, a representative office or a branch in Cambodia.[8] Based on this reporter's observations, the most commonly formed business entities would be sole proprietorships for small business owners and private limited companies.

4 Cambodia's legal framework allows for the creation of security interests under the Civil Code and the Law on Secured Transactions.[9] Under the Civil Code, only security interests specifically created and

4 Law on Non-Government Securities (19 October 2007).

5 Insolvency Law (enacted 2007) Art 6(3).

6 Under Art 7 of the Law on the Organization of the Courts (effective 16 July 2014), court hearings shall be conducted in public except in certain limited circumstances, such as if a public hearing will jeopardise public order.

7 Law on Commercial Rules and Register (as amended, effective 18 November 1999) generally; Law on Commercial Enterprises (effective 19 June 2005) Art 1.

8 Law on Commercial Enterprises (effective 19 June 2005) Arts 274, 278 and 283.

9 The Civil Code was enacted on 31 May 2011 and came into effect on 31 December 2011, and the Law on Secured Transactions was enacted on 24 May 2007. Security interests are set out in Book Six of the Civil Code and Art 4 of the Law on Secured Transactions.

defined thereunder exist. Those security interests that are relevant to assets are rights of retention, pledges (over movable property, immoveable property and rights and claims), hypothecs, transfers of security, and guaranties. Aside from hypothecs, which are registered with the Ministry of Land Management, Urban Planning and Construction,[10] other security interests under the Civil Code do not need to be registered. However, the Law on Secured Transactions adopts the American approach to creating security interests and applies broadly to any agreement that creates or provides for a security interest. Thus, the secured party and the security provider are allowed to contractually stipulate the terms of the security interest.[11] Further, in order to perfect a security interest under the Law on Secured Transactions, it is necessary to file a notice with the Ministry of Commerce's Secured Transactions Filing Office.[12] The records of the Secured Transactions Filing Office are available for public searches, and the registry is available online at <www.setfo.gov.kh>. There is no fee to conduct an online search. As to the relationship between the Civil Code and the Law on Secured Transactions, the Law on the Implementation of the Civil Code provides that if the security agreement is ambiguous as to whether a security interest is created under the Civil Code or the Law on Secured Transactions, it will be created under the Civil Code.[13] Therefore, parties can explicitly state in the security document under which law the security interest is created in order to ensure that the desired law regulates the security interest. The Civil Code also allows for the creation of general statutory liens, which exist over all of the property of the obligor, and

10 Civil Code (enacted 31 May 2011) Art 845. In Cambodia the "land registry" is maintained by the Ministry of Land Management, Urban Planning and Construction.

11 Under Art 3(7) of the Law on Secured Transactions (enacted 24 May 2007), a "security agreement" is any agreement that "creates or provides for a security interest". Further under Art 7(2), a security agreement is effective according to its terms. Therefore, the parties can define the nature of the security interest in the security agreement.

12 Law on Secured Transactions (enacted 24 May 2007) Arts 10(2), 29 and 30.

13 The Law on the Implementation of the Civil Code was enacted on 31 May 2011. Please refer to Art 75 on ambiguities as to whether a security interest is created under the Civil Code (enacted 31 May 2011) or the Law on Secured Transactions (enacted 24 May 2007).

special statutory liens, which exist over specific property of the obligor.[14] Although Cambodian law technically allows for the recording of liens,[15] in practice, the necessary implementing measures have not yet been enacted so liens cannot be recorded at this time.

B RESCUES: OUT-OF-COURT AND IN-COURT (GOVERNANCE AND SUPERVISION)

i *Out-of-court workouts*

5 In Cambodia, insolvency-related practices are still developing and there are no statutory provisions under the Insolvency Law or other laws that expressly permit or regulate out-of-court workouts. Further, there are no market practices or rules that have developed to support out-of-court workouts. Nor are out-of-court workouts precursors to formal insolvency proceedings. Cambodian law does not, in general, support the practice of out-of-court workouts as the Insolvency Law mandates that a debtor file a petition to open insolvency proceedings within 30 days from the date that it fails to meet a valid and mature obligation in an amount in excess of KHR5,000,000.[16] If the debtor fails to file within the mandated time frame, any person who intentionally or with gross negligence fails to file will be personally liable to the debtor's creditors for damages that result directly from such failure to file.[17] As to what constitutes an intentional action or gross negligence, neither term is specifically defined under the Insolvency Law, and it is necessary to refer to the Civil Code for general definitions of an intentional act and a negligent act.[18]

14 Civil Code (enacted 31 May 2011) Art 781.

15 Under the Inter-Ministerial Prakas Concerning Real Rights Registration Procedure Pertaining to the Civil Code, which was enacted on 29 January 2013, liens can be registered under Art 3. In practice, however, this prakas has not been fully implemented. A "prakas" is a ministerial regulation.

16 Insolvency Law (enacted 2007) Art 9(1).

17 Insolvency Law (enacted 2007) Art 9(3).

18 Under Art 742 of the Civil Code (enacted 31 May 2011), an "intentional act" requires that the actor foresaw that a particular result would occur but accepted the

(*continued on the next page*)

6 At the same time, however, insolvency proceedings will not be opened and the petition to open insolvency proceedings will be dismissed by the court if the debtor's assets are not likely sufficient to cover the costs of the insolvency proceedings, unless a sufficient amount of money is advanced by a related person to cover such costs.[19] Therefore, a situation may arise where a person or company may be insolvent, but a court would dismiss a petition because the debtor's assets are insufficient to cover the costs of the insolvency proceedings. In such a case, presumably the debtor and creditors would be incentivised to attempt an out-of-court workout, though, as discussed above, no regulatory framework exists for such workouts. Absent the debtor and creditors reaching an out-of-court workout, there would be no mechanism for satisfying the claims of the creditors or dealing with the insolvent debtor.

7 As there is no regulatory framework or market practices for out-of-court workouts, there are no express exclusions of particular types of debtors or restrictions on participation by any type of creditor in an out-of-court workout. Cambodian law does not include any specific rules to enable or facilitate out-of-court workouts.

8 Cambodian law does not require or specifically encourage mediation or other forms of alternative dispute resolution ("ADR") in cases of financial difficulty. As the Insolvency Law imposes personal liability on natural persons who intentionally or with gross negligence fail to file a petition for insolvency if required under Cambodian law,[20] there is some risk to such persons if they pursue alternative forms of

occurrence of such a result, and a "negligent act" requires that a person could have foreseen that a particular result could normally occur from the act, but that the person failed to foresee the result due to an absence of care, and the person owed a duty to avoid the occurrence of such result but neglected to fulfil such duty.

19 Insolvency Law (enacted 2007) Art 16(1). The term "related person" is defined under Art 4(7) of the Insolvency Law, and includes 11 examples, such as any shareholder or director of a debtor, the spouse of any shareholder or director of the debtor, and any person who holds more than 5% of the shares of the debtor.

20 If the debtor is a natural person, then that person must file the petition. If the debtor is a partnership or company, then it is the duty of every individual director, partner or manager to ensure that the insolvency petition is filed. See Art 9(2) of the Insolvency Law (enacted 2007).

dispute resolution as opposed to complying with their statutory obligations under the Insolvency Law.

ii *Pre-insolvency proceedings*

9 This reporter understands "pre-insolvency proceedings" as those that seek to rescue a company before formal insolvency proceedings are commenced. However, under the Insolvency Law, there are no pre-insolvency proceedings available to a debtor experiencing financial difficulties, thus there is no distinction between pre-insolvency and formal insolvency proceedings. A debtor can submit a plan of compromise[21] at the time the court hears the petition to open insolvency proceedings (and must indicate whether the plan of compromise has the support of creditors), and if the court decides to open insolvency proceedings, it can take into account the plan of compromise in determining the date of the opening creditors' meeting.[22]

10 Therefore, while there is no specific regulatory framework by which a debtor can discuss its plan of compromise before an insolvency petition is filed, a debtor and its creditors can co-ordinate on the plan of compromise. With creditors' support, the plan of compromise will subsequently be approved at a creditors' meeting, which will eventually cause the court to terminate the insolvency proceedings.[23]

iii *Formal insolvency proceedings in general*

11 Under the Insolvency Law, formal insolvency proceedings can be commenced in relation to natural persons and business entities. As for the purpose of such insolvency proceedings, the stated objective of the Insolvency Law is to "provide collective, orderly and fair satisfaction of creditors' claims out of a debtor's properties and, where the parties in

21 See Part O below for more discussion on plans of compromise.
22 Insolvency Law (enacted 2007) Art 13(2).
23 Insolvency Law (enacted 2007) Art 48(1).

interest deem appropriate, the rehabilitation of the business of the debtor".[24]

12 Insolvency proceedings may be opened against a debtor meeting the following requirements:[25]

(a) a partnership or legal entity formed under the laws of Cambodia; or
(b) a partnership or legal person formed under the laws of a foreign country who owns assets situated in Cambodia and has its registered address in Cambodia.

For an asset to be situated in Cambodia, the asset must meet one of the following conditions:[26]

(i) tangible assets located within the territory of Cambodia; or
(ii) assets (tangible assets or intangible assets such as intellectual property) and rights for which the ownership of or entitlement to must be entered in a public register under the authority of the Royal Government of Cambodia.

