Foreign Investment Review 2021

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LEXOLOGY
Getting The Deal Through

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Oliver Borgers
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Lexology Getting The Deal Through is delighted to publish the tenth edition of *Foreign Investment Review*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union, France, Italy, Pakistan, Spain, Sri Lanka and Uzbekistan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

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LAW AND POLICY

Policies and practices

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Cambodia's Law on Investment guarantees that foreign investments are generally treated in the same manner as domestic investments. The one notable exception to this rule is that foreign-owned companies (companies incorporated in Cambodia with foreign shareholders owning more than 49 per cent of the shares) are not allowed to own land in Cambodia. For that reason, there are no specific oversight or review mechanisms for foreign investments in Cambodia, and foreign investors do not require any specific approvals to invest in Cambodia.

In addition, the Law on Investment allows certain foreign investments to apply for qualified investment project (QIP) status. A QIP is entitled to receive a number of investment incentives, including profit tax exemptions for up to nine years and import duty exemptions, from the Cambodian government.

While the Law on Investment establishes some criteria and requirements for a foreign investment to obtain a QIP, these criteria and requirements also apply to domestic investors. Further, we want to highlight that there is no obligation on a foreign investor to seek QIP status for its investment, and a foreign investor can make investments in Cambodia under commercial laws of general application that apply to both foreign and domestic investors.

In Cambodia, there are no currency controls and, in practice, Cambodia has a dollarised economy, where most of the currency in circulation is the US dollar. The US dollar is commonly used in commercial transactions.

From a legal standpoint, the Law on Investment guarantees all investors in Cambodia the right to freely purchase and remit abroad foreign currencies to discharge their financial obligations related to their investments. Cambodia's Law on Foreign Exchange governs all foreign exchange operations relating to payments for commercial transactions, transfers or capital inflows. The Law on Foreign Exchange guarantees that there are no restrictions on foreign exchange operations, although transactions must be made through a bank that has been authorised by the National Bank of Cambodia.

Main laws

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

- The Law on Investment, dated 4 August 1994, as amended on 24 March 2003;
- Sub-decree No. 111 on the Implementation of the Law on Investment, dated 27 September 2005, as amended on 23 April 2007 and 13 February 2019;
- the Law on Commercial Enterprises, dated 19 June 2005; and
- the Law on Commercial Rules and Register, dated 19 June 1995, as amended on 18 November 1999.

Scope of application

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Law on Investment establishes conditions and procedures for granting QIP status to foreign investments, and lays out the investments incentives that a QIP is entitled to. Sub-decree No. 111 on the Implementation of Law on Investment further clarifies these matters.

The Law on Commercial Enterprises and the Law on Commercial Rules and Register are the main company laws in Cambodia and broadly address a number of issues, such as available entities under Cambodian law, shareholder rights, the powers of directors and matters related to corporate compliance and mergers.

As for minority shareholder interests, the Law on Commercial Enterprises sets out a number of decisions that require approval by a special resolution of the shareholders, which means that at least two-thirds of the shares must vote in favour or the matter. Aside from special resolutions, Cambodian law does not offer other protections to minority shareholders. In practice, however, any revisions to a company's articles of incorporation (the company's constitutional document) requires the signature of all shareholders before it can be processed by the Ministry of Commerce. Matters requiring revisions to a company's articles of incorporation include share transfers and changes in the company's capital structure, thus minority shareholders, in practice, have additional protections.

Mergers and acquisitions in a number of regulated sectors (eg, insurance, banking and telecommunications) are subject to approvals by relevant government agencies, such as the Ministry of Economy and Finance. However, the requirements to obtain approval apply equally to both domestic and foreign companies, and there is no specific set of criteria only applicable to foreign investors.

Definitions

4 How is a foreign investor or foreign investment defined in the applicable law?

A foreign investor or foreign investment is not explicitly defined under Cambodian law. However, the Law on Investment and the Law on Commercial Enterprises define a Cambodian entity or an entity having

Cambodian nationality as an entity that has a place of business in and is registered in Cambodia, and has 51 per cent or more of its shares held by a legal or natural person with Cambodian nationality. In that sense, an entity that does not meet these characteristics would be considered a foreign-owned entity. However, there is no difference in terms of treatment between a foreign-owned entity and a Cambodian entity, except with regards to land ownership.

Special rules for SOEs and SWFs

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Cambodian law does not address investments by foreign state-owned enterprises and sovereign wealth funds. Thus, they would be treated in the same manner as regular investors.

Relevant authorities

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

Cambodian law has not established any merger or acquisition review mechanisms to review investments by foreign investors on national interest grounds; thus, there are no officials or bodies responsible for such a review. However, mergers or acquisitions in a number of regulated sectors (eg, insurance, banking and telecommunications) are subject to approvals by relevant government agencies (eg, the Ministry of Economy and Finance). Nevertheless, the requirements to obtain approval apply equally to both domestic and foreign companies.

