



Infrastructure Concessions and Licensing in Cambodia

Infrastructure Development in Myanmar and Cambodia

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Tokyo, Japan



1

Introduction to Cambodia





- Background – multiple influences
 - a. 1954 - 1975:
 - French based Civil Code and judiciary,
 - b. 1979 – 1993:
 - Vietnam - SOC
 - c. 1991-2003: Slow Progress
 - Paris Peace Agreement
 - Elections 1993 / 1998, 2003, 2008
 - Coup 1997
 - Poor implementation
 - Donor in-fighting
 - d. 2005 – joined WTO
 - e. Current influences:
 - Germanic Civil Code / Japanese influence
 - Common Law – Commercial
 - French Civil Code – Judicial
 - China / Vietnam / Korea / Canada



Cambodia: Legal System Benefits and Impediments



- Basic protections in place,
- Many new laws, but big implementation gaps
- Transparency issues
- Enforcement of foreign judgments / arbitral awards
- Not accept International Standard Contracts
- Khmer language / governing law
- Ministerial uncertainty



- Airport: SCA (Société Concessionnaire de l'Aéroport)
- Road: AZ Distribution (National Road No. 4)
- Port:
 - Kampot Port
 - Sihanoukville Port
- Hydropower:
 - Kirirom III (18 MW)
 - Stung Tatay (246 MW)
 - Stung Atay (120 MW)
 - The smaller Kirirom I

2

Regulatory Framework

- Infrastructure concession is mainly governed by the:
 - a) Law on Concession promulgated by Royal Kram No. NS/RKM/1007/027 dated 19 October 2007 ("**Law on Concession**");
 - b) Law on Investment promulgated by Royal Kram No. 03/NS/94 dated 5 August 1994 and its subsequent amendment ("**Law on Investment**");
 - c) Sub-Decree No. 11 ANKr.BK on Build Operation and Transfer ("BOT") dated 13 February 1998; and
 - d) Draft Sub-Decree on Implementation of the Law on Concessions;
- Which law applies?
N.B. Public Procurement Law (2012)

- Infrastructure concession is distinct from and does not include other types of concessions:
 - a) Economic Land Concessions;
 - b) Industrial development concessions;
 - c) Fishing concessions;
 - d) Mining concessions;
 - e) Social Land Concessions.
- The Law on Concession does not apply to infrastructure concessions granted before 19 October 2007

3

Purpose

- Purpose of the Law on Concession:

Promote and facilitate the implementation of privately financed Infrastructure Projects in Cambodia for public interest and the fulfillment of the national economic and social objectives.

- Why the government does not do it?

- More effective/efficient to grant concessions
- Lack of finance
- Lack of capacity
- Lack of HR

4

Scope of the Concession Law & Eligible Sectors

- The Law on Concession governs Concessions in relation to "**Infrastructure Facilities**", providing services to the general public which may be entered into by the relevant authorities in the following sectors:
 - a) Power generation, power transmission and power distribution;
 - b) transportation facilities and systems such as roads, bridges, airports, ports, railways and man-made canals;
 - c) water supply and water treatment;
 - d) infrastructure for telecommunication and information technology;
 - e) infrastructure facility for tourism projects such as tourism sites and museums;

4. Scope of the Concession Law & Eligible Sectors

- f) infrastructure for gas and oil sectors such as oil and gas pipelines;
- g) sewerage, drainage and dredging;
- h) solid waste management and treatment;
- i) public infrastructure related to health, education and sport sectors;
- j) infrastructure related to special economic zones and social housing;
- k) irrigation and agriculture related infrastructure; and
- l) other sectors for which a specific law allows for the granting of Concessions.

5

Eligible Contractual Arrangements

5. Eligible Contractual Arrangements

- Different Forms of Concession Contracts:
 - a) Build, Operate and Transfer (BOT);
 - b) Build, Lease and Transfer (BLT);
 - c) Build, Transfer and Operate (BTO);
 - d) Build, Own and Operate (BOO);
 - e) Build, Own, Operate and Transfer (BOOT);
 - f) Build, Corporate and Transfer (BCT);
 - g) Expand, Operate and Transfer (EOT);
 - h) Modernize, Operate and Transfer (MOT);
 - i) Modernize, Own and Operate (MOO); and
 - j) Lease and Operate, Management or Management Agreement or any variant of these forms.

- No **Concession** Contract can be concluded unless the eligible "**Infrastructure Project**" has been approved as a "**Concession Project**" in accordance with the procedures set forth in the Sub-decree on Implementation of the Law on Concessions.
- New Sub-Decree has been under discussion for several years. In the meantime, the old Sub-Decree applies.
- The Royal Government of Cambodia is strongly of the view that the Concession Law applies to any concession granted after 19 October 2007.

6

Main players in infrastructure Concession

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- Concessionaire
- Contracting Authority
- Ministry of Economy and Finance
- Council for Development of Cambodia (“CDC”)

7

Selection and Organization of the Concessionaire

- Selection of the Concessionaire by the Contracting Authority – bids, negotiations or any other method
- Obtaining of approvals by the Contracting Authority to the final terms of the Concession Contract
- Issuance of a notification of award to the selected candidate prior to execution of the Concession Contract
- Signing of the Concession Contract within 6 months (may be extended) of the notification of award

- Failure of Contracting Authority to sign the Concession Contract within 6 months
- After execution of the Concession Contract, the Concessionaire shall:
 - establish and incorporate the legal entity that will implement the Concession Project (60 days); and
 - apply to the CDC for a final registration certificate in accordance with the Law on Investment.