13 As previously explained, insolvency proceedings will not be opened against a debtor that is a Covered Entity under the Banking Law, Insurance Law or the Securities Law, unless provided for in those laws. Under the Banking Law, insolvency proceedings can be opened against banks and financial institutions; however, it is necessary to deviate from the procedures under the Insolvency Law and follow the procedures under the Banking Law on the appointment of a provisional administrator to immediately determine whether the bank or financial institution is solvent and to co-ordinate with the National Bank of Cambodia. If the bank or financial institution is insolvent then, subject to other requirements under the Banking Law, the insolvency proceedings would begin.[27] Under the Insurance Law, insolvency proceedings can also be opened against insurance companies; however,

24 Insolvency Law (enacted 2007) Art 2.
25 Insolvency Law (enacted 2007) Art 6(1).
26 Insolvency Law (enacted 2007) Art 6(2).
27 Law on Banking and Financial Institutions (effective 18 November 1999) Arts 57–69.

it is necessary to follow certain procedures set out in the Insurance Law on the appointment of a provisional administrator, and the order of satisfying claims.[28] Under the Securities Law, aside from granting the director general of the Securities and Exchange Commission of Cambodia the power to appoint a provisional administrator, the law expressly allows insolvency proceedings pursuant to the Insolvency Law and any delegated legislation.[29] In addition, the claims of creditors are ranked differently under the Banking Law, Insurance Law and the Securities Law, as compared to the Insolvency Law.[30]

14 The Insolvency Law appears to distinguish between foreign and domestic debtors as it only applies to the assets situated in Cambodia of partnerships and legal persons formed under the laws of a foreign country (*ie*, foreign debtors). However, for domestic debtors, there is some ambiguity under the Insolvency Law as to whether insolvency proceedings are limited to assets situated in Cambodia or could further apply to domestic debtors with assets outside of Cambodia.[31]

15 The Insolvency Law does not specifically prescribe the hierarchy or the order of priority regarding the outcome of formal insolvency proceedings, except where, as explained earlier, if a plan of compromise is proposed, and subsequently approved by creditors and sanctioned by

28 Law on Insurance (effective 4 August 2014) Arts 76–80 and 86.

29 Law on the Issuance and Trading of Non-Government Securities (effective 19 October 2007) Art 45(2).

30 See para 60 below for additional information on the ranking of claims.

31 Under Art 3 of the Insolvency Law (enacted 2007), the law expressly governs all business persons and legal entities that "own assets" in Cambodia. Once the Insolvency Law applies to a domestic debtor pursuant to Art 3, there is no express limitation that would prevent an administrator from subjecting foreign assets of a domestic debtor to the insolvency proceeding. However, under Art 199(d) of the Code of Civil Procedure of Cambodia (effective 6 July 2006), foreign court judgments are not enforceable in Cambodia, unless, amongst other requirements, there is a guarantee of reciprocity between Cambodia and the foreign country in which the court is based. As Cambodia has only entered into one reciprocity agreement with Vietnam, a Cambodian court may take the view that unless Cambodia has entered into a reciprocity agreement with a foreign country, a Cambodian court judgment would not be enforceable in such foreign country, which is a position consistent with the Code of Civil Procedure of Cambodia.

the court, it will result in the termination of the insolvency proceedings.[32] A plan of compromise can be used to achieve a business rescue if so provided therein.

16 The general condition for a debtor or its creditors to file an insolvency petition is that the debtor failed to meet one or more valid and mature obligations to pay an aggregate amount in excess of KHR5,000,000.[33] Excluded from such valid and mature obligations are any claims arising from, amongst other items:

(a) fines, administrative penalties and other incidental legal consequences of a criminal or administrative offence which obliges the debtor to pay;[34] and
(b) claims for the repayment of a loan made to the debtor by a person holding not less than 10% of the capital of the debtor, or recourse claims against the debtor for a loan guaranteed or secured by such a person.[35]

The petition must be made in writing and signed by the petitioner, and must contain basic information on the debtor and petitioner, the grounds on which the petition is based, related evidence and, if the petition is filed by the debtor, known creditors.[36] It thus can be seen that the burden of proving that the debtor is insolvent is placed on the petitioner that files the petition to open insolvency proceedings. The Insolvency Law also allows for public interest applications from the public prosecutor or the Minister of the Ministry of Commerce.[37]

17 While the Insolvency Law excludes from insolvency proceedings Covered Entities under the Banking Law, the Insurance Law and the Securities Law, unless provided for in those laws, as explained above, those laws do allow Covered Entities to access insolvency proceedings under the Insolvency Law, in conjunction with modifications set out in

32 Insolvency Law (enacted 2007) Art 48(1).
33 Insolvency Law (enacted 2007) Art 7(1).
34 Insolvency Law (enacted 2007) Art 36(3).
35 Insolvency Law (enacted 2007) Art 36(5).
36 Insolvency Law (enacted 2007) Art 8(2).
37 Insolvency Law (enacted 2007) Art 8(1).

those laws. However, as insolvency practices are still developing in Cambodia, no modifications to the standard formal insolvency proceedings under the Insolvency Law have been developed to address those Covered Entities, as well as other entities posing special challenges such as "too big to fail" companies or state-owned enterprises.

18 The petition for the opening or commencement of formal insolvency proceedings must evidence that the debtor failed to pay one or more valid and mature obligations in the requisite amount. Therefore, Cambodian law looks to determine whether a debtor is actually insolvent, as opposed to allowing the opening of insolvency proceedings against a debtor that may face imminent insolvency. Accordingly, the Insolvency Law does not consider contingent liabilities or balance sheet insolvency in determining whether a debtor qualifies for insolvency. The Insolvency Law will not necessarily preclude *ex ante* the use of formal insolvency proceedings by a debtor whose business is unviable, though to have access to an insolvency proceeding, the debtor will still be required to satisfy the basic condition for seeking insolvency protection as outlined in paragraph 16 above.

19 As explained in paragraph 8 above, each individual director, partner or manager, as the case may be, of a corporate debtor has an obligation to ensure that an insolvency petition is filed when the relevant circumstances arise. Such an obligation is generally consistent with the obligations of directors and partners under Cambodia's Law on Commercial Enterprises, which regulates companies and partnerships.[38] Persons failing to discharge their duty to have a petition filed are personally liable to the debtor's creditors for damages that result directly from such failure, if the failure to file was done intentionally or with gross negligence. If the duty falls on more than one person, all such persons, acting intentionally or with gross negligence, will be jointly and severally liable for damages that result directly from the failure to observe the duty.[39] That said, this reporter is not aware of any precedents where

38 The obligation to file an insolvency petition is generally consistent with the duty of care imposed on directors pursuant to Art 289 of the Law on Commercial Enterprises (effective 19 June 2005).

39 Insolvency Law (enacted 2007) Art 9(3).

personal liability has been imputed on persons failing to satisfy their obligation to file an insolvency petition, though presumably, such claims can be filed by a creditor. If insolvency proceedings are commenced against the debtor, such damages will be included in the estate and the administrator will act on behalf of all creditors in their recovery.[40]

20 Once a petition to open insolvency proceedings has been filed, the court should hold a hearing on the opening of insolvency proceedings within 15 days if the petition is filed by the debtor,[41] or within 30 days if the petition is filed by a creditor, the public prosecutor or the director of companies (being the Minister of the Ministry of Commerce).[42] After the hearing, the court has 14 days to rule on the opening or dismissal of insolvency proceedings.[43] However, in between the time of the filing of the petition to the issuance of a ruling on whether to open insolvency proceedings, the court will, upon the written application of the debtor, any creditor, the public prosecutor or the director of companies, issue a ruling to appoint an administrator.[44] As insolvency practices have not yet been standardised, delays would not be uncommon.

21 Once the administrator has been appointed, the administrator can apply to the court for injunctive relief to freeze assets or seek a stay of action by secured or unsecured creditors against the debtor or assets of the estate.[45] The court may also rule on its own motions on these issues.[46] However, if creditors desire protective or interim measures before the opening of insolvency proceedings and before an administrator has been appointed, the Insolvency Law does not address this issue and provides no mechanism for obtaining protective or interim measures within the framework of the Insolvency Law. Therefore, if a creditor desires such protection, it would be required to seek injunctive relief under laws of general application, such as the Code of Civil Procedure of Cambodia.

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40 Insolvency Law (enacted 2007) Art 9(3).
41 Insolvency Law (enacted 2007) Art 12(1).
42 Insolvency Law (enacted 2007) Art 12(2).
43 Insolvency Law (enacted 2007) Art 13(4).
44 Insolvency Law (enacted 2007) Art 11(1). See Part D below for more discussion on the administrator.
45 Insolvency Law (enacted 2007) Art 11(2).
46 Insolvency Law (enacted 2007) Art 11(2).

22 After the hearing on opening insolvency proceedings, if the court is satisfied with the existence of the grounds on which the petition is based, the court will issue a written ruling on opening the insolvency proceedings.[47] Once the court rules on the opening of insolvency proceedings, filing offices and public registries governing security interests must be immediately notified of the opening of the insolvency proceedings.[48] Further, the administrator has seven days to publish notices, including in at least two major newspapers in Cambodia, the following information:[49]

(a) that insolvency proceedings have been opened against the debtors;
(b) the deadline for the submission of written proofs of claims and the address to which all written proofs of claims should be sent; and
(c) the date, time and place for the opening creditors' meeting.