Aside from the above ministry-specific approvals, the Ministry of Commerce reviews all mergers or acquisitions of all business as part of the share transfer process. If a merger or acquisition results in a decrease of Cambodian ownership of an entity to less than 51 per cent, that entity will no longer be deemed a company of Cambodian nationality, and thereby the company will no longer have the ability to own land in Cambodia.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

Not applicable.

PROCEDURE

Jurisdictional thresholds

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Not applicable.

National interest clearance

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Not applicable.

10 Which party is responsible for securing approval?

Not applicable.

Review process

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Not applicable.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Not applicable.

Involvement of authorities

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Not applicable.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Not applicable.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

Not applicable.

SUBSTANTIVE ASSESSMENT

Substantive test

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

Not applicable.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Not applicable.

Other relevant parties

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Not applicable.

Prohibition and objections to transaction

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Not applicable.

20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Not applicable.

Challenge and appeal

21 | Can a negative decision be challenged or appealed?

Not applicable.

Confidential information

22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Not applicable.

RECENT CASES

Relevant recent case law

23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Not applicable.

UPDATES AND TRENDS

Key developments of the past year

24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

The Cambodian government is in the process of developing a Competition Law. According to the last draft of the Law, which was released in February 2018, the establishment of the Competition Commission of Cambodia (CCC) is being contemplated to address competition issues, including evaluating business combinations, such as mergers and acquisitions. While the current draft of the Competition Law does not contain provisions directly applicable to foreign investment review, foreign investments (as well as domestic investments) may potentially trigger a review by the CCC if they involve a merger or acquisition that prevents, restricts or distorts competition in the market.

The Cambodian government is also in the process of drafting a new Law on Investment, which will replace the exisiting law. According to a draft from October 2020, the Law on Investment will continue to treat foreign investors and domestic investors the same. In addition to allowing investors to apply for qualified investment project status, investors will also be able to apply for guaranteed investment project status, which means the investment project receives investment guarantees but does not obtain investment incentives. The main differences between existing legislation and the new Law on Investment relate to the availability of enhanced tax incentives and investment incentives for a wider range of industries, such as those that relate to: high technology; research and development; tourism; small and medium-sized enterprises in priority sectors; digitial industries; investment in environmental management and protection; and green energy.

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Coronavirus

25 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Cambodian government has taken a number of steps to support businesses during the covid-19 pandemic. Key initiatives are set out below:

- Increased access to business finance: to enable businesses to better access financing, the Ministry of Economy and Finance has introduced an additional US$200 million into the Credit Guarantee Fund, which guarantees loans through financial institutions so that enterprises that may have previously faced difficulties accessing loans have the ability to obtain working capital. The government has also previously provided capital to small businesses through low-interest loans granted by the Agriculture Rural Development Bank (ARDB). Following the pandemic, the ARDB has dropped interest rates on loans for working capital from 6 to 5 per cent, and on loans for investment capital from 6.5 to 5.5 per cent, to help make capital financing more accessible. The maximum term of ARDB investment loans has been shortened to five years (from seven years), and working capital loan terms remain capped at a two-year maximum tenure.
- Delay implementation of seniority back payments: the Ministry of Labour and Vocational Training (MLVT) issued Prakas No. 018/20 for the Postponement of Seniority Indemnity Back Payments for Periods before 2019 and Postponement of Seniority Payments in 2020. Under this measure, which took effect on 2 June 2020, both the issuance of seniority indemnity back payments for periods before 2019 and the issuance of seniority payments for 2020 have been delayed until 2021. Therefore, through the end of 2020, employees who are employed under unspecified duration contracts will not receive payments associated with these programmes.
- No late penalties for 2020 foreign work permit renewals: the MLVT issued an instruction to its staff not to impose any late penalties on non-Cambodian workers who want to renew their 2019 foreign work permits but have failed to meet the initial renewal deadline,

effective until further notice. The MLVT states that the instruction is intended to assist non-Cambodian workers that may not have been able to return to Cambodia to continue their work owing to the global covid-19 pandemic.

- Loan restructuring: the National Bank of Cambodia issued a directive to all banks and financial institutions to restructure loans in order to maintain financial stability, support economic activity and ease the burden of debtors facing major revenue declines that may find it difficult to repay loans during the ongoing covid-19 outbreak. This directive requires banks and financial institutions to establish a policy and procedure on loan restructurings amid the covid-19 outbreak and have it approved by the board of directors.

As for best practices for foreign investors, as a result of covid-19, there has been a renwed focus on labour and employment issues, in particular regarding lay-offs. Cambodian law allows employment under fixed-term contracts or contracts of an undetermined duration. Both types of contract can be terminated for force majeure; however, short of force majeure, a contract of an undetermined duration allows an employer significantly greater flexibility to reduce its workforce based on economic conditions, and usually with lower severance costs. Therefore, employers should give careful consideration as to what form of employment contract provides greater flexibility, in particular as the economy remains unstable.

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