- Offenses in the Anti Corruption Law and in the following articles of the New Criminal Code (2010):
 - Article 624: Favoritism
 - Article 390: Improper bidding
 - Article 630: Delivery of bribe

8

Concession Contract

- The Contracting Authority must set the following in the Concession Contract:
 - a) the nature, scope and standards of works to be performed and services to be provided by the Concessionaire;
 - b) any incentives to be granted to promote cost-efficiency, accelerate construction and increase quality of operation and maintenance to the benefit of the public interest;
 - c) any fees, tolls, rentals or other charges to be applied by the Concessionaire must be approved by the appropriate regulatory agency;
 - d) agreed risk allocation or risk sharing;

8. Concession Contract

- e) service levels and standards required from the Concessionaire in the operation and management of the infrastructure facility and consequences of non-compliance with the set service levels and standards;
- f) payment mechanisms;
- g) required commitment and cooperation of the Contracting Authority and other public authorities to support the implementation of the Infrastructure Project throughout the Concession Period; and
- h) other matters as the parties deem appropriate.

9

Concession Period

- Concession Period specified in the Concession Contract
- Max. 30 years as from signing date of Concession Contract –
Not set in stone
- Not extendable except in some circumstances:
 - Completion delay or interruption of operation due to breach of contract by the Contracting Authority or by acts of other public authorities;
 - Completion delay or interruption of operation due to an event of force majeure as specified in the Concession Contract;

10

Termination / Substitution

- Termination conditions specified in the Concession Contract
- Serious breach by the Contracting Authority or other public authorities of their obligations in connection with the Concession Project entitles Concessionaire to compensation
- Contracting Authority may agree with the entities extending financing, on the substitution of the Concessionaire by a new entity or person appointed to perform under the existing Concession Contract upon serious breach by the Concessionaire or other events that could otherwise justify the termination of the Concession Contract

11

Dispute Resolution

- Dispute settlement mechanism in accordance with the Concession Contract (international arbitration, if agreed so by the parties)
- A decision or an award issued by a competent judicial authority or by arbitration shall be valid, binding and enforceable by and against the parties according to its terms

12

Financing of the Infrastructure Project

- Law: The Concessionaire shall implement the Infrastructure Project at its own cost and risk and without recourse to credits or guarantees made by the Contracting Authorities.
- In exceptional circumstances, a guarantee can be granted in accordance with financial management laws.
- In practice, government guarantees are a quite sensitive issue in Cambodia: the MEF must present a report to the National Assembly. Otherwise, the Financial Laws prohibit the granting of Government guarantees.

13

Security Interests

- Concessionaire has the right to create security interests, as required to secure any financing needed for the Infrastructure Project
- Shareholders of the Concessionaire have the right to pledge or create any security interest in their shares to secure any financing needed for the Infrastructure Project
- In Practice, a share transfer can be difficult

14

Assignment/Transfer of Controlling Interest

- Prior consent of the Contracting Authority is required to assign rights and obligations
- Except pursuant to the exercise of a security right in the Law on Concession, a controlling interest in the Concessionaire may not be transferred to third parties without the prior consent of the Contracting Authority.
- In practice, contracts tend to contradict the above and allow sell-downs after a period of time. However, the law still applies in such case.

15

Governing Law

- Concession Contract must be governed by the laws and regulations of the Kingdom of Cambodia
- If no relevant Cambodian laws or regulations exist on the issue, the relevant provision of the Concession Contract shall be governed by the law chosen by the parties
- Concessionaire shall be free to choose the governing law of any ancillary agreements related to implementation of the Concession Project
- In practice, it is unlikely that the court will accept any other laws than Cambodian laws and any documents in a language other than Khmer

16

Foreign Exchange and Remittance

- No restriction on repatriations under the Forex Law except in case of financial crisis
- According Article 64 of the Law on the Organization and Conduct of the Bank of Cambodia, no person shall refuse any payment in Khmer Riel of any amount denominated in foreign currency. Fine equals to 100 times the relevant amount.

[NB KHR:USD rate fluctuates between 1:4,000 - 4,200, hedge currency risk]

17

Safety of Personnel and Protection of Environment

- Activities pursuant to the Law on Concession shall observe and comply with all health and safety standards and requirements regarding environmental protection (subject to the law on Environmental Protection and Natural Resource Management (1996))

Environmental Impact Study vs. Environmental Protection Agreement

18

Other Key Considerations

- Transfer at the End of the Concession Period
- Acquisition of Rights Related to the Project Site
- The Concessionaire's Right to Payment
- Specific Changes in Cambodian Laws or Regulations
- Royalties/Concession Fees
- Exclusivity

19

Licensing

- CDC is a one-stop for licensing/authorizations
- Upon application for Qualified Investment Project (“QIP”) the CDC shall:
 - Grant investment incentives to the Concessionaire according to the Law on Investment;
 - Specify all Authorizations required to be obtained for the Concession Project;

- Obtain all required Authorizations from the relevant public authorities on behalf of the Concessionaire provided that all required documents have been duly supplied.
- N.B. timing of incorporation of project vehicle
- CDC must provide for a time period for the relevant public authorities to issue the required authorizations for the Concession Project

- Routine “Downstream” Licenses – tax registration, labor registrations, and local authority approvals
- Operating Licenses or “Upstream” Licenses – construction permits from Ministry of Land Management Urban Planning and Construction
- Sequence of licensing in practice

Thank you



Thank you



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