Once the administrator receives the statement of the debtor (which amongst other matters sets out known creditors), the administrator must within seven days notify in writing all creditors listed in the statement of the matters set out in (a) to (c) above.[50]

23 Once a borrower enters formal insolvency proceedings, then the Prakas on Asset Classification and Provisioning in Banking and Financial Institutions[51] requires the bank to write off the loan. If the loan is written off, it would further be classified as a "Loss" under the Prakas, which would require the bank to provision 100% of the gross loan amount.[52]

47 Insolvency Law (enacted 2007) Art 13(1)(a).
48 Insolvency Law (enacted 2007) Art 18(1). Presumably, the administrator, in co-ordination with the court, will undertake these actions.
49 Insolvency Law (enacted 2007) Art 18(2).
50 Insolvency Law (enacted 2007) Art 18(3).
51 Prakas on Asset Classification and Provisioning in Banking and Financial Institutions (effective 25 February 2009) Art 15.
52 Prakas on Asset Classification and Provisioning in Banking and Financial Institutions (effective 25 February 2009) Art 13(ii).

C SUPPORT STRUCTURES (COURTS AND STATE AGENCIES)

24 Insolvency proceedings are ultimately supervised by the court; however, their actual operation is delegated to the administrator appointed by the court. The administrator is granted broad powers under the Insolvency Law to manage the debtor's business, receive all assets of the estate, sell assets, and employ professionals to assist in the performance of the administrator's duties, amongst other powers.[53] The first creditors' meeting is, for example, chaired by a judge with the assistance of the administrator;[54] however, subsequent creditors' meetings are convened and led by the administrator alone.[55] The court is tasked with opening and closing the insolvency proceedings, adjudicating disputes referred to it under the Insolvency Law, providing injunctive relief, and approving certain matters, such as plans of compromise.[56]

25 There have only been a limited number of insolvency cases in Cambodia, and thus, there are no well-established practices in Cambodia. In practice, the administrator has substantial discretion to determine the rules and procedures of the insolvency proceeding (subject to statutory limitations on their powers under the Insolvency Law).[57] Aside from the administrator, the National Assembly has general legislative responsibilities, and the Ministry of Justice[58] has the authority to enact various sub-decrees related to insolvency matters set out in the Insolvency Law. However, none have been issued to date, and this reporter is not aware of any other governmental bodies or professional associations being involved in devising rules of practice or procedures for insolvency matters. Aside from the court, no other government agencies are involved in a plan of compromise. The Insolvency Law does not address (or prohibit) court-to-court communication at a domestic or international level. However, due to the limited number of insolvency cases in Cambodia, this reporter is not aware of court-to-court

53 Insolvency Law (enacted 2007) Art 23.
54 Insolvency Law (enacted 2007) Art 51.
55 Insolvency Law (enacted 2007) Art 73(1).
56 Insolvency Law (enacted 2007) Arts 13(1)(a), 32, 47(2) and 61(1).
57 Insolvency Law (enacted 2007) Art 23. See also para 24 for a discussion of the powers of an administrator.
58 Insolvency Law (enacted 2007) Art 68(3).

communications being an issue. Cambodia is not a member of the Judicial Insolvency Network.

26 If a debtor is a listed company, the Director General of the Securities and Exchange Commission of Cambodia ("SECC") may request a court to appoint an administrator pursuant to the Insolvency Law.[59]

D INSOLVENCY OFFICE-HOLDERS

27 In Cambodia, there is only one insolvency office-holder, being the court-appointed administrator who must be a natural person.[60] As there are no pre-insolvency proceedings in Cambodia, the administrator is only involved if and after the court decides to open insolvency proceedings.[61] To the extent that the administrator requires assistance in carrying out his duties, the administrator can engage the services of various professionals, such as accountants and other business professionals.[62]

28 The Insolvency Law sets out the following qualifications required of the administrator:

(a) has never been convicted by a court of law of an offence involving fraud or dishonesty;[63]
(b) not the debtor, any creditor or related person;[64] or
(c) not the spouse of any creditor or debtor or the relative of debtor or creditor.[65]

59 Law on the Issuance and Trading of Non-Government Securities (effective 19 October 2007) Art 45(2).
60 Insolvency Law (enacted 2007) Art 68(1).
61 Insolvency Law (enacted 2007) Art 68(1)(b).
62 Insolvency Law (enacted 2007) Art 23(o).
63 Insolvency Law (enacted 2007) Art 68(2)(a).
64 Insolvency Law (enacted 2007) Art 68(2)(b).
65 Insolvency Law (enacted 2007) Art 68(2)(c).

As can be seen above, the administrator cannot be the debtor's directors or managers.[66] In addition, the Minister of Justice may issue a Prakas to establish other qualifications and to require administrators to be licensed by the Ministry of Justice,[67] but this reporter is unaware of any such Prakas to date.

29 Under the Insolvency Law, there is no explicit role for the debtor, creditor or other bodies to play in the selection process of the administrator. However, given the relatively few insolvency cases in Cambodia, and the lack of a substantial number of persons with insolvency experience, there may be some co-ordination between the debtor, creditors and the court in selecting the administrator.[68] In past cases, both Cambodian accountants and Cambodian qualified lawyers have been appointed as administrators.

30 The court can discharge the administrator at any time on its own motion,[69] if the administrator requests to be discharged,[70] ceases to possess the necessary qualifications,[71] fails to perform his duties,[72] or upon the request of creditors holding not less than 51% of the claims.[73] Therefore, creditors are given the right to challenge the appointment of an administrator, though this reporter is not aware of this happening to date in Cambodia.

31 As explained in paragraph 24 above, the administrator is granted broad powers to manage the insolvency proceedings.[74] It is important to note, however, that the Insolvency Law does not expressly grant the administrator the power to compel the production of documents or

66 Article 4(7) of the Insolvency Law (enacted 2007) read together with Art 68(2) of the Insolvency Law.
67 Insolvency Law (enacted 2007) Art 68(3).
68 As there have been few insolvency proceedings in Cambodia, it is not uncommon for the petitioner to put forward the name of an administrator at the time of filing the petition.
69 Insolvency Law (enacted 2007) Art 69(2).
70 Insolvency Law (enacted 2007) Art 69(1)(a).
71 Insolvency Law (enacted 2007) Art 69(1)(b).
72 Insolvency Law (enacted 2007) Art 69(1)(d).
73 Insolvency Law (enacted 2007) Art 69(1)(c).
74 Insolvency Law (enacted 2007) Art 23.

information from the debtor or third parties, and the administrator will need to seek a court order if the debtor or third parties fail to co-operate with the administrator (though the debtor is required to fully co-operate with the administrator).[75] As insolvency proceedings are relatively new in Cambodia and most persons and businesses have not participated in insolvency proceedings, there is uncertainty as to whether a person or business should comply with a request or order from the administrator.

32 Once insolvency proceedings have commenced, the administrator will also manage and control all assets of the debtor. The administrator is authorised to make sales as part of its activities to carry on the business of the debtor, but only to the extent necessary to fulfil the objectives of the insolvency proceedings.[76] The debtor has no power to initiate sales of any assets or request the administrator to sell any assets. However, the administrator will require the approval of the creditors at a creditors' meeting, if the administrator intends to:[77]

(a) sell any real property by private treaty;
(b) sell or transfer any part of the estate to a related person by any means; or
(c) carry out any transaction that would irreversibly preclude the proposal, approval or implementation of a plan of compromise.

For sales occurring in a plan of compromise,[78] as approval of a plan of compromise results in the termination of the insolvency proceedings, the approval of the administrator will no longer be required, unless the court ordered the administrator to continue to supervise the debtor for the purpose of ensuring the implementation of the plan of compromise, in which case the court has the discretion to establish the terms of the administrator's supervision.[79]

75 Insolvency Law (enacted 2007) Art 22.
76 Insolvency Law (enacted 2007) Art 23(c).
77 Insolvency Law (enacted 2007) Art 25(1).
78 See Part O below for more discussion on plans of compromise.
79 Insolvency Law (enacted 2007) Art 49(2).

33 The administrator is considered as an officer of the court and only owes a duty of allegiance to the court.[80] In terms of the standard of care expected of the administrator, the Insolvency Law requires the administrator to act with the care and diligence of a reasonable business person in similar circumstances.[81] Further, the administrator is liable to the parties in the proceedings for any damage caused by the administrator's failure to exercise the required care and diligence.[82] If any of the administrator's actions constitutes a criminal offence under the Criminal Code, effective 30 November 2009, the Insolvency Law allows an administrator to be prosecuted under that law.[83] Notwithstanding significant potential liabilities, professional indemnity insurance is not common in Cambodia and administrators may not procure such insurance.

34 The administrator is obliged to prepare a claims list and file it with the court no later than five days before the date of the opening creditors' meeting.[84] The claims list is open to inspection by any person free of charge.[85] If there is a challenge against a claim, any creditor can request the court to rule on the dispute.[86]

35 At the opening of the first creditors' meeting, the administrator must report on the debtor's business situation and indicate whether the debtor's business can be maintained in whole or in part, what chances exist for the approval and implementation of a plan of compromise (if any) and what effects would arise for the satisfaction of the creditors' claims.[87] Within 30 days after the depletion of all saleable parts of the estate, the administrator must submit to the court a written report of his activities, which contains a final account of the distributions made and remaining unsatisfied claims.[88]

80 Insolvency Law (enacted 2007) Art 70(1).
81 Insolvency Law (enacted 2007) Art 71(1).
82 Insolvency Law (enacted 2007) Art 71(2).
83 Insolvency Law (enacted 2007) Art 81.
84 Insolvency Law (enacted 2007) Art 39(1).
85 Insolvency Law (enacted 2007) Art 39(1).
86 Insolvency Law (enacted 2007) Arts 55(1) and 55(2).
87 Insolvency Law (enacted 2007) Arts 24(1)(b) and 52.
88 Insolvency Law (enacted 2007) Art 59.

36 An administrator is remunerated from the proceeds of the sale of the estate.[89] If the anticipated proceeds of the sale of the estate are not sufficient to pay the administrator and cover the costs of the proceedings, the insolvency petition should be dismissed.[90] As for the amount of remuneration to be paid to the administrator, an administrator should be paid "reasonable remuneration" and should be reimbursed for all "reasonable expenses" incurred in the performance of his duties, taking into consideration factors such as the time spent by the administrator, the total value of the estate and the complexity of the proceedings.[91] In practice, the administrator's remuneration will be linked to the time spent, though no consistent practice on how to remunerate the administrator has been established. Although the Ministry of Justice is permitted to issue a declaration on the rate of remuneration for administrators,[92] this reporter is not aware of such a declaration being issued. Thus, there are no clear regulatory caps on the remuneration of an administrator.

37 Because an insolvency petition should be dismissed if the anticipated proceeds of the sale of the estate are not sufficient to pay the administrator, the administrator will not function on a *pro bono* basis and persons with insufficient assets do not have any recourse to insolvency protection.

E DIRECTORS OR MANAGERS OF DISTRESSED ENTITIES

38 As explained in paragraph 19 above, filing an insolvency petition is the obligation of every individual director or manager of a distressed entity, and directors and managers of a distressed entity who fail to do so may be liable for significant damages.

39 Aside from liabilities imposed on directors and managers under the Insolvency Law, there are no other laws that specifically impose obligations on directors and managers in an insolvency context.

89 See generally Insolvency Law (enacted 2007) Arts 35(1) and 57(1)(a).
90 See generally Insolvency Law (enacted 2007) Arts 16(1).
91 Insolvency Law (enacted 2007) Art 72(1).
92 Insolvency Law (enacted 2007) Art 72(2).

However, to the extent that a director or manager commits an offence in the insolvency proceeding (such as fraud), the offence is punishable according to the relevant provision of the Criminal Code.[93]

40 Once the insolvency proceedings are commenced against a corporate entity, the debtor will not remain in possession of its assets, as the management and power over the debtor's assets will vest in the insolvency office-holder, being the administrator.[94] Therefore, Cambodian law does not recognise the concept of a debtor in possession, and no provision under the Insolvency Law allows individual directors of a debtor to be replaced by creditors, special advisers and/or the insolvency office-holders.

41 The Insolvency Law does not recognise any residual powers of directors or managers once the insolvency proceedings have commenced, and does not specify any duties of directors and managers once the administrator has been appointed, apart from the general obligation on the debtor (and hence the director and managers of the debtor) to fully co-operate with the administrator and to provide the administrator with all necessary information on the business of the debtor.[95] Further, there is no relationship between a debtor's directors or managers and the administrator, as there is no express role for the directors and managers in an insolvency proceeding. That said, the administrator cannot be a "related person" of any shareholder, director, partner or manager of the debtor, and cannot be a creditor of the debtor, amongst other disqualifying relationships with the debtor.[96] Therefore, there is no duty articulated under Cambodian law that directors or managers of the distressed company owe to the administrator and *vice versa*. Besides *a duty* to petition for the opening of *insolvency proceedings*, directors or managers of a distressed entity do not owe any duties to any regulatory bodies other than the court.

93 Insolvency Law (enacted 2007) Art 81.
94 Insolvency Law (enacted 2007) Art 21.
95 Insolvency Law (enacted 2007) Art 22.
96 Insolvency Law (enacted 2007) Arts 68(2)(b) and 68(2)(c).

F CONVERSION OF PROCEEDINGS

42 Under the Insolvency Law, there is no compulsory order of process that requires that a restructuring be attempted before a liquidation. If the debtor or its creditors seek a restructuring, it will be necessary for them to submit a plan of compromise as part of the insolvency proceeding.[97] However, a plan of compromise is not mandatory, and in the absence of such a plan, the administrator will proceed to liquidate the debtor. In other words, pursuing a plan of compromise under the Insolvency Law is only possible once the insolvency proceedings have opened. However, if a plan of compromise is put forward but not approved by creditors or sanctioned by the court, then the liquidation of the debtor will simply continue.[98]

43 If the debtor is liquidated and dissolved, and additional assets of the debtor are later discovered, any creditor whose claim was included in the claims list, but was not satisfied in full, may within one year from the termination of the insolvency proceedings make a written application to the court to resume insolvency proceedings.[99] Insolvency proceedings will resume if assets are later discovered that were not taken into account during the initial insolvency proceedings,[100] but will not resume if the value of the assets discovered is insufficient to cover the costs of the resumed proceedings.[101]

G RESCUE FINANCING

44 Under the Insolvency Law, the "costs of the proceedings" and "costs of the resumed proceedings" are satisfied from the proceeds of the liquidation of the estate.[102] The costs of proceedings mean the court's fees and costs; and the remuneration, fees and expenses of the

97 See Part O below for more discussion on plans of compromise.
98 Insolvency Law (enacted 2007) Arts 47(3) and 54(2)(a).
99 Insolvency Law (enacted 2007) Art 65.
100 Insolvency Law (enacted 2007) Art 66(1)(b).
101 Insolvency Law (enacted 2007) Art 66(2).
102 Insolvency Law (enacted 2007) Arts 35 and 57.

administrator,[103] and further include administrative claims, which broadly include the expenses of the administrator and all claims arising from a contract which the administrator elects to continue performing.[104] The costs of proceedings also include the costs of a resumed proceeding, which is any insolvency proceeding resumed after its earlier termination.[105] Costs incurred in the preparation and proposal of a plan of compromise by the debtor or the administrator will be considered as an administrative claim to be satisfied from the estate.[106] Similarly, all costs incurred by creditors in the establishment and operation of the creditors' committee will be treated as claims incurred by the administrator in the course of the insolvency proceedings.[107] However, costs incurred towards other plan proposals are not deemed administrative claims, and such plans will be at the expense of the party proposing them.[108]

45 The costs of the proceedings are met when the administrator proceeds with the liquidation of the estate. The proceeds of the liquidation are paid according to the order set out in Article 57 of the Insolvency Law whereby claims by the administrator for remuneration and fees, administrative fees and court fees all enjoy, alongside with employees' wages, the highest priority.

46 The Insolvency Law does not contain any special provisions on the extension of finance to a debtor either within a fixed period of time before the collapse of the business or commencement of a restructuring, and there is no distinction between financing provided in an out-of-court restructuring and formal insolvency proceedings; or even after the petition for or the commencement of insolvency proceedings.

47 If the creditors approve a plan of compromise, assets can be sold, either subject to or free of any encumbrances or liens, in furtherance of

103 Insolvency Law (enacted 2007) Art 4(4).
104 Insolvency Law (enacted 2007) Art 30(6).
105 See para 43 above for discussion on the resumption of insolvency proceedings.
106 Insolvency Law (enacted 2007) Art 43.
107 Insolvency Law (enacted 2007) Art 78(2).
108 Insolvency Law (enacted 2007) Art 43.

the plan of compromise.[109] However, to the extent that a creditor has a security interest in any of the assets, the administrator may allow the secured creditor to enforce its security interest if the administrator determines that such action is in the best interest of the estate.[110]

48 Cambodian law does not contain any specific rules or requirements that require shareholders and/or related companies to financially assist a distressed debtor. To the extent that any person holding directly or indirectly not less than 10% of the equity of the debtor extends any loans to the debtor, or has recourse claims against the debtor for a loan guaranteed or secured, or caused to be guaranteed or secured, by such a person, such claims are not admissible in insolvency proceedings.[111] However, if a person's claim is not excluded, it would be treated as an admissible unsecured claim.

49 As explained in paragraph 6 above, insolvency proceedings will not be opened unless the assets of the debtor are sufficient to cover the costs of the proceedings or a sufficient amount of money is advanced by a related person. If a related person does advance the funds to cover such costs, including costs for any litigation contemplated, then the person may, within five years from the time the amount is advanced, claim reimbursement of such amount from any person who failed to discharge his duty to petition for the opening of insolvency proceedings against the debtor at the time the petition was filed.[112]

H EFFECT OF THE STAY AND MORATORIUM

50 Once the court opens insolvency proceedings, no actions, proceedings or execution processes, or any other actions can be commenced or continued against the debtor or the assets of the estate by a creditor.[113] If the debtor is a general partnership or limited partnership, then the foregoing stay of action will apply to any action, proceedings or

109 Insolvency Law (enacted 2007) Art 41(1)(d).
110 Insolvency Law (enacted 2007) Art 19(2).
111 Insolvency Law (enacted 2007) Art 36(5).
112 Insolvency Law (enacted 2007) Art 16(2).
113 Insolvency Law (enacted 2007) Art 19(1).

execution process for debt of the debtor and against the partner's assets, respectively.[114] Further, once the administrator has been appointed, the administrator may also apply to the court for injunctive relief to freeze assets or seek a stay of action by secured or unsecured creditors against the debtor or assets of the estate.[115] Stays of action are valid from the opening and until the termination of insolvency proceedings.[116]

51 Regarding the impact of stays of action, for secured creditors, they are entitled to have their claims satisfied according to the ranking set out in Article 57 of the Insolvency Law, unless the administrator considers it in the best interest of the estate to allow them to enforce their security interest.[117] As for pending lawsuits and unexecuted judgments, assuming that such lawsuits are not brought by creditors, they would not be within the scope of the stay of action. However, to the extent that a judgment was rendered against the debtor, it is likely that the judgment would be deemed an unsecured claim.

52 A stay of action will definitely cover the assets situated in Cambodia regardless of whether the debtor is formed under the laws of Cambodia or those of a foreign country, though it is unclear whether the stay will apply to the overseas assets of a domestic debtor.[118] A stay of action is not applied to provisional administrative claims on the remuneration, fees and expenses of the administrator and other administrative claims incurred by the administrator.[119]

53 As it does not recognise informal restructurings, the Insolvency Law is silent on whether a contractual stay between the parties in an informal restructuring can be recognised, and does not specifically provide any form of stay protection for rescue plan negotiations that are conducted outside formal insolvency proceedings.

114 Insolvency Law (enacted 2007) Art 19(3).
115 Insolvency Law (enacted 2007) Art 11(2).
116 Insolvency Law (enacted 2007) Art 19(1).
117 Insolvency Law (enacted 2007) Art 19(2).
118 See paras 12 and 14 above.
119 Insolvency Law (enacted 2007) Art 19(4).

I ORDINARY AND SPECIAL CONTRACTS

54 One of the powers the administrator is granted to manage the debtor's business is the power to terminate, cancel or avoid any transaction, contract, agreement or transfer to which the debtor is a party.[120] When the insolvency proceedings are opened, if a contract has not been fully performed by the debtor and the counterparty, the administrator may make a decision to continue the contract.[121] The administrator must declare his decision in writing to the contracting parties within 30 days from the date of the opening of insolvency proceedings, though this time frame can be extended by 14 days if the administrator files a request to the court.[122] If the administrator does not declare his decision in writing to the contracting parties within the above time frames, the contract will be deemed terminated, and the counterparty may file a claim for damages as a creditor in the insolvency proceedings.[123] On the other hand, the counterparty to an executory contract can, at any time, submit a written request to the administrator to continue the contract.[124] However, if the administrator fails to declare his decision to be bound to the contract within the prescribed time frame of up to 21 days, the contract will be terminated, and the counterparty may file a claim for damages as a creditor in the insolvency proceedings.[125]

55 All claims arising from a contract that the administrator elects to continue will be treated as administrative claims incurred by the administrator and will be accorded the applicable priority under Article 57 of the Insolvency Law.[126] If a creditor has a right, on the date of the opening of the insolvency proceedings, to set off its claim in the proceedings against an obligation owed to the debtor, such right of set-off will not be affected by the opening of the insolvency

120 Insolvency Law (enacted 2007) Art 23(1)(l).
121 Insolvency Law (enacted 2007) Art 30(1).
122 Insolvency Law (enacted 2007) Art 30(2).
123 Insolvency Law (enacted 2007) Art 30(2).
124 Insolvency Law (enacted 2007) Art 30(3).
125 Insolvency Law (enacted 2007) Art 30(3).
126 Insolvency Law (enacted 2007) Art 30(6). See para 60 below for a discussion of priority.

proceedings.[127] However, the creditor's right to set-off would be void if the creditor becomes a debtor of the estate only after the opening of the insolvency proceedings,[128] or otherwise acquires its claim from another creditor after the opening of the insolvency proceedings,[129] or if the underlying transaction is subject to avoidance.[130] Lastly, any claim listed in Article 36 of the Insolvency Law would be inadmissible, such as interest accruing on claims from the date of the opening of the insolvency proceedings, fines or administrative penalties of a criminal or administrative office, or claims filed after the deadline.[131]

56 A utility provider may not terminate, alter or discontinue service to the administrator or the debtor solely on the basis of the opening of insolvency proceedings against the debtor or that a debt owed by the debtor to such utility provider for service rendered before the opening of insolvency proceedings was not paid when due.[132] Without prejudice to the right of the administrator to elect to continue a contract, a utility provider may refuse to conclude a new contract for service to a debtor if the administrator does not, within 30 days after the opening of insolvency proceedings, furnish adequate assurance of payment, in the form of a deposit or other security, for service under an eventual new contract after the opening of insolvency proceedings.[133]

57 Cambodian law does not provide any specific rules on the use, sale, lease or assignment of assets or contracts involving intellectual property and its licensing, as well as domain names upon the commencement of insolvency proceedings. Aside from the right of set-off discussed above, Cambodian law does not address the validity of contractual clauses that purport to entitle the counterparty to terminate or modify contractual rights in the event of the debtor's insolvency or its entry into insolvency proceedings. The Insolvency Law does not specifically address whether contracts to which the debtor is a party can be transferred or assigned to

127 Insolvency Law (enacted 2007) Art 34(1).
128 Insolvency Law (enacted 2007) Art 34(2)(a).
129 Insolvency Law (enacted 2007) Art 34(2)(b).
130 Insolvency Law (enacted 2007) Art 34(2)(c).
131 Insolvency Law (enacted 2007) Art 34(2)(d).
132 Insolvency Law (enacted 2007) Art 31(1).
133 Insolvency Law (enacted 2007) Art 31(2).

a purchaser of the debtor's business. However, presumably, such contracts can be so transferred if the administrator elects to continue the contracts.

58 Although there are no specific rules on financial derivative contracts under the Insolvency Law, in the case of individual contracts for the sale or purchase of securities, rights or other similar goods in a market or stock exchange which are part of a larger framework agreement for the consolidated settlement of those individual contracts, the administrator's election to continue with contracts will be made with respect to all the individual contracts under that framework agreement as a whole. The administrator may not elect to continue with only some of those individual contracts.[134]

J RANKING, PRIORITY AND RESOLUTION OF CREDITOR CLAIMS

59 As a first step to the claims resolution process, a creditor must submit proof of its claims to the administrator in writing by the deadline stated in the notice in paragraph 22 above.[135] Each proof of claim must contain general information on the claim, such as the legal nature and cause of the claim, when the claim arose, the amount of the claim, whether there is any priority attached to the claim, the nature and rank of any alleged security in any asset, and copies of documents in support of the claim.[136] The administrator will then prepare a claims list based on the above information and submit it to the court no later than five days before the date of the opening creditors' meeting.[137]

134 Insolvency Law (enacted 2007) Art 30(4).

135 In practice, the administrator has the discretion to set and extend the deadline. If a claim is not submitted on time, there is no explicit process for the creditor to appeal against being excluded from the claims list.

136 Insolvency Law (enacted 2007) Arts 38(1) and 38(2).

137 Insolvency Law (enacted 2007) Art 39(1).

60 Creditors' claims will be ranked according to the following order:[138]

(a) employee wages, administrator's remuneration and fees, administrative fee, and the court's fees;
(b) the secured claims, up to the higher of the value of the secured portion of the claim as determined under Article 26 or the relevant net proceeds from an effective sale of the encumbered asset (collateral);
(c) state taxes whose notice is not filed; and
(d) all other admissible unsecured claims.

Claims are ranked in terms of priority. Costs incurred by creditors by reason of their participation in the insolvency proceedings are not admissible in the insolvency proceedings.[139]

61 At the opening of the first creditors' meeting, the claims list will be reviewed and verified by the administrator and the creditors.[140] The administrator, the debtor or any creditor may challenge the validity, amount, secured status, or other priority, of any claim in the claims list. A claim is deemed admitted for satisfaction in the insolvency proceedings if and to the extent to which it is not challenged by the administrator or by a creditor at the opening creditors' meeting.[141] If a claim is challenged by the administrator or a creditor, it is for the creditor to seek the determination by judgment of the claim before the court, and the court will hear such a matter with utmost expediency.[142]

138 Insolvency Law (enacted 2007) Art 57. The ranking of creditors is different under Art 64 of the Law on Banking and Financial Institutions (effective 18 November 1999) ("Banking Law") and Art 86 of the Law on Insurance (effective 4 August 2014) ("Insurance Law"). Under the Banking Law, the priority granted to employee wages falls to the third position and state taxes rise to second. Subordinated debts and equity type loans are the last on the priority ranking list. Under the Insurance Law, claims of insurance claimants and claims by insurance policyholders are ranked second and third, respectively. Employee wages fall to the fourth position, and state taxes fall to the sixth position.

139 Insolvency Law (enacted 2007) Art 36(2).

140 Insolvency Law (enacted 2007) Art 53(3).

141 Insolvency Law (enacted 2007) Art 55(1).

142 Insolvency Law (enacted 2007) Art 55(2).

62 In practice, the claims review process may not be completed during the opening of the first creditors' meeting, and in some cases, the creditors' committee may be tasked with assisting the administrator with reviewing and verifying claims. The claims list will be finalised by the administrator and filed with the court after any changes are made in the light of any subsequent final determinations pursuant to a court judgment.[143]

63 As for voting rights, all creditors have the same voting rights in proportion to the value of their claims and without regard to the priority set out above, except with regard to voting to approve a plan of compromise.[144]

64 The Insolvency Law fails to address in what instances and to what extent claims could be subordinated, and whether subordinated creditors are admitted for the purpose of voting and payment. However, it states that subordinated claims that are ineffective in insolvency proceedings as agreed between the creditor and the debtor are not admissible in insolvency proceedings.[145] Further, the Insolvency Law does not address whether creditor claims can be traded, and this reporter is not aware of any such practices.

K TREATMENT OF FOREIGN CREDITORS

65 The Insolvency Law is ambiguous as to whether claims of Cambodian tax authorities have a higher priority than the claims of foreign counterparts. Under Article 57 of the Insolvency Law, "state taxes whose notice is not filed" are ranked higher than other admissible unsecured claims, but the term "state taxes" is not defined in the Insolvency Law. Under Article 64 of the Banking Law, however, taxes and fees owed to the "National Treasury" have priority, thus there is a suggestion under other laws that the claims of Cambodian

143 Insolvency Law (enacted 2007) Art 55(3).

144 See Insolvency Law (enacted 2007) Arts 45 and 75. See Part O below for details on the voting of a plan of compromise.

145 Insolvency Law (enacted 2007) Art 36(8).

tax authorities may be treated separately from the claims of foreign counterparts.

66 The Insolvency Law treats domestic and foreign creditors the same, and Cambodia does not prejudice a foreign creditor who claims for the same pool of bankruptcy assets as domestic creditors. This reporter is of the view that a foreign creditor who has managed to collect against "foreign" assets of a domestic debtor will be treated as unsecured creditors provided that its claims are not secured with the relevant authorities.

L CREDITOR SUPERVISION OF PROCEEDINGS

67 The Insolvency Law provides for a creditors' meeting during insolvency proceedings.[146] Creditors can also appoint a creditors' committee at any creditors' meeting.[147] The purpose of the creditors' committee is to represent the interest of the creditors as a whole, perform duties entrusted to it by the creditors, assist the administrator with the management of the estate (upon the administrator's request), and inspect the books of the debtor.[148] The creditors' committee will consist of no fewer than three and no more than nine members, and will be drawn from both secured and unsecured creditors.[149] All costs incurred by creditors in the establishment and operation of the creditors' committee will be treated as claims incurred by the administrator in the course of the insolvency proceedings.[150] Aside from the foregoing creditors' committee there are no other channels for creditors to organise.

68 In general, the creditors' meeting has more power and functions as compared to the creditors' committee, and the creditors' meeting can make decisions on any matter of the insolvency proceedings, including, among others, the preparation and approval of a plan of compromise,

146 See generally Insolvency Law (enacted 2007) Art 73.
147 Insolvency Law (enacted 2007) Art 76(7).
148 Insolvency Law (enacted 2007) Art 79.
149 Insolvency Law (enacted 2007) Art 78(1).
150 Insolvency Law (enacted 2007) Art 78(2).

discharging and replacing the administrator, proposing the administrator's remuneration and making recommendations to the creditors' committee.[151]

69 The Insolvency Law distinguishes between the first creditors' meeting and subsequent creditors' meetings. The administrator must announce details of the first creditors' meeting, including date, time and place, no later than seven days after the opening of the insolvency proceedings.[152] For subsequent creditors' meetings, the administrator has the discretion to call for those meetings at any time if he is of the view that such a meeting would be beneficial to the administration of the insolvency proceedings.[153] Further, any creditor can make a written request to the administrator to convene a creditors' meeting.[154] Membership of the creditors' meeting is limited to creditors,[155] and only creditors are afforded voting rights.[156]

70 Decisions at a creditors' meeting are made by an affirmative vote of creditors holding a majority of the total value of the claims of creditors present and voting at the meeting.[157] Therefore, decisions can be made notwithstanding the existence of dissenting creditors. However, outside of insolvency proceedings there are no tools to bind a dissenting stakeholder. Aside from the voting threshold, there are no specific quorum requirements, or measures to protect against the suppression of minority interests during voting at such meetings. Only creditors whose claims are not disputed by the administrator or by other creditors will vote at a creditors' meeting, and those with disputed claims can vote only to the extent permitted by the administrator or the creditors with a right to vote at the meeting.[158] Where no agreement can be reached between

151 Insolvency Law (enacted 2007) Art 76.
152 Insolvency Law (enacted 2007) Art 18(2)(c).
153 Insolvency Law (enacted 2007) Art 73(1).
154 Insolvency Law (enacted 2007) Art 73(2).
155 In practice, it is common for creditors to be represented by their duly authorised legal counsel in a creditors' meeting, though this point is not explicitly set out in the Insolvency Law (enacted 2007).
156 Insolvency Law (enacted 2007) Art 75(2).
157 Insolvency Law (enacted 2007) Art 75(1).
158 Insolvency Law (enacted 2007) Art 75(2).

the parties as to the right of a creditor to vote at the creditors' meeting, the administrator should make a written application to the court for a decision, and the creditors' meeting will be postponed to seven days after the court's decision is issued.[159] Creditors holding inadmissible claims will have no right to vote.[160] A creditor may attend any meeting and may cast a vote either personally or by proxy.[161] The Insolvency Law does not specify if voting online or by e-mail is permissible.

71 Members of a creditors' meeting or committee are not exposed to personal liability by virtue of their membership. Members of a creditors' meeting are not typically remunerated. However, the administrator has the discretion to compensate members and there are precedents for members of a creditors' committee to be compensated for attending meetings.[162]

M EMPLOYMENT, STAKEHOLDING AND PENSION ISSUES

72 Under the Labour Law,[163] the closing of an enterprise does not excuse an employer from making any statutory payments[164] to employees,

159 Insolvency Law (enacted 2007) Art 75(2).

160 Insolvency Law (enacted 2007) Art 75(3).

161 Insolvency Law (enacted 2007) Art 75(4).

162 In the MFone insolvency proceedings, members of the creditors' committee received a small stipend for attending each meeting. This reporter was counsel for a creditor in the MFone insolvency proceedings, the second such proceedings in Cambodia. For more discussion of the MFone insolvency case, see Daniel de Carteret, "After MFone, Insolvency Perils Remain Numerous in Kingdom" *The Phnom Penh Post* (9 January 2015).

163 Labour Law (13 March 1997; amended on 20 July 2007 and 26 June 2018).

164 Article 73(6) of the Labour Law (13 March 1997; last amended 26 June 2018) ("Labour Law") provides that at the end of a fixed duration contract ("FDC"), the employer must provide the employee with severance proportionate to both the wages and the duration of the FDC. Such severance must be at least equal to 5% of the wages and fringe benefits earned during the duration of the FDC, unless set out otherwise in any contractual provision. Effective 1 January 2019, an employee under an undetermined duration contract ("UDC") is entitled to an ongoing seniority payment for each year of service, which is calculated at a rate of 15 days of the employee's daily wages per year: Labour Law, Art 89. This is only applicable to UDCs and not FDCs. For seniority periods before 2019 (and which are only applicable to periods served under a UDC), Notification No 042/19 on

(*continued on the next page*)

even if the enterprise is insolvent. Therefore, the Labour Law protects employees if their employer becomes insolvent.[165] If a business is sold, the Labour Law allows labour contracts to be binding between the new employer and the workers of the former enterprise. However, the Insolvency Law does not provide any special or additional tools for restructuring employment contracts. As employees are entitled to the full payment of their wages (and other statutory payments) and enjoy priority in liquidation as discussed above, employees will receive a payout based on the proceeds of liquidation. This reporter is not aware of any instances where the contracts of employees were transferred as part of insolvency proceedings.

73 All employees are treated equally under the Insolvency Law, and there are no distinctions between employees of varying titles, including employees in management positions and those in non-management positions. There are no special provisions made for stakeholders other than employees.

74 The Insolvency Law does not explicitly grant employees or their representatives any participation rights in insolvency proceedings. However, employees will mostly likely be creditors of the debtor by virtue of unpaid wages and, as such, will have the right to participate in creditors' meetings. In practice, employees may be represented by a small number of representatives, and those representatives will attend creditors' meetings and may be granted a seat in any creditors' committee.

75 All employers in Cambodia are obligated to make social security contributions on behalf of employees. However, the insolvency of a debtor will not affect those payments already made to the National

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the Payment of Seniority Indemnity before 2019 for Enterprises/Establishments Besides Garment, Textile and Footwear Sectors (22 March 2019) provides that employers outside of the textile, garment and footwear production industry are not required to pay such seniority payments until December 2021. However, until December 2021, if any employee with UDC seniority before 2019 is terminated for reasons other than his serious misconduct, or retires or dies, all back payments shall be paid in a single payment to that employee or his heir. In addition, employees also have rights to be paid out for unused annual leave.

165 Labour Law (13 March 1997; last amended 26 June 2018) Art 87.

Social Security Fund. There is no requirement for Cambodia-based employers to provide employees with pensions.

N AVOIDANCE AND CLAWBACK RULES AND SAFE HARBOUR PROVISIONS

76 The Insolvency Law allows the administrator (and only the administrator) to submit a complaint to court if the administrator desires to void a transaction that meets specified criteria, such as transactions entered into by the debtor to defraud creditors;[166] transactions where the debtor has received no consideration;[167] transactions where the debtor's obligations greatly exceed the value of the other party's obligations;[168] and transactions where the debtor discharges a debt that has not become due,[169] with a lookback period varying from six months to three years prior to the opening of insolvency proceedings depending on the type of the transaction in question.[170] Upon receiving a complaint by the administrator, the court will hold a hearing with the other party to the transaction, and can adjudicate the transaction to be void.[171]

77 If a court determines that a transaction is void, any money paid, property transferred or proceeds from the sale of the property transferred will be recovered and included in the estate of the debtor.[172] In turn, any person from whom money or property is recovered will be entitled to restitution if the person has given any consideration for the transaction, and can file a claim as a creditor in the insolvency proceedings.[173] The Insolvency Law does not address how litigation will be financed. However, any expenses of the administrator, including the expenses to pursue litigation, will be deemed an administrative claim which enjoys the highest priority in the proceeds of the liquidation of the estate as

166 Insolvency Law (enacted 2007) Art 32(1).
167 Insolvency Law (enacted 2007) Art 32(2).
168 Insolvency Law (enacted 2007) Art 32(3).
169 Insolvency Law (enacted 2007) Arts 32(4), 32(5) and 32(6).
170 See generally Insolvency Law (enacted 2007) Art 32.
171 Insolvency Law (enacted 2007) Art 32.
172 Insolvency Law (enacted 2007) Art 33(1).
173 Insolvency Law (enacted 2007) Art 33(2).

explained earlier. The Insolvency Law does not provide any special protection from avoidance agreements.

O RESCUE PLANS AND SALES AS A GOING CONCERN

78 As introduced briefly in paragraph 42 above, the Insolvency Law provides for "plans of compromise" which can only be pursued after formal insolvency proceedings are opened.[174] A plan of compromise provides the option to reach a compromise with creditors so that the debtor's business may (partially) continue or be rehabilitated. However, a plan of compromise is not necessarily focused on rescue of the business and is intended to reach a solution that is in the interest of the creditors. If the creditors deem it appropriate, continuation of the debtor's business (or a part thereof) may be pursued by a plan of compromise.

79 Any plan of compromise must satisfy statutory requirements which include stating the period for the implementation of the plan,[175] providing for the payment in full of all costs of the insolvency proceedings,[176] treating all creditors in a given class equally,[177] and awarding dissenting creditors satisfaction for their claims on terms not less favourable than they would receive in case of the debtor's liquidation,[178] amongst others. Further, plans of compromise must foresee that no payments related to income, dividends or equity will be made to any shareholder or partner of the debtor, until entitlements under the plan have been fully paid to the creditors whose claims have been affected by the plan.[179] Therefore, shareholders' rights can be affected by a plan of compromise.

174 See Insolvency Law (enacted 2007) Arts 40–50 for a general discussion on plans of compromise. See para 91 below for additional information on the statutory requirements for plans of compromise.
175 Insolvency Law (enacted 2007) Art 41(1).
176 Insolvency Law (enacted 2007) Art 41(2).
177 Insolvency Law (enacted 2007) Art 47(2)(b).
178 Insolvency Law (enacted 2007) Art 47(2)(c).
179 Insolvency Law (enacted 2007) Art 47(2)(e).

80 The debtor[180] and the administrator[181] may propose initial plans of compromise. If no plan of compromise is proposed by the debtor at the first creditors' meeting or if the debtor's plan of compromise is not approved at that meeting, then the creditors may adjourn the meeting by a maximum of 60 days, during which period, the administrator, or any creditor or creditors holding not less than one-fifth of the total value of all claims, can propose a plan of compromise.[182] While the Insolvency Law does not expressly grant any creditor the right to participate in negotiations over the content of the plan of compromise, as the plan of compromise must be approved by the creditors, presumably creditors will be able to participate in any such negotiations.

81 Regardless of who prepares the plan of compromise, a proposed plan of compromise must be filed with the court no later than seven days before the date of the relevant creditors' meeting (which may be either the first creditors' meeting or a subsequent creditors' meeting)[183] where the proposed plan will be considered. A proposed plan of compromise filed with the court is open for inspection free of charge.[184]

82 In order to approve a plan of compromise at a creditors' meeting, creditors will first be grouped into the following three classes of creditors for voting purposes:[185]

(a) creditors holding secured claims;
(b) creditors holding claims which fall under Article 57(1)(c) ("state taxes whose notice is not filed"); and
(c) creditors holding claims which fall under Article 57(1)(d) ("all other admissible unsecured claims").

Creditors holding inadmissible claims have no right to vote on a plan of compromise.

180 Insolvency Law (enacted 2007) Arts 13(2) and 54(2).
181 Insolvency Law (enacted 2007) Art 23(1)(n).
182 Insolvency Law (enacted 2007) Art 54(2)(a).
183 Insolvency Law (enacted 2007) Art 44.
184 Insolvency Law (enacted 2007) Art 40.
185 Insolvency Law (enacted 2007) Art 45(1).

83 However, the rights of creditors to vote on a plan of compromise are subject to the following conditions:

(a) a creditor whose claim is not impaired or affected by the plan of compromise will have no rights to vote;[186] and
(b) a creditor holding a secured claim will be entitled to vote (i) only to the extent that the total value of its claim exceeds the higher of the value of the secured portion of the claim as determined by the administrator or the value of any proceeds from a sale of the encumbered asset,[187] or (ii) if the creditor waives its security right in the encumbered asset.[188]

84 Therefore, a secured creditor may vote for the portion of its claim that exceeds the value of the encumbered asset, and for the part that is regarded as an unsecured claim under the Insolvency Law. A creditor may also opt to waive its security right in an encumbered asset to become a voting creditor.

85 A plan of compromise requires the approval of (a) each class of creditors, through an affirmative vote of creditors in each class holding not less than three-fourths of the claims of all creditors present at the meeting;[189] or (b) at least one class of creditors, through an affirmative vote of creditors in the class holding not less than three-fourths of the claims of all creditors present at the meeting.[190] The Insolvency Law does not require shareholders in a corporate entity to approve the plan of compromise.

86 Without creditor approval, no plan of compromise can be implemented. A cram-down is not available in Cambodia; neither has practice shown this as an option. In case the proposed plan of compromise is fully rejected by the creditors, liquidation of the entity will commence.[191]

186 Insolvency Law (enacted 2007) Art 46(1).
187 Insolvency Law (enacted 2007) Art 46(2)(a).
188 Insolvency Law (enacted 2007) Art 46(2)(b).
189 Insolvency Law (enacted 2007) Art 45(2)(a).
190 Insolvency Law (enacted 2007) Art 45(2)(b).
191 Insolvency Law (enacted 2007) Arts 54(2) and 54(3).

87 If a plan of compromise is approved by the creditors, then the administrator must make a written application to the court to sanction the plan of compromise within seven days of the approval.[192] The court shall sanction the plan of compromise if the voting is carried out pursuant to the Insolvency Law, all creditors in the same class are treated equally, and no creditor will receive more than the full amount of their claim, amongst other statutory conditions.[193] The Insolvency Law does not require the court to assess the plan's overall fairness. If any of the above conditions are not satisfied, the court must reject the plan and rule to commence liquidation of the estate in accordance with the Insolvency Law.[194]

88 A court may only sanction or reject a plan of compromise in its entirety, and thus may not amend the terms of the plan.

89 A plan of compromise that is duly approved by creditors and sanctioned by the court will extinguish all inadmissible claims (except for fines and penalties related to criminal or administrative offences), and binds all creditors, including dissenting creditors and creditors that have not received notice, or those that have received notice, but elected not to appear at the meeting or to vote on the plan.[195] Further, the court's sanction of the plan of compromise has the effect of terminating the insolvency proceedings and beginning the period for plan implementation.[196] The Insolvency Law does not expressly permit or address whether a court's order to sanction the plan of compromise can be appealed.

90 A creditor that dissents from a plan of compromise receives some form of protection as the dissenting creditor may only be bound to the plan if it will receive satisfaction for its claim that is not less favourable than what the creditor would receive in case of liquidation of the debtor.[197] Further, any decision, including on the approval of a plan of

192 Insolvency Law (enacted 2007) Art 47(1).
193 Insolvency Law (enacted 2007) Art 47(2).
194 Insolvency Law (enacted 2007) Art 47(3).
195 Insolvency Law (enacted 2007) Art 48(2).
196 Insolvency Law (enacted 2007) Art 48(1).
197 Insolvency Law (enacted 2007) Art 47(2)(c).

compromise, at any creditors' meeting other than the first creditors' meeting, in which creditors have not received proper notice, will be null and void.[198]

91 The plan of compromise must be implemented in accordance with the term set in the plan. However, the term for implementation of the plan may not exceed two years following court sanction of the plan.[199] During the operation of the plan, the debtor must include a statement on every business document that it issues, addressing that a plan of compromise is being implemented in respect to the debtor.[200] The court may, upon approval of the plan or at a later date, order the administrator to continue its supervision over the debtor during the implementation of the plan, if the court deems this necessary.[201] If the plan of compromise is not implemented within the time period set out in the implementation plan, then insolvency proceedings shall be re-opened against the debtor pursuant to a court ruling and the debtor will be liquidated.[202]

92 Where the plan of compromise is rejected by the court, the court must make a ruling to commence liquidation of the affected entity.[203]

93 Pre-packaged sales are not addressed in Cambodian law, and there is no practice evidencing that they are possible. In theory, a debtor may petition to open the insolvency proceedings, and then work to convince the administrator that a solution like that of a pre-packaged sale will be the best plan of compromise. The plan of compromise must, however, be approved by creditors and sanctioned by the court, therefore differing from what is generally understood to be a pre-packaged sale of a company in other jurisdictions. The procedure described above amounts to a formal insolvency proceeding.

94 Listed companies are required under corporate governance laws to disclose information to shareholders that may influence their decision-

198 Insolvency Law (enacted 2007) Art 74(3).
199 Insolvency Law (enacted 2007) Art 48(1).
200 Insolvency Law (enacted 2007) Art 49(1).
201 Insolvency Law (enacted 2007) Art 49(2).
202 Insolvency Law (enacted 2007) Art 50.
203 Insolvency Law (enacted 2007) Art 47(3).

making.[204] In addition, they are required to submit continuous disclosure documents to the SECC, including information on their financial state.[205] Lastly, listed entities must fulfil "special disclosure" requirements, including disclosure in "case there is a claim for taking a restructuring, liquidation, and dissolution or bankruptcy procedure from the primary creditor bank", and in case any event occurs that has a major impact on the companies, which will include an imminent insolvency petition.[206]

95 Third-party releases are not addressed by the Insolvency Law, and practice has not shown these are permissible or prohibited in Cambodia. In theory, a plan of compromise can include third-party releases, but the plan is always subject to creditor approval and subsequent court sanction.

96 Usually the sale of the business and its main assets means the shares and assets of the business will be transferred to the new owner, resulting in the old entity under new registered ownership. In other cases, it may be more favourable for the buyer to buy the main assets and transfer these to a new or existing entity, and subsequently deregister the old, insolvent entity. The Insolvency Law does not dictate what happens to the debtor's entity if a successful plan of compromise is implemented; presumably the debtor's entity will either be purchased or closed.

P GROUP INSOLVENCIES

97 The Insolvency Law does not contain any special provisions on insolvent groups of companies or any definition of what constitutes "a group of companies". Further, it is silent on whether procedural or substantive consolidation of insolvency proceedings across a corporate group is permissible. If a group of companies or a group of affiliated companies files for insolvency protection, there will be significant ambiguity under the Insolvency Law as to how the insolvency will be handled and whether the proceedings will be consolidated. Because there

204 Prakas on Corporate Governance for Listed Companies (31 December 2009) Art 47.

205 See generally the Prakas on Corporate Disclosure (27 April 2012).

206 Prakas on Corporate Disclosure (27 April 2012) Art 5(17).

have only been a small number of actual insolvency proceedings in Cambodia, this reporter believes that the insolvency of a group of companies will be a case of first impression, which means that there will be uncertainty as to how such a case will be handled.

98 However, the Insolvency Law does address loans and guarantees provided by persons holding not less than 10% of the equity of the debtor, and such loans and guarantees are not admissible in insolvency proceedings.[207] Therefore, to the extent that a group of companies has extended loans and guarantees to each other, those loans and guarantees may be implicated under the Insolvency Law.

Q SMALL AND MEDIUM-SIZED ENTERPRISES

99 The Insolvency Law does not contain any special provisions on the insolvency of micro, small and medium-sized enterprises ("MSMEs") or provide any simple rescue plan or simplified insolvency proceedings for MSMEs.[208] As the Insolvency Law applies to all merchants or traders and legal entities that own assets in Cambodia,[209] it is suggested that the insolvency proceedings of MSMEs are in the same manner as generally discussed in this report. From a practical standpoint, because insolvency proceedings will not be opened and the petition will be dismissed if the debtor's assets will likely not be sufficient to pay the costs of the proceedings unless a sufficient amount of money is advanced to cover such costs,[210] there may be financial barriers for MSMEs that attempt to access the insolvency protections afforded under Cambodian law because it is unlikely that the assets of a micro or small enterprise will be sufficient to pay the costs of insolvency proceedings.

207 Insolvency Law (enacted 2007) Art 36(5). See also para 48 above.

208 Sub-Decree No 124 R N Cr BK (effective 2 October 2018) defines small enterprises as enterprises having between 10 and 50 employees and a turnover from KHR250,000,000 to KHR700,000,000 and defines medium enterprises as enterprises having between 51 and 100 employees and a turnover from KHR700,000,000 to KHR4,000,000,000.

209 Insolvency Law (enacted 2007) Art 3.

210 Insolvency Law (enacted 2007) Art 16(1).

R INTERNATIONAL AND CROSS-BORDER INSOLVENCY LAW

100 The Insolvency Law does not contain any specific provisions on the extraterritorial effect of the law. The scope of the Insolvency Law is limited to merchants or traders or legal entities that own assets in Cambodia, regardless of whether they are formed under the laws of Cambodia or any foreign country.[211] However, Article 3 is ambiguous on whether the law would extend to such persons to the extent that they own assets both in and outside of Cambodia.

101 Further, Article 5 of the Insolvency Law provides that provisions of the Code of Civil Procedure apply to insolvency matters unless the Insolvency Law contains special provisions.[212] The Code of Civil Procedure provides some guidelines on the enforcement of foreign court judgments. An execution judgment of a Cambodia court having jurisdiction is necessary in order to execute a foreign court judgment.[213] Additionally, the foreign court judgment must fulfil four criteria on proper jurisdiction of the foreign court, notice, no violation of public policy and a reciprocity agreement with the foreign country.[214]

102 Cambodia has not adopted the UNCITRAL Model Law on Cross-border Insolvency (1997) or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), and this reporter is not aware of any plans from the Royal Government of Cambodia to adopt any of these laws or any drafts that UNCITRAL is currently preparing in the future. The reporter is also not aware that judges in Cambodia participate in any guidelines for co-operation between courts, such as the Judicial Insolvency Network Guidelines.

S OTHER MATTERS

103 There are no official statistics on the number of insolvency filings in Cambodia or financial metrics related to insolvency matters.

211 Article 3 read together with Art 16(1) of the Insolvency Law (enacted 2007).
212 Insolvency Law (enacted 2007) Art 5.
213 Code of Civil Procedure (effective 6 July 2006) Art 352(1).
214 Code of Civil Procedure (effective 6 July 2006) Arts 352(2) and 199.

104 Even more than a decade following the enactment of the Insolvency Law, the concept of insolvency remains foreign to most Cambodians. There is likely a negative perception of insolvency or bankruptcy. This negative perception not only exists in society but is also reflected in certain laws. For example, under Article 31 of the Law on the Bar,[215] a condition that must be met to practise law in Cambodia is to never have been declared personally bankrupt by a court. Additionally, under Article 18 of the Banking Law, any person that has been declared bankrupt in Cambodia or abroad shall not be allowed to serve as a member of a board of directors or supervisory board of a bank or financial institution in Cambodia. This condition is stipulated alongside the condition that such person shall not have been convicted of any misdemeanour or felony. These conditions suggest that there is a perception that becoming insolvent is considered as a moral failure for professionals.

105 Although the Insolvency Law has established the basic rules and procedures for insolvency proceedings, which in theory should lead to a number of insolvency filings, in practice there have been few insolvency cases in Cambodia. Many insolvent businesses are excluded from the possibility of obtaining any relief under the Insolvency Law because they lack sufficient assets to pay for the cost of the administrator or the court proceedings, which is a condition for opening insolvency proceedings. Access to insolvency protection could be greatly enhanced if the condition of having sufficient assets were dropped. Failure to allow the opening of insolvency proceedings if companies do not have sufficient assets risks creating a class of zombie companies that are insolvent but are too asset poor to avail themselves of insolvency protection.

106 Further, the scope of the Insolvency Law is limited to "business persons and legal entities", thus there is no path for those who are not business persons to avail themselves of insolvency protection. Expanding the scope of the Insolvency Law to include all persons, regardless of whether they are deemed business persons, and eliminating the requirement that assets be sufficient to pay for the cost of the

215 Effective 22 August 2005.

administrator and the insolvency proceedings, would greatly expand access to the law and would provide a path to rehabilitate debtors.

APPENDIX OF LEGISLATION REFERRED TO

1. Civil Code (enacted 31 May 2011)
2. Code of Civil Procedure (effective 6 July 2006)
3. Criminal Code (effective 30 November 2009)
4. Insolvency Law (enacted 2007)
5. Labour Law (13 March 1997; last amended 26 June 2018)
6. Law on Banking and Financial Institutions (effective 18 November 1999)
7. Law on Insurance (effective 4 August 2014)
8. Law on Commercial Enterprises (effective 19 June 2005)
9. Law on Commercial Rules and Register (as amended, effective 18 November 1999)
10. Law on Secured Transactions (enacted on 24 May 2007)
11. Law on the Bar (effective 22 August 2005)
12. Law on the Implementation of the Civil Code (enacted 31 May 2011)
13. Law on the Issuance and Trading of Non-Government Securities (effective 19 October 2007)
14. Law on the Organization of the Courts (effective 16 July 2014)
15. Notification No 042/19 on the Payment of Seniority Indemnity before 2019 for Enterprises/Establishments Besides Garment, Textile and Footwear Sectors (22 March 2019)
16. Prakas on Asset Classification and Provisioning in Banking and Financial Institutions (effective 25 February 2009)
17. Prakas on Corporate Disclosure (27 April 2012)
18. Prakas on Corporate Governance for Listed Companies (31 December 2009)
19. Sub-Decree No 124 R N Cr BK (effective 2 October 2018)

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